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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 LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 1863360 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP

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v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Century Services Inc. *v.* Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

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Century Services Inc. *Appelante*

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Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

Répertorié : Century Services Inc. *c.* Canada (Procureur général)

2010 CSC 60

N^o du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

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

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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By Abella J. (dissenting)

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

Act, R.S.C. 1985, c. B-3 (“*BIA*”). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. (“LeRoy Trucking”) commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax (“GST”) collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d’avis d’accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L’entreprise a vendu certains éléments d’actif excédentaires, comme l’y autorisait l’ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s’applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s’applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s’appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l’époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l’emportait sur la *LACC*, la Couronne jouissant ainsi d’un droit prioritaire à l’égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu’elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l’objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu’il sera utile de le faire.

[4] On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 $ soit détenue par le contrôleur dans son compte en fiducie.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Issues

2. Questions en litige

[9] This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d'une priorité en cas d'insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l'insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l'objet d'aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu'elle l'était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l'État en cas d'insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l'État ne bénéficie d'aucune priorité, alors qu'aux États-Unis et en France il jouit au contraire d'une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d'une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l'impôt sur le revenu et des cotisations à l'assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s'applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n'a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

également les biens détenus par un créancier garanti qui, si ce n'était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l'égard des retenues à la source relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC (voir par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J'emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d'un litige portant sur la priorité de rang entre, d'une part, une fiducie réputée établie en vertu de la *LIR* à l'égard des retenues à la source, et, d'autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D'après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l'égard des biens du débiteur pour une valeur égale à la somme due au titre de l'impôt sur le revenu — commençait à s'appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l'emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n'existait pas de biens susceptibles d'être visés par la fiducie réputée de la *LIR* lorsqu'elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu'elle est réputée s'appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l'arrêt *Sparrow Electric* »).

[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed . . . .

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** . . .
>
> . . .
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . . .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

> **18.4** . . .
>
> . . .
>
> (3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :
>
> *a*) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;
>
> *b*) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

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

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

[62] Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

Fish J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

Le juge Fish —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”) provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed
>
> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d’insolvabilité, on conclut à l’existence d’une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l’existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l’art. 222 de la *LTA*.

[98] La première est la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^{e} suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

> (4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l’absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l’effet contraire n’a aucune incidence sur la fiducie ainsi constituée :

> (4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l’insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d’un montant qu’une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d’une valeur égale à ce montant sont réputés :
>
> *a*) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI*.

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II <u>is deemed</u>, for all purposes and despite any security interest in the amount, <u>to hold the amount in trust for Her Majesty</u> in right of Canada, <u>separate and apart</u> from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II <u>est réputée</u>, à toutes fins utiles et malgré tout droit en garantie le concernant, <u>le détenir en fiducie pour Sa Majesté du chef du Canada, séparé</u> de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

The following are the reasons delivered by

Version française des motifs rendus par

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] Section 11[1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

[115] L'article 11[1] de la *LACC* disposait :

> **11.** (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 Section 11 was amended, effective September 18, 2009, and now states:

> **11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

> **11.** Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

18.3 (1) . . . [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the *CCAA* proceedings.

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] I would dismiss the appeal.

[136] Je rejetterais le présent pourvoi.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l’encontre du failli, sont exempts d’exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu’ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu’il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l’application de l’alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l’absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s’applique pas à l’égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l’assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l’égard des montants réputés détenus en fiducie aux termes de toute loi d’une province créant une fiducie présumée dans le seul but d’assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d’une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l’une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l’impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*;

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

TAB 2

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 Stelco Inc., and other Applicants listed in Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

[Indexed as: Stelco Inc. (Re)]

[* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]

75 O.R. (3d) 5
[2005] O.J. No. 1171
Docket: M32289

Court of Appeal for Ontario,
Goudge, Feldman and Blair JJ.A.
March 31, 2005

Corporations -- Directors -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under Companies' Creditors Arrangement Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation -- In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Arrangements -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under the Companies' Creditors Arrangement

Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation - In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the Companies' Creditors Arrangement Act ("CCAA"). Subsequently, while a restructuring under the CCAA was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the CCAA restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe [page6] and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the CCAA, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set aside on the grounds that (a) Farley J. did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process of the CCAA. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the CCAA. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the CCAA context, the discretion given by s. 11 to stay proceedings against the debtor corporation and the discretion given by s. 6 to approve a plan which appears to be reasonable and fair supplanted the need to resort to inherent jurisdiction. A judge is general ly exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it was designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the CCAA. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. In the course of acting as referee, the court has authority to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. The court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructurin g efforts. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. The court is not catapulted into the shoes of the board of directors or into the seat of the chair of the board when acting in its supervisory role in the restructuring.

The matters relating to the removal of directors did not fall within the court's discretion under s. 11. The fact that s. 11 did not itself provide the authority for a CCAA judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. Section 20 of the CCAA offered a gateway to the oppression remedy and other provisions of the Canada [page7] Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA") and similar provincial statutes. The powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute.

Court removal of directors is an exceptional remedy and one that is rarely exercised in corporate law. In determining whether directors have fallen foul of their obligations, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. The evidence in this case was far from reaching the standard for removal, and the record would not support a finding of oppression, even if one had been sought. The record did not support a finding that there was a sufficient risk of misconduct to warrant a conclusion of oppression. Further, Farley J.'s borrowing the administrative law notion of apprehension of bias was foreign to the principles that govern the election, appointment and removal of directors and to corporate governance considerations in general. There was nothing in the CBCA or other corporate legislation that envisaged the screening of directors in advance for their ability to a ct neutrally, in the best interests of the corporation, as a prerequisite for appointment. The issue to be determined was not whether there was a connection between a director and other shareholders or stakeholders, but rather whether there was some conduct on the part of the director that would justify the imposition of a corrective sanction. An apprehension of bias approach did not fit this sort of analysis.

For these reasons, Farley J. erred in declaring the appointment of Woollcombe and Keiper as directors of Stelco of no force and effect, and the appeal should be allowed.

Cases referred to

Alberta Pacific Terminals Ltd. (Re), [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99 (S.C.); Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.), revg in part [2001] O.J. No. 5046, 30 C.B.R. (4th) 163 (S.C.J.); Babcock & Wilcox Canada Ltd. (Re) [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75 (S.C.J.); Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, 25 O.R. (3d) 480n, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161; Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.); Catalyst Fund General Partne r I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.); Clear Creek Contracting Ltd. v. Skeena Cellulose Inc. [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); Country Style Foods Services Inc.

(Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.); Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.); Ivaco Inc. (Re), [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.); Lehndorff General Partner Ltd. (Re), [1993] O.J. No. 14, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (Gen. Div.); London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1 (Gen. Div.) (sub nom. Olympia & York Dev. v. Royal Trust Co.); Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 244 D.L.R. (4th) 564, 2004 SCC 68, 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215; R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] [page8] S.C.J. No. 3, 88 B.C.L.R. (3d) 1, 194 D.L.R. (4th) 1, [2001] 6 W.W.R. 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, [2001] SCC 2; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251, 7 C.B.R. (5th) 294 (S.C.J.); Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC 210-006 (sub nom. Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd., Adrien v. Ontario Ministry of Labour); Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293, 96 O.T.C. 279 (Gen. Div.); Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Stephenson v. Vokes (1896), 27 O.R. 691, [1896] O.J. No. 191 (H.C.J.); Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.)

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 2 [as am.], 102 [as am.], 106(3) [as am], 109(1) [as am.], 111 [as am.], 122(1) [as am.], 145 [as am.], 241 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 20 [as am.]

Authorities referred to

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Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --),

Jacob, I.H., "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28

Peterson, D.H., Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis--Butterworths, 1989)

Sullivan, R., Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002)

APPLICATION for leave to appeal and, if leave is granted, an appeal from the order of Farley J., reported at [2005] O.J. No. 729, 7 C.B.R. (5th) 307 (S.C.J.), removing two directors from the board of directors of Stelco Inc.

Jeffrey S. Leon and Richard B. Swan, for appellants Michael Woollcombe and Roland Keiper.

Kenneth T. Rosenberg and Robert A. Centa, for respondent United Steelworkers of America.

Murray Gold and Andrew J. Hatnay, for respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. And Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782.

John R. Varley, for Active Salaried Employee Representative.

Michael Barrack, for Stelco Inc.

Peter Griffin, for Board of Directors of Stelco Inc.

K. Mahar, for Monitor.

David R. Byers, for CIT Business Credit, Agent for DIP Lender. [page9]

The judgment of the court was delivered by

BLAIR J.A.: --

Part I -- Introduction

[1] Stelco Inc. and four of its wholly-owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act (the "CCAA") [See Note 1 at the end of the document] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

[2] Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

[3] The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies -- Clearwater Capital Management Inc. and Equilibrium Capital Management Inc. -- which, respectively, hold approximately 20 per cent of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

[4] The Stelco board of directors (the "Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in

being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40 per cent of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their [page10] experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

[5] On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

[6] The appointments of the appellants to the Board incensed the employee stakeholders of Stelco (the "Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability -- exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as "the bare knuckled arena" of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

[7] The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

[8] The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation -- as opposed to their own best interests as shareholders -- in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as the "Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse. [page11]

[9] On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

[10] For the reasons that follow, I would grant leave to appeal, allow the appeal and order the reinstatement of the applicants to the Board.

Part II -- Additional Facts

[11] Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected 11 directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

[12] Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of 20 directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

[13] Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

[14] In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids and report on the bids to the court.

[15] On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a [page12]capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase

substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

[16] A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

[17] Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately five per cent as at November 19, to 14.9 per cent as at January 25, 2005, and finally to approximately 20 per cent on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

[18] On February 1, 2005, Messrs. Keiper and Woollcombe and other representatives of Clearwater and Equilibrium met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this

view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20 per cent of the company's common shares. [page13]

[19] At paras. 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40 per cent of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.

18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

[20] In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed

that:

(a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;

(b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and

(c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

[21] On the basis of the foregoing -- and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" -- the Board made the appointments on February 18, 2005.

[22] Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but [page14] because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

> In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the

Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III -- Leave to Appeal

[23] Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

[24] This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is prima facie meritorious or frivolous;

(d) whether the appeal will unduly hinder the progress of the action.

[25] Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on [page15] which there is

little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision-making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be e vident that in my view the appeal has merit.

[26] Leave to appeal is therefore granted.

Part IV -- The Appeal

The Positions of the Parties

[27] The appellants submit that,

(a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;

(b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,

(c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;

(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,

(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

[28] The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, second, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the [page16] ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: Re Algoma Steel Inc., [2001] O.J. No. 1943, 25 C.B.R. (4th) 194 (C.A.), at para. 8.

[29] The crux of the respondents' concern is well-articulated in the following excerpt from para. 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group -- particular investment funds that have acquired Stelco shares during the CCAA itself -- have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

[30] The respondents submit that fairness, and the perception

of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see Re Olympia & York Development Ltd. (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.); Re Ivaco Inc., [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.), at paras. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, Chef Ready Foods Ltd. v. Hong Kong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; Re Lehndorff General Partners Ltd., [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see Re Dylex Ltd., [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the

statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --), vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided 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. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the docuemnt], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to

control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end fo the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The section 11 discretion

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion -- in spite of its considerable breadth and flexibility -- does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the Canada Business Corporation Act, R.S.C. 1985, c. C-44 ("CBCA"), and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy gr ounds.

[40] The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . . . .

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1); [page20]

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . . . .

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

[41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002), at p. 262.

[42] The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions [page21]made by directors and officers in the course of managing the business and affairs of the corporation.

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a) -- (c) and 11(4)(a) -- (c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in

conducting what are in substance the company's restructuring efforts.

[45] With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

[46] I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Stephenson v. Vokes, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). The authority to remove must therefore be found in statute law.

[47] In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: [page22] CBCA, ss. 106(3) and 111 [See Note 4 at the end of the document]. The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court -- where it finds that oppression as therein defined exists -- to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.).

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other

applicable statute. There is no legislative "gap" to fill. See Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., supra, at p. 480 S.C.R.; Royal Oak Mines Inc. (Re), supra; and Richtree Inc. (Re), supra.

[49] At para. 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem. The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

(Emphasis added)

[50] Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in [page23] the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power -- which the courts are disinclined to exercise in any event -- except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The oppression remedy gateway

[52] The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

> 20. The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

[53] The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

[54] I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority. [page24]

The level of conduct required

[55] Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in Catalyst Fund General Partner I Inc. v. Hollinger Inc., supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is an extraordinary remedy and certainly should be imposed most sparingly. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada". [See Note 5 at the end of the document]
>
> SS. 18.172 Removing and appointing directors to the board is an extreme form of judicial intervention. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. By tampering with a board, a court directly affects the management of the corporation. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be a measure of last resort. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.

(Emphasis added)

[56] C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark,

however, and the record would not support a finding of oppression, even if one had been sought.

[57] Everyone accepts that there is no evidence the appellants have conducted themselves, as directors -- in which capacity they participated over two days in the bid consideration exercise -- in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk -- a reasonable apprehension -- that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future. [page25]

[58] The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium -- the shareholders represented by the appellants on the Board -- had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

[59] Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They

are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, at paras. 42-49.

[60] In Peoples the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well -- in the context of "the shifting interest and incentives of shareholders and creditors" -- the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in [page26]its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

[61] In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs. Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

[62] The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over 14 months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

[63] There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

[64] The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The business judgment rule

[65] The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings -- and courts in general -- will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in Peoples, supra, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ... [page27]

[66] In Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.), at p. 320 O.R., this

court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority. [See Note 6 at the end of the document]

[67] McKinlay J.A. then went on to say [at p. 320 O.R.]:

> There can be no doubt that on an application under s. 234 [See Note 7 at the end of the document] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

[68] Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., supra; Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Olympia & York Developments Ltd. (Re), supra; Re Alberta Pacific Terminals Ltd., [1991] B.C.J. No. 1065, 8 C.B.R. (4th) 99 (S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

[69] Here, the motion judge was alive to the "business

judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a [page28]situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

[70] I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) -- which describes the directors' overall responsibilities -- and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e., in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 2 of the CBCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

[71] This is not to say that the conduct of the Board in

appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

[72] The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion -- not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and [page29] flexible supervisory jurisdiction -- a jurisdiction which feeds the creativity that makes the CCAA work so well -- in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of di rectors.

The reasonable apprehension of bias analogy

[73] In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual aebias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and

responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40 per cent of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

[74] In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

[75] Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably [page30]prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

[76] If the respondents are correct, and reasonable

apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V -- Disposition

[77] For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

[78] I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

[79] Counsel have agreed that there shall be no costs of the appeal.

Order accordingly.

[page31]

Notes

Note 1: R.S.C. 1985, c. C-36, as amended.

Note 2: The reference is to the decisions in Dyle, Royal Oak Mines and Westar, cited above.

Note 3: See para. 43, infra, where I elaborate on this decision.

Note 4: It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

Note 5: Dennis H. Peterson, Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis -- Butterworths, 1989), at 18-47.

Note 6:Or, I would add, unpopular with other stakeholders.

Note 7: Now s. 241.

TAB 3

CITATION: Tucker v. Aero Inventory (UK) Limited, 2011 ONSC 4223
COURT FILE NO.: 09-8456-00CL
DATE: 20110818

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF JAMES ROBERT TUCKER, RICHARD HEIS AND ALLAN WATSON GRAHAM OF KPMG LLP, AS JOINT ADMINISTRATORS, Applicants

AND IN THE MATTER OF AERO INVENTORY (UK) LIMITED and AERO INVENTORY PLC, Respondents

APPLICATION UNDER SECTION 46 AND FOLLOWING OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: MORAWETZ J.

COUNSEL: Orestes Pasparakis, Evan Cobb and Vasuda Sinha, for the Trustee

Sean F. Dunphy, Alexander D. Rose and Kathryn Esaw, for Air Canada

John Porter, for Lloyds TSB Commercial Finance Limited

ENDORSEMENT

[1] KPMG Inc., as Trustee in Bankruptcy (the "Trustee") for Aero Inventory (UK) Limited and Aero Inventory plc (together, "Aero") brings this motion to have certain transactions (the "October Transactions") entered into between Aero and Air Canada declared void pursuant to s. 95 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ("*BIA*"). The Trustee seeks the return of value in the amount of U.S. $75 million from Air Canada (the "Preference Proceeds").

[2] A threshold issue has been identified. The Trustee takes the position that the Preference Proceeds, once recovered, would be subject to the rights of Aero's secured creditors. Air Canada takes the position that any proceeds resulting from this preference motion should only benefit Aero's unsecured creditors.

[3] Therefore, at this point, the central issue is a question of law: are the proceeds of a preference action under s. 95 of the *BIA* subject to the rights of secured creditors?

[4] In addition to the direction sought with respect to the priority of the Preference Proceeds, Air Canada also seeks an order regularizing the proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*"), the parallel proceedings under the *BIA* and the preference motion.

BACKGROUND INFORMATION

[5] In its factum, Air Canada has provided an account of the events leading up to the October Transactions. In view of the threshold question of law, in my view, it is premature to focus on the facts in respect of the October Transactions. A brief overview of the background is, however, helpful, to put matters into context.

[6] On November 11, 2009, Administration proceedings in respect of Aero were commenced in the High Court of Justice of England and Wales (Chancery Division, Companies Court) (the "Foreign Proceedings"). Messrs. Tucker, Heis and Graham of KPMG LLP were appointed as joint administrators (the "Administrators") of Aero.

[7] On the same day, this court recognized the appointment of the Administrators as foreign representatives of Aero (the "Foreign Representatives") under Part IV of the *CCAA*.

[8] Aero reported that its secured creditors would face a shortfall of approximately £150 million, while its unsecured creditors, who are owed approximately £60 million, would receive virtually nothing at all.

[9] Following the November 11, 2009 filings, the Foreign Representatives met with Air Canada and discussed, *inter alia*, the October Transactions. From the Foreign Representatives' standpoint, a concern arose that the October Transactions might constitute an unlawful preference.

[10] The October Transactions arose out of a relationship between Air Canada and Aero in respect of maintenance required for Air Canada's aircraft. In December 2008 Air Canada and Aero executed an agreement (the "Line Maintenance Agreement") under which Aero became Air Canada's exclusive supplier for practically all of its Category 3 Inventory used for line maintenance.

[11] In early 2009, Aero and Air Canada entered into an agreement (the "January Purchase Agreement") under which Aero sold to Air Canada a pool of Category 3 Inventory. Over the course of the year, Aero was expected to purchase parts from this pool of inventory.

[12] In return, Air Canada provided Aero with nine U.S. $10 million principal Bills of Exchange (#1 – 9) and one similar Bill of Exchange (#10) for approximately U.S. $10.7 million (collectively, the "Bills of Exchange"). Each of the Bills of Exchange was payable to Aero and drawn on Air Canada. Air Canada contends that with the exception of transfers of the Bills of Exchange to Deutche Forfait (which never, in fact, occurred), the January Purchase Agreement required Air Canada's consent to any transfer of the Bills of Exchange.

[13] Air Canada contends that Aero ultimately failed to comply with the most significant provisions of the January Purchase Agreement. Ultimately, Aero and Air Canada reached an agreement under which certain Bills of Exchange were delivered back by Aero to Air Canada. It is this series of transactions as between Aero and Air Canada that the Trustee refers to as the October Transactions.

[14] In January 2010, the Foreign Representatives brought a motion to assign the Aero companies into bankruptcy expressly "for the purpose of pursuing a preference action under s. 95(1) or 96(1) of the *BIA*. On January 22, 2010, the court authorized the Administrators to assign Aero into bankruptcy and temporarily lifted the stay for that purpose (the January 2010 "Order").

[15] In seeking the January 22, 2010 Order, the Administrators advised the court that they wished to assign Aero into bankruptcy to preserve the right to pursue any reviewable preferences that may have taken place during the statutory review period prescribed by the *BIA*. The Administrators further advised that their security searches had revealed two secured creditors, Lloyds (asserting a general security interest in Aero's assets) and Air Canada.

[16] On February 4, 2010, the Trustee reported that although no claims process had been conducted, all creditors had been advised of the Administrators' view that the secured creditors would suffer a significant shortfall and that there would be no funds available for distribution to unsecured creditors. The Trustee further reported its expectation that the secured creditors' security would extend to any funds generated from a preference claim under ss. 95 or 96 of the *BIA*.

[17] The Trustee also reported that, in light of the expectation that there would be no recoveries to unsecured creditors, it saw no value in incurring the expense associated with the discharge of its statutory obligations under the *BIA*.

[18] On February 4, 2010, the Trustee filed a motion seeking to dispense with certain obligations of the Trustee under the *BIA*. The court granted the order sought by the Trustee (the "February 2010 Order"). Air Canada did not oppose the relief sought. The court issued the February 2010 Order in the *CCAA* proceedings extending the time period for the Trustee to perform its statutory obligations under the *BIA* (including convening a meeting of creditors and holding a vote of the unsecured creditors) until further order. The February 2010 Order further authorized the Administrators to provide direction to, and supervise the Trustee in pursuing the contemplated preference motion, subject to the review of the court.

[19] On April 27, 2010, the Trustee brought a motion in the *CCAA* proceedings seeking a declaration that the October Transactions between Air Canada and Aero constituted a preference within the meaning of s. 95(1) of the *BIA*.

[20] On June 30, 2010, the Trustee filed a report which included opinions from independent counsel on the validity and enforceability of the security held by a syndicate of secured lenders (the "Lenders") over Aero's assets.

[21] Aero financed its business with the U.S. $500 million revolving facility which it obtained from the Lenders. The Lenders hold:

(a) a general security interest and fixed mortgage over all the personal property of Aero in Canada, which has been duly registered; and

(b) a deed of Hypothec also duly registered in the Province of Quebec.

THE ISSUES

[22] Three issues need to be determined on this threshold motion:

(a) Whether secured creditors are entitled to assert priority over the proceeds of a preference action. Put another way, can the Trustee pursue the preference action solely on behalf of, and for the benefit of, a secured creditor?

(b) Is the preference motion properly brought within the *CCAA* proceedings, or should it be reconstituted in the bankruptcy proceedings?

(c) Should the February 2010 Order be varied to provide that the Trustee has to comply with certain obligations under the *BIA*?

[23] As the Trustee points out in its factum, on several occasions, Canadian courts have had to consider whether a secured creditor has the right to assert its priority claim over the proceeds of a preference action. The Trustee acknowledges the body of jurisprudence appears unclear, inconsistent and conflicting.

[24] It is the Trustee's position that jurisprudence and policy considerations underlying the *BIA* lead to the conclusion that the Preference Proceeds should be paid over to the Lenders by the Trustee.

[25] Air Canada, not surprisingly, takes a different position. Air Canada does not contest the Trustee's ability to pursue preference claims in the bankruptcy proceedings. However, Air Canada takes the position that the Trustee cannot pursue a preference claim as an advocate for Lloyds or for Lloyd's exclusive benefit.

THE PARTIES' POSITIONS

1. Are secured creditors entitled to assert priority over the proceeds of a preference action and can the Trustee pursue a preference action solely on behalf of, and for the benefit of, a secured creditor?

Air Canada's Position

[26] Air Canada takes the position that a trustee cannot pursue a preference action where the proceeds would accrue to the sole benefit of a secured creditor as to do so is inconsistent with the

jurisprudence holding that fraudulent preferences that do not benefit unsecured creditors cannot be pursued. Instead, the right to pursue a fraudulent preference action is a statutory right of the trustee only, and where appropriate to pursue, such preferences are only void as against the trustee, such that the recovered property accrues to the benefit of the general body of unsecured creditors. Finally, Air Canada submits that the proposed preference action is inconsistent with the role of a trustee.

The purpose of a preference action

[27] Air Canada submits that the purpose of a preference action is to allow for the equal distribution of the debtor's assets among the general body of creditors such that a trustee cannot pursue a preference action for the sole benefit of a secured creditor.

[28] Further, the purpose of s. 95 of the *BIA* is to ensure that the debtor's money is divisible equally among unsecured creditors, subject to the priorities in s. 136 of the *BIA*. In support of this proposition, counsel to Air Canada cites the Supreme Court of Canada in *Hudson v. Benallack*, [1976] 2 S.C.R. 168 at p. 175, where it is noted that the purpose of preference actions is to put all creditors on an equal footing.

[29] Counsel further submits that s. 95 of the *BIA* permits a trustee to challenge the debtor's transactions occurring on the eve of bankruptcy, as such transactions reduce the money available for distribution to creditors and presumably fail to treat all of the creditors equally. Conversely, where there would be no benefit to unsecured creditors from the pursuit of a preference action, the Trustee may not undertake a preference action.

[30] In this case, the Trustee's position is that the proceeds of the preference action accrue to the benefit of the secured creditor. Counsel to Air Canada submits that this would not constitute a benefit to the general body of creditors such that this action cannot be pursued. Instead, secured creditors' rights are to be exercised outside of bankruptcy as a function of their security agreement and provincial law: *BIA*, ss. 69.3, 70(1), 136(1) and 141.

[31] Air Canada takes the position that the jurisprudence is replete with examples of the courts declining to allow a trustee to pursue a preference action where the proceeds would accrue to the sole benefit of secured creditors.

[32] Air Canada submits that in *Ex parte Cooper* (1875), L.R. 10 Ch. App 510 (Div. Ct.) at p. 511-512, the court found that the trustee ought not to pursue a preference action for the benefit of a single creditor. Instead, preference actions are to be pursued for the benefit of all creditors. In that case, a creditor alleged that he had given the debtor an advance of £2000, secured by a consignment of the debtor's shipment of currants. However, once the shipment arrived, the debtor pledged the bills of lading for that shipment to a subsequent creditor, as security for advances made by that person. The Registrar declined to order the trustee to account to the estate for the value of the currants or take the necessary steps for their recovery, but did order that the first creditor was at liberty to use the trustee's name in any proceeding against the subsequent creditor or the debtor to enforce the delivery of the currants or payment of the proceeds to him. On appeal, the Divisional Court found that the trustee's name could not be

used in a preference action by an encumbrancer, unless the secured creditor were to give up the claim on the property for the benefit of all creditors. There could be no fraudulent preference where the preference granted concerned property that did not belong to the bankrupt.

The right to bring a preference action is a statutory right of the Trustee

[33] Air Canada takes the position that the Trustee's proposed preference action is incompatible with the fact that the right to pursue a preference action is a statutory right provided solely to the Trustee and a secured creditor cannot take advantage of the Trustee's statutory right. Instead, property recovered as a result of the exercise of the Trustee's statutory right is not subject to any security interest.

[34] Counsel to Air Canada referenced *In Re Yagerphone Limited*, [1935] 1 Ch. 392 (Ch.D.) at p. 396, which counsel submits affirms the principle established in *Ex parte Cooper*. In *Re Yagerphone*, the liquidator sought to attack the provision of certain funds to a creditor, which funds were said to be subject to a debenture. The debenture holder was found to not be entitled to the proceeds of the preference action as he held a general or floating security interest in the debtor's property, rather than a fixed charge over those funds. As a result, the preference action could be pursued and the transfer was considered to be void solely as against the liquidator, with the recovered funds impressed with a trust in favour of the creditors generally.

Bennett J. stated at pp. 395-96:

> There have been two cases which establish quite clearly that, whether in bankruptcy or in the liquidation of a company, <u>a secured creditor has no right to enforce for his benefit the remedy which is given to a trustee in bankruptcy or the liquidator of the company of avoiding a payment or setting aside a transaction made or entered into with a view to preferring a creditor of the bankrupt or a company in liquidation</u>. The authorities are Ex parte Cooper and Willmott v. London Celluloid Co.
>
> Neither of these cases, as I have said, decides the point which arises on the summons. I propose to decide it in favour of the liquidators on this ground - namely, that, at the time when the securities contained in the debenture issued to H. Yager (London), Ld., crystallised, the 240l. 11s. 2d. was not the property of Yagerphone, Ld., the company which issued the debenture.
>
> ...
>
> <u>The right to recover a sum of money from a creditor who has been preferred is conferred for the purpose of benefitting the general body of creditors</u>, and I think Mr. Montgomery White was right when he said that the sum of money, when recovered by the liquidators by virtue of s. 265 of the Companies Act, 1929, and s. 44 of the Bankruptcy Act, 1914, <u>did not become part of the general assets of</u>

> Yagerphone, Ld., but was a sum of money received by the liquidators impressed in their hands with a trust for those creditors amongst whom they had to distribute the assets of the company. [Emphasis added; Citations omitted.]

[35] Air Canada submits that the reasoning of *Re Yagerphone* was adopted in *Re Maybank Foods Inc.* (1990), 72 O.R. (2d) 93 (S.C.), and *Re Oasis Merchandising Ltd.*, [1998] Ch. 170 (C.A.). In *Re Maybank*, the respondent had conceded that the proceeds of a preference action are held in trust for the general body of creditors. Air Canada frames the distinction drawn in *Re Oasis* as between assets which were the debtor's property upon liquidation and may be subject to a charge, and those that were conveyed away to another creditor but recovered pursuant to a preference action, which are not subject to a charge. In other words, the court in *Re Oasis* drew a distinction between assets over which a secured creditor possesses a fixed charge at the time of liquidation, which are subject to the security, and assets which were conveyed to another creditor and recovered pursuant to a preference action, which were subject to a floating charge and, as such, not subject to the secured creditor's security. *Re Oasis* dealt with the proceeds of a wrongful trading claim, but the court nevertheless noted that the proceeds of preference actions are not company property, but rather, exist by virtue of liquidation and the liquidator's right of action, and are impressed with a trust in favour of the unsecured creditors. At pp. 181, the Court stated:

> Thus a right of action against directors for misfeasance which the liquidator (amongst others) can enforce under section 212 of the Act of 1986 and the fruits of such an action are property of the company capable of being charged by a debenture, because the right of action arose and was available to the company prior to the winding up. But with this can be contrasted the right of action by a liquidator, and the fruits of such an action, for fraudulent preference or fraudulent or wrongful trading, which are not the property of the company and are not caught by a debenture: see *Gough, Company Charge*s, 2nd ed. (1996), p. 122.

[36] Similarly, Air Canada notes that Millet J. in *In Re M.C. Bacon Ltd.*, [1991] Ch. 127 (Ch.D.), a case concerning whether the liquidator was entitled to recover its fees for the pursuit of a preference action, continued to apply *Re Yagerphone* to the determination of whether that preference action was properly brought so as to constitute an expense of the winding up payable out of the assets of the company. In making that determination, Millet J. noted that a preference action can only be made by a liquidator or administrator, and not a debentureholder because a debenture holder is bound by payments in the ordinary course of business even if the payment is preferential, whereas the liquidator is not. Millet J. wrote at p. 137:

> It was thus established long before 1986 that any sum recovered from a creditor who has been wrongly preferred enures for the benefit of the general body of creditors, not for the benefit of the company or the holder of a floating charge. It does not become part of the company's assets but is received by the liquidator impressed with a trust in favour of those creditors amongst whom he has to distribute the assets of the company: see In re Yagerphone Ltd. [1935] Ch. 392.

Fraudulent preferences are only void as against the trustee

[37] Counsel to Air Canada submits that fraudulent preferences under s. 95 of the *BIA* are declared to be void *as against the Trustee* and not as against any other party, including secured creditors. Property recovered pursuant to a preference action is held by the Trustee for the benefit of the general body of creditors.

[38] Air Canada submits that the judgment of Hood J. in *S-Marque Inc. v. Homburg Industries Ltd.*, [1998] N.S.J. No. 550 (S.C.) aff'd for diff't reasons [1999] N.S.J. No. 94 (C.A.), endorses this view. In that case the deficit in the security of the secured creditor could not be paid in priority from the proceeds of a preference action. Rather the secured creditor could claim for the deficit as an unsecured creditor. Hood J. reviewed the jurisprudence relating to the entitlement to the proceeds of preference actions and concluded at para. 147:

> The effect of all these decisions is that overturning a fraudulent preference puts the property back in the hands of the trustee. <u>The transaction is void as against the trustee in bankruptcy. The property does not, however, revert to the bankrupt to be available as part of the security over which a secured creditor has rights of seizure</u>. [Emphasis added.]

[39] To similar effect, Air Canada submits that the court in *Canadian Imperial Bank of Commerce v. Canotek Development Corporation* (1997), 35 O.R. (3d) 247 (C.A.) ("*Canotek*"), stated at p. 256 that "[s]ection 95 renders a fraudulent preference void as against the trustee in bankruptcy; it does not render it void as against a secured creditor".

[40] In *Canotek*, the bank held a general security agreement and chattel mortgage on the assets of F. Inc. (the debtor), which went bankrupt, but C. Corp, (the landlord of F. Inc.) levied distress against F. Inc without granting sufficient time for the tenant to rectify the situation. The court found that there was a fraudulent preference against the trustee, but not as against the bank. However, the landlord might still have rights under s. 136(1)(f) as a preferred creditor.

[41] The court rejected the bank's argument regarding the reversal of priorities, stating at p. 251:

> However, the bank says that but for the premature sale the property distrained would have been property of the bankrupt and, thus, subject to the bankruptcy. In that case, the bank argues, it would have been entitled to its security as against the trustee. In short, the bank argues that it has been deprived of the right to take advantage of the assignment in bankruptcy to gain priority in the goods and their proceeds over the trustee in bankruptcy. Since the trustee would have priority over the landlord's distraint, the bank would thus have priority over the landlord as secured creditor in the bankruptcy. This is a tail-chasing type of priority problem which must be resolved by looking at the relationship between the true parties to the dispute. In this case, the bank never did have a priority over the landlord once the landlord distrained against the goods. <u>The artificiality of</u>

> looking to the bankruptcy proceedings to give the bank something the law never intended it to have is obvious, and should not be countenanced by the court.

[42] Intriguingly, the Court while noting, at p. 256, that "[g]enerally, provincial law governs priorities between various secured creditors, and also between secured creditors and landlords", went on to state that ...outside bankruptcy the landlord prevails in facts such as these, and the incidence of bankruptcy should in no way alter this situation."[Emphasis added.]

The Trustee is an impartial officer of the court

[43] Air Canada takes the position that the Trustee's position in respect of the proposed preference action is inconsistent with its role as an impartial officer of the court submitting that a trustee should not act as an advocate for any particular class of creditors. Instead, its role is to gather in the assets of the bankrupt and divide the proceeds in accordance with the scheme of the *BIA*: See *Re Beetown Honey Products Inc.* (2003), 46 C.B.R. (4th) 195 (Ont. S.C.) at para. 22, aff'd (2004) 3 C.B.R. (5th) 204 (Ont. C.A.).

[44] Air Canada submits that in bringing this preference action, the Trustee seeks to realize a benefit solely for Lloyd's, a secured creditor. The Trustee has also failed to involve the unsecured creditors and it has failed to disclose competing considerations that might indicate that this preference action is unwarranted. While the Trustee may act for a secured creditor pursuant to s. 13.4 of the *BIA*, Air Canada contends that the record does not indicate that it has met the statutory preconditions to assisting a secured creditor. Air Canada submits that the purpose of s. 13.4 is to protect unsecured creditors' rights: See *Pratchler Agro Services Inc. (Trustee of) v. Cargill Ltd.* (1999), 11 C.B.R. (4th) 104 (Sask Q.B.) at para. 9.

[45] Section 13.4 of the *BIA* provides:

> (1) No trustee may, while acting as the trustee of an estate, act for or assist a secured creditor to assert a claim against the estate or to realize or otherwise deal with a security that the secured creditor holds, unless the trustee has obtained a written opinion from independent legal counsel that the security is valid and enforceable against the estate.
>
> (1.1) Forthwith on commencing to act for or assist a secured creditor of the estate in the manner set out in subsection (1), a trustee shall notify the Superintendent and the creditors or the inspectors
> (*a*) that the trustee is acting for the secured creditor;
> (*b*) of the basis of any remuneration from the secured creditor; and
> (*c*) of the opinion referred to in subsection (1).
>
> (2) Within two days after receiving a request therefor, a trustee shall provide the Superintendent with a copy of the opinion referred to in subsection (1) and shall also provide a copy to each creditor who has made a request therefor.

[46] Air Canada submits that the record before the court does not indicate that the Trustee has obtained a written opinion from independent legal counsel that the security in issue is valid and enforceable against the estate. There is also no evidence that the Trustee has notified the Superintendent in Bankruptcy and other creditors of such an opinion (if it exists), its intention to act for Lloyd's, or the details of any remuneration it may be receiving from the secured creditor.

The Trustee's Position

[47] The Trustee's position is that the jurisprudence is somewhat unclear, but the weight of jurisprudence favours granting the proceeds of preference action to secured creditors possessing a fixed, rather than floating charge, a finding that is reinforced by the structure of the *BIA* and the policy considerations underlying the *BIA*. As a result, the proceeds of this preference action ought to be paid to the secured creditor.

The distinction between fixed and floating charges

[48] The Trustee submits that Air Canada avoided a long-standing and obvious distinction between fixed and floating charges. Floating charges have been held to not attach to property that is the subject of a preference action. Conversely, fixed charges do: *Re Yagerphone*. This is because the secured creditor has no title when a charge is floating, yet gains priority where it is specific: *Bank of Montreal v. Innovation Credit Union*, [2010] 3 S.C.R. 3 at para. 46.

[49] Counsel to the Trustee submits that certain courts have interpreted *Re Yagerphone* overbroadly. *Re Yagerphone* concerned a dispute as to the priority as between a liquidator and a debentureholder over the proceeds of a preference action. The court held that the debentureholder's security did not attach to the assets at the time that they were transferred such that, in that case, the secured creditor had no greater claim to those assets than any other creditor.

[50] The Trustee acknowledges that *Re Maybank Foods* goes beyond the ratio in *Re Yagerphone*, yet contends that the overbroad interpretation of *Re Yagerphone* was based on a concession made by the respondent.

[51] The Trustee submits that the weight of case law favours the view that floating charges do not attach to assets recovered pursuant to a preference action; but, fixed charges do. In support of this position, the Trustee notes that: *Re M.C. Bacon Ltd.* (which found that preference action proceeds enure to the benefit of the general body of creditors) concerned a floating, rather than fixed charge; *Re Oasis* is the product of a technical reading of UK legislation; and *S-Marque Inc.* was affirmed for different reasons at the Court of Appeal, namely, that the debenture had not crystallized at the time that the asset was transferred away, such that the secured creditor was not entitled to the proceeds of a preference action. This is the same finding as the court in *Mohawk Sports Equipment* (1972), 17 C.B.R. (N.S.) 115 (Ont. S.C.), at paras. 16-17, which prevented the proceeds of a preference action being claimed by the holder of security that had not crystallized at the time of transfer.

[52] The Trustee points out that this distinction is found throughout the case law. Roy Goode in *Principles of Corporate Insolvency Law,* 3d ed. (London: Sweet & Maxwell, 2005) notes at s. 11-140:

> All these cases assume that what is recovered by the liquidator either was never the property of the chargee or ceased to be so prior to the winding up as the result of the fact that the transfer in question overrode the charge. In such a case the chargee is not entitled to use the avoidance provisions to recover what he had lost or had never had. Where however, the charge was not overridden by the transfer and the property transferred is recovered, the charge continues to attach to the recovered property. [Emphasis added]

[53] The Trustee further submits that in *N.A. Kratzmann Pty. Ltd. (In Liq.) v. Tucker (No. 2)* (1968), 123 C.L.R. 295 (Qld. C.A.), the court noted in obiter at p. 302 that "if specific property, to which a charge, validly created by the bankrupt prior to his bankruptcy, has attached prior to the time of its disposition, is subsequently recovered as a preference the trustee's title will be no higher or better than that of the bankrupt to which he has succeeded". In arriving at this conclusion, the court draws the distinction between specific property, that is subject to a charge, and over which the secured creditor will enjoy priority even if recovered pursuant to a preference, whereas property subject to a floating charge will not be subject to the charge when recovered by the trustee. The court reasoned at pp. 300-01:

> Now in bankruptcy the property of a bankrupt vests in his trustee upon the making of the sequestration order. The property which so vests is, of course, subject, in the hands of the trustee, to any charges validly created in relation to it by the bankrupt prior to the bankruptcy. The position of a secured creditor who has a charge on specific property is, of course, not in question; such property in the hands of the trustee will still remain subject to the charge. But where security has been given by a bankrupt over all of his assets and a payment to a creditor is made by him out of moneys subject to the charge and the payment is, as against the trustee, subsequently declared void as a preference the moneys paid, when recovered, will not be subject to the charge. In such a case it may be said that although the moneys paid as a preference were at the time of payment subject to the charge, the moneys recovered by the trustee are not the same moneys and that they do not, by virtue of payment to the trustee, become moneys of the bankrupt or in any way subject to the charge; when recovered they become the moneys of the trustee and his title to them does not depend upon his succession to any title which the bankrupt had. It was, we think, in this sense that Bennett J meant in the passage that we have first cited that, applying the bankruptcy rules in a winding up,
>
> > "...the sum of money, when recovered by the liquidators by virtue of s 265 of the Companies Act, 1929, and s 44 of the Bankruptcy Act 1914, did not become part of the general assets of Yagerphone Ltd, but was a sum of money received by the liquidators impressed in their hands with a trust for

> those creditors amongst whom they had to distribute the assets of the company."

The view which we have formed is, we think, borne out by the observations of Russell L.J. concerning the decision in *Yagerphone* case where, in *N.W. Robbie & Co. Ltd. v Witney Warehouse Co. Ltd.* he said:

> "...that a claim by the liquidator for repayment to him of a fraudulent preference was not subject to the debenture-holder's charge; <u>a statutory right in and only in the liquidator to make such a claim could never have been property of the company subject to the charge.</u>"

It is of significance that his Lordship did not think that the decision in any such case could depend upon whether or not the charge had crystallized at the time when the payment to the creditor was made.

<u>The case would be otherwise, of course, where a preference consists of the disposition of specific and identifiable property subject to a charge validly created in relation thereto by a bankrupt prior to his bankruptcy and where the avoidance of the disposition affects title to such property</u>. That this is so seems to us to be clear as a matter of principle....

<u>In such a case the result of the avoidance of the disposition is to revest the property in the trustee subject to the charge which the bankrupt had validly created prior to the bankruptcy</u>. [Emphasis added; Footnotes omitted.]

The Structure of the BIA

[54] The Trustee submits that the structure of the *BIA* favours giving the proceeds of a preference action to the secured creditor. Successful preference actions render transactions void as against the trustee as per s. 95 of the *BIA*. The property then vests in the Trustee as per ss. 67 and 71 of the *BIA*. However, the Trustee takes the property subject to the rights of secured creditors pursuant to s. 71, as the Trustee cannot obtain a greater interest in the goods than that enjoyed by the bankrupt: *Giffen (Re)*, [1998] 1 S.C.R. 91 at para. 50; *Lefebvre (Trustee of)*, [2004] 3 S.C.R. 326 at para. 37. Further, the Trustee reasons that division of the estate is subject to the rights of secured creditors pursuant to s. 136 of the *BIA*. As a result, secured creditors retain priority in those assets over which they had perfected security interests.

[55] The Trustee submits that the court in *Re ASI Acoustical Supplies Inc.* (2000), 22 C.B.R.(4^{th}) 174 (B.C.S.C.), noted that the fact that only the trustee can bring a preference action does not disturb the priority rights of creditors to the proceeds of preference actions, stating at para. 20: "[i]n any event the fact that only a Trustee can make a claim alleging *a* fraudulent preference does not change the priority position of a secured creditor.

[56] The Trustee further submits that in *Agricultural Credit Corp. of Saskatchewan v. Featherstone (Trustee of)* (1996), 145 Sask. R. 161 (Q.B.), the court recognized that "[m]onies

owing to a bankrupt, when collected by the trustee continued to be the property of the bankrupt and continue to be subject to the existing security interests. This includes monies realized through the efforts of the trustee" (citations omitted).

[57] The case of *Royal Bank of Canada v. North American Life Assurance Co. et al.*, [1996] 1 S.C.R. 325, cited by the Trustee, is not analogous, but potentially somewhat informative. The court found that s. 91 (dealing with whether settled property falls back into the estate) is subject to s. 67, insofar as s. 67 governs the disposition of assets in the estate. The court bifurcated the inquiry as follows at paras. 44, 45, 46, 48 and 49:

> In reconciling ss. 67(1)(b) and 91 BIA, it is important to remember that the general scheme through which a bankrupt's estate is divided by the trustee among creditors involves two distinct stages. First, the Act provides that an insolvent person "may make an assignment of all his property for the general benefit of his creditors" (s. 49(1)), or that creditors "may file in court a petition for a receiving order against a debtor" (s. 43(1)). At the time of the assignment or receiving order, the trustee in bankruptcy is obligated to take possession of the assets forming the estate of the bankrupt. Thus, by operation of s. 71(2), the bankrupt's property passes to and vests in the trustee…
>
> Once the bankrupt's property has passed into the possession of the trustee, the Act provides the trustee with the power to administer the estate…
>
> During the property-passing stage of bankruptcy, the trustee is empowered under s. 91 of the Act to set aside certain settlements which have reduced the size of the estate. Thus, s. 91 outlines the circumstances in which a settlement will be voidable at the behest of the trustee in bankruptcy. If a settlement is declared void against the trustee, then the settled property reverts back to the bankrupt's estate, and falls into the possession of the trustee in bankruptcy…
>
> …
>
> However, the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.
>
> Thus, it can be seen that ss. 91 and 67 relate to two different stages of bankruptcy. Section 91 dictates that certain settled property will fall back into the estate of the bankrupt in the possession of the trustee, while s. 67 is directed at the exercise of administrative powers over the estate by the trustee. Where a settlement is void against the trustee under s. 91, then in normal circumstances, the trustee is empowered to administer the settled asset, and use it to satisfy the claims of creditors. However, in the special case where the asset is exempt under s.

67(1)(b), then the trustee is prohibited from exercising his or her distribution powers because the asset is not subject to division among creditors.

[58] Counsel to the Trustee also references *Re Thorne, Ernst & Whinney Inc. and Gazzola et al.* (1989), 60 D.L.R. (4th) 590 (B.C.C.A.). In determining whether a landlord would be entitled to the proceeds of a preference action the Court of Appeal outlined the scheme of distribution as follows:

> Under the Bankruptcy Act the trustee is charged with gathering the assets of the bankrupt for the benefit of creditors and then distributing those assets pursuant to the scheme of distribution set out in s. 136 of the Act. Section 95 is in that part of the Act that deals with schemes and preferences. Pursuant to s. 95 the trustee is entitled to consider any transaction involving a creditor of the bankrupt and if that transaction occurred within three months prior to the bankruptcy, the trustee can take steps to seek to establish that the transaction be deemed fraudulent and void as against the trustee...
>
> ...
>
> In due course, depending on the claims of secured creditors and those standing in priority to the landlord under the scheme of distribution established by s. 136 of the Act, if there are sufficient assets in the estate the landlord will then receive payment pursuant to the provisions of that section.

[59] The Trustee suggests that this reasoning was endorsed in *Canotek* at p. 256 where the Court of Appeal held that provincial law governs priorities between secured creditors and landlords and the incidence of bankruptcy should not disturb the order of priority present outside bankruptcy.

The policy underlying the BIA

[60] The Trustee submits that the policy underlying the *BIA* favours giving the proceeds of the preference action to the secured creditor, as this interpretation avoids altering priorities and nullifying a secured creditor’s claim to collateral simply because a debtor has dealt with those assets preferentially. Otherwise, an insolvent person could defeat secured creditors’ rights by granting a preference immediately prior to bankruptcy, with the resulting proceeds flowing to the benefit of unsecured creditors. This would be inconsistent with commercial sense, which the *BIA* seeks to protect.

[61] The Trustee notes that the courts have disallowed attempts to alter priorities through unlawful means. In *Anron Mechanical Ltd. v. L’Abbe Construction (Ontario) Ltd. (Trustee of)* (1991), 5 C.B.R. (3d) 133 at para. 9 (Ont. Gen. Div.), the specific and identifiable property (traceable moneys), that had been impressed with a trust did not lose that quality simply by virtue of being recovered as fraudulent payments:

> If this were not so, a general contractor could then easily divert monies, defeat the rights of the unpaid subcontractors and thwart the whole purpose of the trust section of the Construction Lien Act. If he cannot divert the monies lawfully, as by assignment, then surely he cannot do so unlawfully, as by a fraudulent preference.

[62] The Trustee submits that the proceeds of a preference action ought to be paid in accordance with the hierarchy established in the *BIA*. Unsecured creditors do share rateably under s. 141, yet their claim is expressly subordinate to preferred creditors under s. 136, whose claim is itself subject to the rights of secured creditors.

[63] As a final point, the Trustee submits that this proposed action is not inconsistent with the role of the trustee. The trustee may act for secured creditors pursuant to s. 13.4 of the *BIA* if they have obtained a written opinion from independent legal counsel that the security is valid and enforceable. The Trustee contends that such an opinion was obtained and submitted in the Trustee's report filed on June 30, 2010.

[64] The Trustee also contends that it provided notice to the Superintendent and notified creditors before any action was taken on behalf of the lenders in accordance with the February 2010 Order. Further, it has: provided notice of its independent security opinion; posted this notice; and provided notice that it was bringing a preference action with the expectation that it would pay over the proceeds of that action to the secured creditor, Lloyds. As the Trustee is not receiving any remuneration from secured creditors, it provided no notice that it was receiving remuneration from the secured creditor. Instead, the Trustee is funded by the Foreign Representatives who have been funded to date by monies in the estate.

2. Is the preference motion properly brought within the *CCAA* proceedings, or should it be reconstituted in the bankruptcy proceedings?

[65] Air Canada submits that this preference action is improperly brought. A preference action pursuant to s. 95 of the *BIA* can only be taken in Bankruptcy proceedings or, pursuant to s. 36.1 of the *CCAA*, a monitor (appointed pursuant to s. 11.7) may pursue a preference action where a plan of compromise or arrangement has been proposed. This preference action is not brought in bankruptcy and is not brought pursuant to a plan of arrangement, while the Trustee, as an Information Officer, is unable to bring an action that is reserved to a monitor.

[66] The Trustee submits that this Court dealt with this issue in its February 2010 Order dealt with this issue, with reasons reported at 2010 ONSC 1196. It held that concurrent *BIA* and *CCAA* proceedings are contemplated by Part IV; the preference motion is brought to maximize the Debtor Company's assets; failing to allow concurrent proceedings may preclude the review of what may in fact be a preferential transaction which is contrary to public policy; Air Canada commenced and then abandoned an appeal to this motion; such that, these issues are now *res judicata*. In any event, the Trustee contends that s. 42 of the *CCAA* intends for the *CCAA* to operate in tandem with the *BIA*: *Century Services Inc. v. Canada (Attorney General),*[2010] 3 S.C.R. 379 at para. 76.

3. Should the February 2010 Order be varied to provide that the Trustee has to comply with certain obligations under the *BIA*?

[67] Air Canada notes that the February 2010 Order ought to be varied to ensure that the Trustee complies with its statutory obligations. To date, no proofs of claim have been sought from unsecured creditors, and no meeting of creditors has been convened to either consider the bankrupt's affairs, or hold a vote of the unsecured creditors to affirm the appointment of the Trustee, or substitute another trustee in its place, or to appoint inspectors to give direction to the Trustee. As a result, Air Canada submits that an order directing the Trustee to comply with its obligations under the *BIA* ought to be granted.

ADDITIONAL COMMONWEALTH JURISPRUDENCE

[68] The case of *Willmott v. London Celluloid Co.* (1886), 31 Ch. D. 425 (C.A.), appears to support the position of Air Canada, as the court held at pp. 435-36 that a preference action can only be pursued by a liquidator, while the proceeds are intended for the benefit of the general body of creditors: See also: *Re Quality Camera Co. Pty. Ltd.* (1965), 83 W.N. (Pt 1) 226 (N.S.W.S.C.); and *Bibra Lake Holdings Pty. Ltd. (in liq.) v. Firmadoor Australia Pty. Ltd.* (1992), 7 A.C.S.R. 380 (W.A.S.C.) .

[69] Further support can be found in *Wily (in his capacity as Official Liquidator of Space Made Pty. Ltd. (in liq.)) v. St. George Partnership Banking Ltd.* (1999), 161 A.L.R. 1 (F.C.A.), in which no fraudulent preference was found as the payment was *to* a secured creditor, but the Federal Court of Australia helpfully mentioned three principles applicable to that context. The first being that a debtor is entitled to prefer creditors subject to the *Statute of Elizabeth* 13 Eliz 1 c 5. The second and third principles are detailed at p. 5 as follows:

> ...in insolvency, by which I mean bankruptcy in the case of a natural person and liquidation in the case of a company, legislation provides that, <u>with certain limited exceptions, all unsecured creditors of a bankrupt or an insolvent company are to be treated equally</u>: that is, their liabilities are to be discharged rateably. This principle can be found in bankruptcy statutes dating back to 1542 (see 34 & 35 Hen 8 c 4, s 1 which was concerned with absconding debtors) and in company statutes since the Winding Up Act of 1844 (7 & 8 Vict c 111); see now s 108 of the Bankruptcy Act and s 555 of the Corporations Law.
>
> The third principle is the recognition that certain dispositions made by a debtor who subsequently becomes bankrupt, or by a company that subsequently is wound up, should be recovered and be available to meet the claims of the creditors generally. Section 122 of the Bankruptcy Act is one example of the operation of this principle. Others are to be found in the Bankruptcy Act and the Corporations Law. Many other systems of law have comparable provisions. [Emphasis added.]

[70] In *Wily*, the Court found that if there is no detriment to the unsecured creditors, there can be no preference. Consequently, it would be appear to be the case that if the proceeds of the

preference action were to be co-opted entirely to the benefit of the secured creditors there would be no resulting benefit to the unsecured creditors, thereby precluding bringing a preference action in this situation. The Court in *Wily* stated at pp. 9-10:

> If one asks whether there is less money available for the general body of creditors by reason of the three payments to the bank the answer must be a clear No. The reason is that if the payments had not been made the property available for distribution among creditors would not have increased. The bank would have been entitled to receive payment out of the property in the hands of the liquidator in priority to the other creditors. Any payment out of property that is not available to meet the debts due to the other creditors cannot confer a preference in favour of the payee. <u>In this case then, the other creditors are not any the worse off by reason of the payments to the bank.</u>
>
> ...
>
> the short answer to the liquidator's submission is that provisions such as s 122 are designed to protect the statutory order of priority established by the Bankruptcy Act and, when it applies in a winding up, the statutory order established by the Corporations Law, <u>the statutory order being the right to receive payments pari passu. Section 122 is not concerned to protect the rights of a creditor who is accorded priority by some other legislation</u>, whether State or federal. [Emphasis added.]

(See also *St. Anne Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.* (2005), 255 D.L.R. (4th) 137 (N.B.C.A.), which stands for the proposition that where a secured creditor is paid first there can be no fraudulent preference).

[71] Additionally, McPherson J.A., who expressed concurring reasons in *Starkey v. Deputy Commissioner of Taxation* (1993), 11 A.C.L.C. 558 (Qld. C.A.) stopped short of endorsing the view in *Re Yagerphone* that preference proceeds are impressed in the hands of the liquidators with a trust for unsecured creditors, but did accept that since a secured creditor cannot bring a preference action a trustee should not be allowed to bring a preference action for the sole benefit of a secured creditor. The rationale for preventing secured creditors from sharing in the benefits of a right of action of a trustee was elucidated at pp. 566-67:

> <u>If a secured creditor may not set in motion for his own benefit a procedure for avoiding preferences that exists for the benefit of the unsecured creditors, it is a logical consequence that he should not be able to claim the proceeds of avoiding such a preference when recovered</u>. But it is another matter to say that the liquidator holds those proceeds in trust for the unsecured creditors if what is meant by that is a 'trust' in the full sense of the word, under which the unsecured creditors are equitable owners of the assets in winding up. There is little in recent decisions to support that view of the rights of creditors….

> It is secured creditors who, under the decision in Re Yagerphone Ltd, are denied a share in the proceeds of avoiding preferences in winding up. Unlike the claimant in that case the Commissioner here is not a secured creditor with rights that are enforceable against identified property independently of winding up. [Emphasis added.]

[72] In *Bibra Lake Holdings Pty. Ltd. (in liq.)* v. *Firmadoor Australia Pty. Ltd*. (1992), 10 A.C.L.C. 726 (W.A.S.C.A.), Ipp J., in concurring reasons, held that fraudulent preferences are rendered void as against the liquidator only and the proceeds thereof do not form part of the assets of the company, writing at pp. 731:

> Moneys paid in circumstances which create an undue preference, and which are recoverable under s 451(1), are moneys which are recoverable for the benefit of the creditors and contributories. Such moneys cannot be said to have been the property of the company.
>
> ...
>
> Undue preferences are void as against liquidators, not as against companies. Section 451 confers upon liquidators the sole right to bring proceedings for the recovery of undue preferences. [Emphasis added.]

[73] Since *Re Yagerphone*, the governing UK law has been amended, including, in particular, by the 1985-86 reforms to the *Insolvency Act* (U.K.), 1986, c. 45, with the consequence that the court can now make an order to restore the *status quo ante* as if there had never been a preference. Nevertheless, despite these broadened powers, Millet J. found in *Re M.C. Bacon Ltd. (No. 2)* that *Re Yagerphone* remained applicable at p. 137:

> It was thus established long before 1986 that any sum recovered from a creditor who has been wrongly preferred enures for the benefit of the general body of creditors, not for the benefit of the company or the holder of a floating charge. It does not become part of the company's assets but is received by the liquidator impressed with a trust in favour of those creditors amongst whom he has to distribute the assets of the company: see In re Yagerphone Ltd. [1935] Ch. 392….
>
> In my judgment that is still the law, notwithstanding section 239(3) of the Act of 1986 which empowers the court on finding a voidable preference proved to make such order as it thinks fit for "restoring the position to what it would have been if the company had not given that preference," and section 241(1)(c) which empowers the court to "release or discharge . . . any security given by the company." Those powers are not intended to be exercised so as to enable a debenture holder to obtain the benefit of the proceedings brought by the liquidator.[Emphasis added.]

[74] In *Tolcher v. National Australia Bank Ltd.* (2003) 44 A.C.S.R. 727 (N.S.W.S.C.), Palmer J. found that where a settlement was paid from the estate subject to a charge in the form of a

general security agreement against all assets of the bankrupt (which was characterised as a floating charge, rather than a specific charge), the monies recovered pursuant to a preference action to impugn that settlement are not subject to the charge as the trustee's title is not dependent on the debtor's title, nor can it be in the case of a statutorily-provided right of action.

[75] Somewhat more nuanced support for Air Canada's position can be found in the case of *N.W. Robbie & Co. Ltd. v. Witney Warehouse Co. Ltd.*, [1963] 1 W.L.R. 1324 (C.A.). In that case, which had to do with whether certain debts could be set off rather than whether preference proceeds could accrue to secured creditors, Russell L.J. at p. 1338 rejected the suggestion that *Re Yagerphone* stands for the proposition that a charge cannot attach to assets acquired after the date of crystallization, noting instead that it stands for the proposition that proceeds from a liquidator's right to pursue a preference action, being a liquidator's right, cannot be property of the company subject to the charge. Russell L.J. stated at p. 1338:

> We were referred, in the course of the argument that there is no charge on the post-receivership "future assets," to a phrase in Kerr on Receivers (1963), 13th ed., p. 327, which says the charge would not attach to assets of the company acquired subsequent to the date of crystallisation." The authority cited is In re Yagerphone Ltd. The quotation, divorced from its context, is too wide to be supported, and if so divorced is not justified by that decision, which was that a claim by the liquidator for repayment to him of a fraudulent preference was not subject to the debenture-holder's charge: <u>a statutory right in and only in the liquidator to make such a claim could never have been property of the company subject to the charge</u>. [Emphasis added.]

[76] Further support can be found in the case of *Horn v. York Paper Co. Ltd.* (1991), 5 A.C.S.R. 112 (N.S.W.S.C.), McLellan J. stated at p. 113:

> Where a transaction is avoided as against a liquidator by virtue of the operation of s 451 of the Companies Code (or s 565 of the Corporations Law) the liquidator is a necessary party to proceedings for the recovery of property or money based on such avoidance: see Kent v La Communauté des Soeurs de Charité de la Providence [1903] AC 220 at 226. This is because <u>the transaction is avoided only against the liquidator, and the proceeds of recovery do not necessarily form part of the general assets of the company</u>: see; Re Quality Camera Co Pty Ltd [1965] NSWR 1330; 83 WN (Pt 1) (NSW) 226 and; N A Kratzmann Pty Ltd (in liq) v Tucker (No 2) (1968) 123 CLR 295." [Emphasis added; See also *Bibra Lake*, holding to the same effect.]

[77] In *Bayley v. National Australia Bank Ltd.* (1995), 16 A.C.S.R. 38 (Tas. S.C.), Wright J. was tasked with determining whether funds recovered via a s. 468 action under the Australian *Corporations Law* (which renders dispositions after a winding up void), as well as funds recovered pursuant to a preference action, were subject to a secured creditor's registered floating charge. Wright J. held that the disposition successfully challenged via s. 468 were void for all purposes, as if the payment had never occurred, such that the funds "remained the property of the

company at all relevant times and upon being restored to the company by the liquidator's actions became once more subject to the respondent's floating charge." Wright J. then went on to deal with the question of whether the charge attached to the assets recovered pursuant to the preference action.

[78] Wright J. held that the proceeds of a preference action were for the benefit of the general body of creditors. Wright J. noted that "unlike dispositions affected by s 468(1), preferences coming within the ambit of s 565(1) are not void in any absolute sense but are void as against the liquidator only." It was not necessary for Wright J. to decide whether this would mean that the recovered property could be said to be free and clear of any prior charges, (although it was noted that this may be true of specific property subject to a charge prior to a winding up order) since, in the circumstances of that case, the charge at issue was floating and had not crystallized prior to the liquidation proceedings, such that it did not attach to the funds that were preferred. Instead, those funds were held for the benefit of the general body of creditors. Wright J. concluded:

> ...irrespective of whether for some purposes the recovered funds may be viewed as the "property" of the company being wound up, in the present circumstances they are not property which was or could have been subject to the floating charge at the time that charge crystallised viz, the date upon which liquidation proceedings commenced. Thus, in my opinion, the fund constituted by those moneys is not available to the respondent, but is distributable to the general creditors subject only to the statutory priorities provided by the Corporations Law.

[79] The import of the words "void as against the trustee" was the subject of judicial consideration by the New South Wales Court of Appeal in *National Acceptance Corporation Pty. Ltd. v. Benson & Ors* (1988), 13 A.C.L.R. 1 (N.S.W.S.C.A.), where the Court held that the use of the word "void" in s. 368 of the Companies Code in question (which is similar to s. 468 of the Corporations Law considered in *Bayley*) "...means at least void for all purposes related or incidental to the administration of the winding up of the company" in contrast to the use of the word "void against the trustee" in their *Bankruptcy Act* which is more narrow. On this point, the Court noted that in *Commercial Bank of Australia v. Carruthers* (1964), 6 F.L.R. 247 (F.C.A.), Manning J. "held that the provision did not produce the result that the preferential payment was void against anyone else than the Trustee in Bankruptcy" (emphasis added).

[80] Andrew Keay in "The Effects of a Successful Action by a Liquidator to Avoid a Pre-Liquidation Transaction" (1996) 15 (2) U. Tasm. L. Rev. 236 notes that the Australian bankruptcy regime has changed such that now transactions are no longer said to be "void as against the liquidator" but rather "voidable", and further, recovery vests in the company. He submits at p. 241 that this is a difference without a distinction as in the U.K., where the *Insolvency Act* grants the court broad powers to void fraudulent preferences and restore the position to the *status quo ante*, the courts have continued to apply *Re Yagerphone*. For instance, in *Re M.C. Bacon Ltd. (No. 2)*, *Re Yagerphone* was again endorsed as holding that secured creditors cannot recoup the proceeds of a preference action despite a similar change in wording as Australia's under the U.K. *Insolvency Act*.

[81] In that article, Andrew Keay also notes that *Re Yagerphone* has existed for a long period of time and the government had the option to disturb this judicial practice but did not do so, nor is there evidence in the speeches of Parliament or the Explanatory Memorandum relating to the U.K. Bill that changed the U.K. *Insolvency Act* most recently that a change in judicial practice was contemplated, let alone required.

[82] In addition to Andrew Keay's comments, it should be recalled that s. 95 of the *BIA* is worded more restrictively than the U.K. or Australian preference provisions, rendering fraudulent preferences void against the trustee only.

[83] Andrew Keay does not regard reversing priorities as a problem, so much as a function of the legislative scheme itself. He writes at p. 264, in relation to the reversal of priorities:

> With respect, it appears that this argument overlooks the fact that <u>bankruptcy or liquidation changes everything</u>. While the company continues to exist, it is <u>no longer directed by directors, and it is not run for the benefit of the shareholders. A liquidator acts on behalf of the company and he or she does so for the general body of creditors. Liquidation produces a whole new set of relationships</u> and duties. While a secured creditor may argue that the general creditors are sometimes unjustly enriched by receiving the benefits of a recovery, the rebuttal to that might be that those creditors were prejudiced before liquidation because they did not receive any benefit from the voidable transaction and, in any event, they have suffered losses as a result of the liquidation. [Citations omitted; emphasis added.]

[84] It could be argued that while priorities may well be reversed, as held in the case law, this stems from the role of the trustee. The status of the trustee is tripartite: as a successor in title, as a representative of creditors and finally, and importantly, the trustee has independent status under either federal or provincial law to avoid certain transactions: *Roderick Wood, Bankruptcy and Insolvency Law* (Irwin Law: Toronto, 2009) at pp. 180-81. As such, as Professor Wood notes at p. 82 the principle that a trustee "steps into the shoes" of the bankrupt and acquires the bankrupt's property "warts and all" "does not operate where bankruptcy or other legislation gives the trustee a power to subordinate or avoid certain property rights of third parties. In such cases, the trustee may have a better right to the asset than that held by the bankrupt."

[85] This may constitute an oddity, but the danger of legislative intrusion outweighs any possible unfortunate consequences from the reversal of priorities. While the legislative measure could be an oddity, this would not be anomalous. As Professor Ian Fletcher writes in *The Law of Insolvency*, 4th ed. (London: Sweet & Maxwell, 2009) of the legislative history of British bankruptcy law at pp. 796-97 as follows:

> ...the legislative history is scarcely homogeneous, but is more accurately described as one of almost perpetual accretion and revision amid shifting socio-political influences. It must be submitted that the current position, in terms of policy and principle, is both muddled and confusing. It has resulted from the

> historic lack of a co-ordinated, thought-through approach to our law of credit, security and insolvency, amounting to a persistent failure...to address the essentially interlocking and inter-dependent nature of these vital areas. Consequently, the law has become beset by anomalies and inconsistencies, particularly concerning the operation of the pari passu principle, which are in some instances squarely at odds with commercial and social realities....

[86] However, there is also jurisprudence and commentary in support of the Trustee's position. Doyle C.J., for the majority, in *Fresjac Pty. Ltd. (In Liq, Re Campbell v. Michael Mount PPB)*, (1995), 65 S.A.S.R. 334 (S.A.S.C.), approved of *N.A. Kratzmann.* This was cited by counsel to the Trustee, and reconciled many of the prior Commonwealth cases mentioned above <u>by distinguishing the issue of who possesses the right to bring a preference action, from the issue of the entitlement to the proceeds of such actions</u>. The Court in *Fresjac* was faced with the issue of to whom the proceeds of a s. 468 action by the liquidator, which renders dispositions of property after the commencement of winding up void, accrue. Doyle C.J. noted that the purpose of this section is identical to the purpose underlying preference actions, writing at pp. 341-42 "...both have an eye to the preservation of assets, to the preservation of the *status quo*, and to a later orderly distribution of assets among creditors, <u>subject to the rights of secured creditors</u>" (emphasis added).

[87] In *Fresjac*, Doyle C.J. disagreed with Wright J.'s conclusion in *Bayley* that funds rendered void under s. 468 were at all times the property of the company and became subject to the charge once restored to the company. Doyle C.J. opined that such a characterization is artificial. The funds recovered were not the same funds, and title could not be revested, although this could occur in the case of land or identifiable chattel. Instead, the company would have a claim to recover an equivalent amount of money and its entitlement to the funds of s. 468 is a separate question from the right to impugn a transaction. Wright J.'s reliance upon the fact that a s. 468 action is "void", whereas a preference action is "void as against the liquidator" is, in Doyle C.J.'s view at p. 344, misplaced, as those words "control who may invalidate the preference, and to identify the liquidator as the person with that right, not to decide or determine who is entitled to the proceeds."

[88] In this regard, Doyle C.J.'s analytic framework is noteworthy and worth setting out. It was noted that there is a "need to distinguish between the avoiding effect of the section, the location of the right to recover property disposed of by the company in a transaction avoided by the section, and the entitlement apart from that to rely upon the avoiding effect of the section." Doyle C.J. wrote at p. 344-45:

> The preference cases indicate, in my opinion, that the right to recover property disposed of in a transaction avoided as a preference belongs to a trustee in bankruptcy or liquidator, and property recovered by the exercise of that right will not vest in a secured creditor unless the exercise of the right should cause the revesting of title in specific property subject to a security.
>
> ....

> ...the location of the right to assert voidness does not also determine the location of the right to proceeds recovered after the cancellation of a void transaction.
>
> ...
>
> The mere right to assert or rely upon voidness cannot, as a matter of logic, give rise to a right to recover the property disposed of by the void transaction.
>
> The right to recover property disposed of in a transaction voided by s 468 is not property of the company, and the proceeds of the exercise of the right do not fall to be treated as property of the company caught by pre-existing charges or security but, in my opinion, specific property the subject of a charge or security will, if recovered, again be subject to that charge or security.
>
> On this approach, the right to recover property the disposition of which is avoided by s 468 is not a right to which a charge or security will attach.
>
> In addition, in my opinion money recovered as the result of the avoidance of a preference or because a payment is void is not to be regarded as property of a company to which a charge or security can attach.
>
> These conclusions emphasise the similarity between the preference provisions and s 468, despite the difference of language (void as against the liquidator and void) and despite the difference in the stages before liquidation to which they apply and the differences in the manner in which they operate.
>
> On the other hand they avoid the oddity (as some would see it) of a better result for a secured creditor in respect of a void payment, and the oddity of a remedy conferred for the purposes of a liquidation working for the benefit of the secured creditor. I do not pretend the result which I have reached is obvious, or that the contrary arguments are lacking in substance. [Emphasis added.]

[89] In addition, in *Bank of New Zealand v. Essington Developments Pty. Ltd. & Ors,* (1991), 5 A.S.C.R. 86 (N.S.W.S.C.), it was held that a secured creditor has the benefit of a liquidator's recovery of assets *in specie* over which a secured creditor has a charge. McLelland J. wrote at pp. 89-90:

> The position of a creditor with a charge over all the assets of a company and a receiver appointed by that creditor appears to be that if as a result of the avoidance of the transactions property is recovered in specie, then that property is included in the assets of the company which are subject to the charge and which therefore are available to the receiver for the benefit of the secured creditor. On the other hand, moneys which are recovered merely because payments have been avoided as preferences do not come within the general assets of the company available for the secured creditor and the receiver, but may be utilised by the

> liquidator for the purposes of the liquidation, and in particular for the benefit of unsecured creditors. [Emphasis added.]

[90] In *Re Shapland Inc.*, [2000] B.C.C. 106 (Ch.D.), the court appears to be of the view that a trustee can pursue a preference action for which the benefits will accrue to the secured creditor (although in that case unsecured creditors would actually benefit as well) in stating at p. 110:

> Mr Goodison submitted that I should make no such order, on the ground that it would benefit only the bank, which was a secured creditor, and the power under s. 239 was conferred to benefit unsecured creditors, not secured creditors. I am very doubtful that this submission would be correct, even if the bank's claim were fully secured. However, on the facts of this case, it is not: the indebtedness of Shapland to the bank greatly exceeds the value of the property, so that a large part of the bank's claim is unsecured. Furthermore, the bank's security has been challenged, so that it would be wrong for me to proceed on the assumption that it is unquestionably a secured creditor. Lastly, the bank and the liquidator, who is financed in these proceedings by the bank, have agreed that after payment of the costs and expenses of the winding up, ten per cent of the proceeds of sale of the property are to go to unsecured creditors. Accordingly, the setting aside of the charge will benefit unsecured creditors, and the factual basis for Mr Goodison's submission is not made out. [Emphasis added.]

[91] In *The Law of Insolvency,* Professor Fletcher would appear to provide some support for the Trustee's position, in claiming that the purpose of a preference action is to restore the situation to the *status quo ante*, and that the court may make such order to achieve that purpose as it sees fit, such that the idea that the proceeds of the action are not subject to the rights of secured creditors would be put into doubt. The new broad power to strike down fraudulent preferences, declare them void, and make any order that is just, was introduced in the 1985-86 reforms to the *Insolvency Act* in England. However, as previously noted, this form of relief is not replicated in the *BIA.*

[92] Professor Fletcher also notes that the trustee's title is subject to various equities. He states at p. 246 that in the individual debtor context, whereby preferences can be declared void to restore the *status quo ante* (much like in the company debtor context), "the trustee is essentially a *successor* to such title as the bankrupt actually had at the time of his adjudication, including any limitation or imperfections in that title, and can enjoy no better position in relation to the property than did the bankrupt himself formerly" (emphasis in original; citations omitted).relying on *Johnson v. Smiley* (1853), 51 E.R. 1019 (Ch.D.); *Mapleback, Re* (1876), 4 Ch.D. 150 (C.A.); *Garrud, Re* (1880), 16 Ch.D. 552 (C.A.), per James L.J.; *Beeston, Re*, [1899] 1 Q.B. 626 (C.A.) at p. 610 per Lindley M.R.

[93] More forcefully, he states at p. 247 "[a]ll such rights as might have been exercised by third parties prior to bankruptcy may be exercised after adjudication, and no action by the trustee can be effective to gain priority over such vested rights: unless the property can be disclaimed, the rights remain undisturbed" relying on *Anderson, Re,* [1911] 1 K.B. 896 (Ch.D.).

[94] The Trustee's position is supported by additional academic literature. Rebecca Parry in "The Destination of Proceeds of Insolvency Litigation" (2002) 23(2) Comp. Law. 49, is concerned about the reversal of priorities that occurs where secured creditors cannot recoup the benefits of a preference action brought by a trustee under English law, especially given the anomaly that many preference actions could be pursued as misfeasance claims that do not give rise to the same result. This is because in the misfeasance context, amounts recovered are recoverable by secured creditors: See *Re Produce Marketing Consortium Ltd. (No. 2)*, [1989] B.C.L.C. 520 (Ch.D.); *Re Asiatic Electric Co. Pty. Ltd. (in liq.)* (1970), 92 WN (N.S.W.S.C.) at pp. 362-64. The remainder of her article deals primarily with the particular wording of the U.K. law.

[95] Lee Eng Beng in "The Avoidance Provisions of the Bankruptcy Act 1995 and their Application to Companies" (1995) Sing J. Legal Stud. 597 notes that even with respect to preferential dispositions of specific property, the right to recover the assets vests in the liquidator such that a chargee cannot be entitled to the fruits of that recovery, especially since the process itself is intended for the benefit of unsecured creditors rather than secured creditors, as the latter exist outside of the bankruptcy regime. Nonetheless, Lee Eng Beng acknowledges the rights of secured creditors to trace monies at p. 632:

> While the property which has been disposed of may have been validly charged, the fact of it being wrongfully disposed of gives rise to the chargee's right under the general law to trace against the disponee and nothing more. The rights and remedies of secured creditors are conferred by the general law and they are not to be reinforced by statutory provisions designed to provide an equitable debt collection system for unsecured creditors. Of course, <u>any right of a secured creditor which exists at general law would override any right of the liquidator or trustee in bankruptcy to proceed against the assets by virtue of any statutory provision, as the latter cannot be in a better position than the company or bankrupt, as the case may be. It follows that if a secured creditor has the right to recover the assets transferred away in breach of his security rights and the liquidator or trustee in bankruptcy recovers the assets pursuant to the statutory provisions, any recovery by the latter must be held for the benefit of the former in so far as they would have been recoverable by the secured creditor</u>. [Emphasis added.]

[96] Gerard McCormack in "Swelling Corporate Assets: Changing What is on the Menu" (2006) 6 J. Corp. L. Stud. 39 advances five reasons at pp. 56-57 for doubting the line of cases affirming *Re Yagerphone,* two of which are not peculiar to the English context:

1. *Re Yagerphone g*ives rise to the unprincipled anomaly that certain preference actions can also constitute misfeasance actions, yet only in the latter case are payments subject to the rights of secured creditors.

2. Too much emphasis is placed on the liquidator's independent status which is merely an administrative convenience. He states that "the fact that proceedings are brought

> by the liquidator or administrator might be seen as largely procedural. The liquidator or administrator are not acting in their own individual rights but rather by virtue of the office they hold in relation to a particular company. In a broad sense the proceedings are brought on behalf of the company in question." (Citations omitted; emphasis added.)

[97] Nancy Sanborn supports this interpretation, admittedly in the U.K. context. She writes in "Avoidance Recoveries in Bankruptcy: For the Benefit of the Estate or the Secured Creditor?" (1990) 90 Colum. L. Rev. 1376 at 1399-1400 supports the above authors writing:

> The proposition that all amounts recovered must be available for administrative expenses and unsecured claims and interests, without recognition of any security interest in the recovery because avoidance powers are exercised for the benefit of the estate, fails to distinguish between two separate functions of the bankruptcy process. One function is to maximize the value of the pool of assets to which all claimants and interest holders will look for payment. Transfers are avoided, then preserved or recovered, to serve this function. The estate benefits from the exercise of these powers even if a creditor possesses a security or beneficial interest in the property.
>
> A separate issue, how entitlements to the accumulated pool of assets should be allocated, should be resolved primarily by nonbankruptcy law. A secured creditor should be afforded the same protections that would have been available to it under state law if no bankruptcy had ensued. [Citations omitted].

ANALYSIS

[98] The foregoing review of jurisprudence confirms the submission of the Trustee, namely, that the jurisprudence is unclear and inconsistent. However, it seems to me that, with a consistent application of (i) insolvency principles; and (ii) personal property security principles, the jurisprudence can be reconciled.

[99] Both the Trustee and Air Canada make extensive reference to the English decision of *Re Yagerphone*. *Re Yagerphone* has been cited by some Canadian courts to stand for the proposition that secured creditors have no claim to the proceeds of a preference action.

[100] Counsel to the Trustee submits that, read properly, the holding in *Re Yagerphone* is, in fact, narrower. I agree.

[101] In *Re Yagerphone*, the court considered a priority dispute between the liquidator and a debenture holder over the proceeds of a preference action. In reaching its conclusion, the court focussed on the nature of the debenture holder's security. The court observed that at the time the preference was given, the debenture holder's charge was still floating and therefore had not attached to the assets of *Re Yagerphone*:

> On January 17, 1933, the creditor to whom the money was paid and from whom the money was recovered was a creditor Yagerphone, Ld. When Yagerphone, Ld. paid to the creditor the 240l 11 s. 2 d. that sum, in my judgment ceased to be the property of Yagerphone, Ld. The payment to that creditor could not have been attacked or impeached, unless within three months from the date of payment, the liquidation of Yagerphone, Ld. had begun, and, in my judgment, at the date when the security contained in the debenture crystallised, the sum of 240l 11 s. 2 d. was not the property of Yagerphone, Ld....

[102] As counsel to the Trustee points out, at the time the preference was given by the debtor, the assets transferred were not subject to the debenture holder's security and when the debenture holder's security was crystallized, the debtor's estate did not extend to the assets that had already been transferred on account of the preference. On this basis, the court found that the debenture holder's security did not attach to those assets when they were eventually returned to the estate.

[103] Counsel to the Trustee goes on to submit that, from a policy perspective, the holding in *Re Yagerphone* is not unreasonable, as, in particular, because the debenture holder's security was floating it had no claim to the assets. When these assets were brought back into the estate, the court's decision that all creditors share in those assets is consistent with the fact that the "fraud" occurred against all of the debtor's creditors.

[104] In *Mohawk Sports Equipment* Houlden J. (as he then was) applied *Re Yagerphone* in circumstances which involved a floating charge that had not crystallized. The court held that the proceeds "cannot be claimed by the debenture holder as it was not part of the property of the debtor company at the time the security was crystallized".

[105] Counsel to the Trustee further submits that in subsequent cases, the holding in *Re Yagerphone* has been summarized more broadly to apply to secured creditors generally. Reference was made to *Re Maybank* where at paragraph 2 the court stated:

> It is conceded by the respondent that the monies recoverable by a trustee from a creditor who has been preferred do not become part of the general assets of the bankrupt estate subject to the claims of secured creditors but rather are received by the trustee subject to a trust in favour of the creditors represented by the trustee: Re Yagerphone, Ltd. (1935) 1 Ch. 392 (Ch. D.).

[106] It is the Trustee's submission that the concession in *Maybank Foods* goes beyond the ratio in *Re Yagerphone* as the reasoning in *Re Yagerphone* does not necessarily follow the circumstances in which a secured creditor holds a fixed charge over the assets of the debtor. Counsel goes on to submit that where the secured creditor holds a fixed charge, the policy considerations are different. Unlike a floating charge, a fixed charge gives the secured creditor a property interest in the debtor's collateral that attaches at the time the charge is granted. Reference was also made to the recent decision of the Supreme Court of Canada in *Bank of Montreal v. Innovation Credit Union*, [2010] 3 S.C.R. 3, which, in turn referred to the case of

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411, in which the distinction between a fixed and a floating charge was explained at para. 46:

> The critical significance of the characterization of an interest as to being fixed or floating, of course, is that it describes the extent to which a creditor can be said to have a proprietary interest in the collateral. In particular, during the period in which a charge over inventory is floating, the creditor possesses no legal title to that collateral….However, if a security interest can be characterized as a fixed and specific charge, it will take priority over a subsequent statutory lien or charge; in such a case, all that the lien can attach to is the debtor's equity of redemption in the collateral….

[107] The distinction between a fixed and floating charge and considering whether the charge has crystallized is not a new concept. The issue was also live in *Maybank Foods*.

[108] In *Maybank Foods*, the respondent was a secured creditor of the estate. The estate had been engaged in three actions in Nova Scotia referred to as the Food Group Litigation, the Provisioners Litigation, and the Seaway Litigation, respectively. The trustee requested orders that the proceeds from such litigation were the property of the estate free and clear of the secured claim of the respondent.

[109] At para. 2 of the decision, Saunders J. referenced the Provisioners Litigation and the Seaway Litigation as involving claims against preferred creditors. It was in this context that the concession was made by the respondent that the monies recoverable by the trustee would not form part of the general assets of the estate.

[110] However, at para. 3 of the decision, Saunders J. addresses the claim against Food Group:

> The claim against Food Group was in respect of an account receivable. Food Group unsuccessfully defended the claim of the trustee on the basis of set-off. It was held that in the circumstances there was no mutuality, because at the time the bankrupt became indebted to Food Group, the receivable was being claimed by another secured creditor, Citibank under a crystallized charge. Upon the bankruptcy, the receivable of Food Group vested in the trustee subject to the secured claim of the predecessor in title of the respondent. Accordingly, the respondent may assert a right to the proceeds of the Food Group Litigation unless defeated by some principle or a statute. The situation is different from the other two actions where the respondent had no charge on the property being claimed by the trustee and the trustee was asserting a statutory right unavailable to the respondent. Here, the respondent has a charge on the receivable being claimed from Food Group. The trustee argued the respondent could not have successfully claimed against Food Group because Food Group would have been entitled to a set-off which in its submission made the situation analogous to the other two actions. I cannot accept that argument. The action of Citibank in crystallizing its charge foreclosed the Food Group from successfully asserting the set-off defence.

> In my opinion, the respondent who also had a charge against that asset could assert along with the trustee that set-off is not available notwithstanding the charge to the respondent may not have crystallized before the claim of Food Group against the bankrupt arose. There is, in my opinion, no basis in statute or principle preventing the respondent from claiming the net proceeds of the Food Group action.

[111] Justice Saunders endorsed the record as follows:

> Net proceeds (after deducting of costs and disbursements) of Food Group Litigation are subject to the secured claim of the respondent. Proceeds of the Provisioners Litigation and the Seaway Litigation are free and clear of such claim. The costs and disbursements with respect to the Provisioners Litigation and the Seaway Litigation should not be paid out of the assets of the estate that are subject to the secured claim of the respondent unless that claim has been satisfied in full. Costs to the trustee and to the respondent out of the estate on a solicitor-and-client basis.

[112] The distinction between a fixed charge and a floating charge was also the subject of the decision of the Nova Scotia Court of Appeal in *S-Marque*.

[113] In *S-Marque*, the Nova Scotia Supreme Court found that the proceeds of a preference action will inure to the benefit of the unsecured creditors for two reasons:

(a) first, the court relied on the decision *In Re Yagerphone*; and

(b) second, the court cited a number of decisions to the effect that only a trustee can void a preference action.

[114] The decision was affirmed on appeal but the Court of Appeal decided the priority issue for different reasons. The Court of Appeal focussed on the fact that the secured creditor held a floating charge and that the preference occurred "before the debenture crystallized". As counsel to the Trustee reasoned, as in *Mohawk Sports Equipment*, the court determined the matter on the basis that the secured creditor "never had a fixed charge on these assets when the debenture crystallized".

[115] Counsel to the Trustee submits that the court considered the priority rights of secured creditors to proceeds from a preference action and that in the 2000 British Columbia Supreme Court decision, in *Re ASI Acoustical Supplies Inc.*, the court squarely addressed the fact that only a trustee can make a claim for fraudulent preference under the *BIA*. Counsel to the Trustee submits that the court noted that, while the *BIA* gave that right to the trustee, it did not change the priority rights of creditors to the proceeds.

[116] In my view, the *ASI Acoustical* decision does not stand for the proposition put forth by counsel to the Trustee.

[117] The matter came before the court by way of an appeal by the trustee for *ASI Acoustical* from a decision of the Registrar, refusing to approve the payment to the trustee of its fees and disbursements. The Bank of Nova Scotia took security in the form of a general security and assignment of accounts receivable. The security was ultimately assigned to Mr. Willsie.

[118] Prior to bankruptcy, ASI bought materials from Winrock and owed Winrock around $56,000. Winrock then bought a substantial amount of ASI inventory. Winrock owed ASI approximately $45,000 for the inventory, but resisted payment claiming a right of "contra account". The trustee wrote to Winrock noting that a subsidiary company Hubcity owed part of the money to ASI and therefore the claim of "contra account" could not be made out. The trustee also alleged that the Winrock claim was a preference on the basis that the sole reason Winrock bought the inventory from ASI was to reduce its claim in the bankruptcy.

[119] Ultimately, the matter was settled. The position of the trustee was that the matter was settled on the basis that the purchase of inventory was a fraudulent preference under the provisions of the *BIA* and because this remedy is not available to the secured creditor, the money obtained from the settlement was an asset of the estate.

[120] The registrar held that there was no dispute that the account receivable from Winrock was covered by the security interest, and the fact that there were negotiations and the claim was eventually paid because the trustee alleged that there was a fraudulent preference, did not convert the asset into some other kind of asset not subject to the security interest. The registrar therefore found that the proceeds of the claim should not appear on the statement of receipts and disbursements as an amount available to the estate.

[121] At the hearing before Martinson J. on appeal, the creditors disputed the characterization of the transaction as a fraudulent preference. The only evidence before the registrar was that there had been an allegation of a fraudulent preference by the trustee, that no claim had been commenced by the trustee and that there was a negotiated settlement with Winrock.

[122] Justice Martinson concluded that it was open to the Registrar, based on the material before her, to conclude that the settlement monies were accounts receivable and subject to the security interest. It was in this context that the reference which was cited by counsel to the Trustee: "[i]n any event, the fact that only a trustee can make a claim alleging a fraudulent preference does not change the priority position of a secured creditor" was made.

[123] From my reading of *ASI Acoustical*, the significant point is that the court recognized that in the circumstances of that case, the fact that a fraudulent preference action had commenced, did not preclude the ability of a secured creditor to realize on security or to follow the proceeds from security in accordance with the specific security agreement.

[124] This position is again recognized in *Agricultural Credit Corp. of Saskatchewan*, where the court noted:

> Monies owing to a bankrupt, when collected by the trustee continue to be the property of the bankrupt and continue to be subject to the existing security

> interests. This includes monies realized through the efforts of the Trustee. (Holy Rosary Parish (Thorold) Credit Union Limited v. The Premier Trust Company, (1965), S.C.R. 503); Re Stadnik (Bankrupt) (1991), 90 Sask. R. 12 (QB); Re Moore (Bankrupt) (1989), 79 Sask. R. 63 (C.A.).

[125] Counsel to the Trustee submits that the conclusion of the court in *Re ASI Acoustical* is consistent with a long line of jurisprudence that holds that monies recovered by the trustee are subject to the rights of secured creditors.

[126] It seems to me that this statement is too broad. In my view, the focus has to be on whether or not the secured creditor had rights in the collateral at the time of the suspect transaction.

[127] In *Re Yagerphone,* the debenture holder's security was floating and the debenture holder had no claim to the assets recovered by the liquidation.

[128] In *Mohawk*, the floating charge had not crystallized.

[129] In *Maybank*, the court recognized that the secured creditor could have a claim, under a crystallized charge.

[130] In *S-Marque*, the secured creditor held a floating charge and the preference "occurred before the debenture crystallized".

[131] In *ASI Acoustical*, the court concluded that it was open to the registrar to conclude that the settlement monies were accounts receivable and subject to the security interest.

[132] In *Agricultural Credit Corp.*, monies owing to a bankrupt on account of shares in the Saskatchewan Wheat Pool, when collected by the trustee continued to be the property of the bankrupt and subject to the existing security interest. It was not a preference action.

[133] *Re Yagerphone* arose in the context of a regime dominated by fixed and floating charge debentures. In Ontario, since the enactment of the *Personal Property Security Act*, R.S.O. 1990, c. P-10 ("*PPSA*"), security agreement do not generally refer to fixed and floating security, but the concepts of fixed and floating charges is still recognized. (See *Bank of Montreal v. Innovation Credit Union, supra*.)

[134] Under the *PPSA* regime, the issue that has to be analyzed is whether or not the debtor had the ability to transfer the collateral charged by the security agreement to a third party free and clear of the security interest.

[135] It seems to me that, if the debtor was in a position to transfer the collateral free and clear of the interest of the secured party, the *Re Yagerphone* analysis and conclusions remains valid. Conversely, if the collateral remains subject to the claims of a secured party, the secured party may retain the ability to enforce its rights as against the collateral or any proceeds arising from the collateral.

[136] It seems to me that this outcome is consistent with the views of Doyle C.J. in *Fresjac Pty. Ltd. (In liq), Re, supra*, which are summarized at [86] – [88] above. I am in agreement with the views and conclusions set out by Doyle C.J. in that case. The outcome is also consistent with the approach of Lee Eng Beng in the emphasized part of [95]. The outcome is also consistent with the approach outlined by Gerald McCormack at [96] and by Nancy Sanborn at [97].

[137] Section 95 of the *BIA* makes it clear that a transaction that is declared to be a preference is void as against the trustee. This, in my view, makes it clear that it is the trustee that has the cause of action to declare a preference to be void. But, as stated in *Fresjac Pty. Ltd. (In Lq.), Re supra*, the issue of who possesses the right to bring a preference action does not necessarily determine entitlement to proceeds.

[138] The s. 95 cause of action remedy is designed to ensure that there is *pari pasu* treatment as between unsecured creditors. The recipient of a preferential transfer is not entitled to keep the preferential proceeds if the elements of s. 95 are proven. The subject of the preference is returned to the estate but subject to the rights of secured creditors. In the words of Lee Eng Beng at [95] above, "…if a secured creditor has the right to recover the assets transferred away in breach of his security rights and the liquidator or trustee in bankruptcy recovers the assets pursuant to the statutory provisions, any recovery by the latter must be held for the benefit of the former in so far as they would have been recoverable by the secured creditor."

[139] Ultimately, distributions of the bankrupt's estate are made pursuant to s. 136 of the *BIA* and again are preferenced with the *proviso*: "subject to the rights of secured creditors".

[140] The ability of a trustee to recover monies for the estate for the benefit of creditors is, in its entirety, subject to the rights of secured creditors. If a secured creditor still has rights in the collateral, there is nothing in the fraudulent preference remedy regime that would appear to preclude the secured creditor from exercising its rights. To the extent that the secured party has rights in the collateral and has a remedy against the collateral in the hands of the third party, such remedy and the resulting priority is not, in my view, altered because a trustee embarks on a preference action.

[141] This analysis is consistent, in my view, with the structure of the *BIA*. The *BIA* respects the rights of secured creditors. Over time, modifications have been made to the statute to harmonize it with statutes providing for remedies to secured creditors. But, the priority regime has not changed. If the secured creditor has rights to the collateral, the secured creditor takes priority over the claims of unsecured creditors.

[142] Counsel to the Trustee also referenced *Re Thorne Ernst & Whinney and Gazzola et al.* in connection with an explanation as to the interplay of the preference provisions and priority distributions. The case involved a dispute between a landlord of a bankrupt tenant and the trustee. The landlord appealed from a judgment holding that a distress levied by the landlord was fraudulent and void as a preference as against the lessee's trustee.

[143] Justice Hickson opined that under the *BIA*, the trustee is charged with gathering the assets of the bankrupt for the benefit of the creditors and then distributing those assets pursuant to the

scheme of distribution set out in s. 136 of the Act. In the context of a preference, the trustee can bring an application under s. 95 and, if successful, the landlord would be required to pay over the proceeds of the transaction to the trustee. Hickson J.A. went on to state that "in due course, depending on the claims of secured creditors and those standing in priority to the landlord under the scheme of distribution established by s. 136 of the Act, if there are sufficient assets in the estate the landlord will then receive payment pursuant to the provisions of that section".

[144] Counsel to the Trustee went on to submit that in a similar case involving a preference action against the landlord, the Court of Appeal for Ontario considered and followed *Gazzola* and, citing concurring reasons in *Gazzola*, the court noted that the preference proceeds are to be distributed in accordance with the scheme in s. 136, which is subject to the rights of secured creditors: See *Canadian Imperial Bank of Commerce v. Canotek Development Corp., supra*.

[145] In reviewing both the *Gazzola* decision and the *Canotek* decision, I do not see any finding that it is inconsistent with the views that I have expressed above. Simply put, a trustee can pursue a preference action. If the trustee recovers proceeds, they are to be distributed in accordance with s. 136. The reference "which is subject to the rights of secured creditors" restates the position that if secured creditors have rights in the collateral, such priority is to be respected by the trustee.

[146] I do not read into the words "subject to the rights of secured creditors" as putting the position of the secured creditor at an even higher level. Specifically, I do not interpret this phrase as enabling a secured party to step into and occupy the position of the trustee. The trustee's rights are established under the *BIA*. The rights of a secured creditor are provided for in security agreements and the *PPSA* and the process by which realization takes place is provided for in court orders, security agreements, the *PPSA*, and in this case, the *BIA*.

[147] Counsel to the Trustee also raises a number of policy considerations underlying the *BIA* in support of its position. Specifically, counsel submits that the proposition that unsecured creditors have priority to the proceeds of a preference action may lead to anomalous results insofar as an insolvent person could defeat the rights of a secured creditor by simply granting a preference immediately prior to assigning itself into bankruptcy. The consequences of reversing the preference would be such that the proceeds would benefit unsecured creditors. Counsel submits that it cannot be correct that by dealing with collateral in a preferential fashion, an insolvent person can alter bankruptcy priorities and nullify a secured creditor's exclusive claim to that collateral.

[148] This theme has also been recognized in certain academic writings. For example, Professor Fletcher, in *The Law of Insolvency*, provides support for the trustee's position. In stating that the purpose of a preference action is to restore the situation to the *status quo ante*, he puts into doubt the notion that the proceeds of the action are not subject to the rights of secured creditors.

[149] The answer to the concern posed by counsel to the Trustee is not easy. To some extent, secured creditors are protected by an ability to take action for recovery as a result of the

provisions of their particular security agreement. The *BIA* does not extinguish the rights of secured creditors to follow collateral if circumstances are such that it is lawful and appropriate to follow the collateral.

[150] If, for example, the transaction is out of the ordinary course of business or, if the recipient is on notice that it is an improper transaction, the secured party may very well have rights to recover the collateral or proceeds. However, if the debtor was in a position to lawfully dispose of the collateral free and clear of the security interest, and has done so, it could very well be that the only recovery for the secured creditor would be to participate in a distribution to unsecured creditors under s. 136 of the *BIA*. This, of course, would happen if the secured creditor declares part of its indebtedness to be unsecured. This outcome is a consequence, however, not of some realignment or readjustment of priorities under the *BIA*, but rather, it is a consequence of a factual scenario under which the debtor could lawfully transfer the collateral. This outcome is, in my view, consistent with the *Yagerphone* analysis.

[151] In the final analysis, I have concluded that:

(i) a trustee in bankruptcy (or a section 38 *BIA* assignee) is the only party that can bring a preference action in bankruptcy proceedings;

(ii) the proceeds recovered by the trustee are brought into the estate;

(iii) distribution under the *BIA* is subject to the rights of recovery of secured creditors;

(iv) the bringing of a preference action and the recovery of proceeds does not preclude secured creditors from pursuing whatever remedies they may have under the provisions of the security agreement and relevant statutes.

[152] There is also nothing, in my view, that would preclude a secured creditor from pursuing appropriate remedies in conjunction with the trustee pursuing its remedies. For example, at the outset of a proceeding, when investigations may not have been complete, it may be difficult to pinpoint a specific remedy. This would likely require a cooperative effort as between secured creditors and a trustee and some sort of formal agreement to recognize how matters are to be prosecuted and how proceeds of litigation are to be allocated. An example of such an arrangement is referenced in *Re Sharpland Inc., supra*.

[153] Overall, the objective of the preference action is to void preferential transactions for the benefit of creditors, while recognizing legitimate security interests.

[154] Air Canada has taken issue with the role of the Trustee in this case and makes specific reference to s. 13.4 of the *BIA* which explicitly contemplates that a trustee may act for or assist a secured creditor in certain circumstances. These submissions from counsel to Air Canada have been put forth in an effort to persuade the court that the Trustee should, in this case, be following the requirements of the *BIA*. Counsel to Air Canada also questions whether this court has the jurisdiction to allow a trustee to pursue a *BIA* preference action within the context of a *CCAA* proceeding.

[155] The *CCAA* does address the issue of preferences and transfers under value. Section 36.1(1) provides that the preferential provisions of the *BIA* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement, unless the compromise or arrangement provides otherwise.

[156] In this case, there is no compromise or arrangement that has been proposed to creditors, nor is it expected to flow from the type of proceeding that is currently before the court.

[157] This leads to a straight-forward conclusion, in my view, that the preference action should proceed under the *BIA.*

[158] However, this conclusion leads to the subject of coordination of proceedings under the *CCAA* and the *BIA*. This subject was addressed by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379.

[159] In *Century Services*, the majority noted that the *CCAA* is a flexible statute designed to preserve the value of a business as a going-concern through a court supervised re-organization. In that case, a re-organization under the *CCAA* had failed and the Crown brought a motion for payment of its statutory deemed trusts pursuant to s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15. Brenner C.J. denied the motion and allowed the assignment of the company into bankruptcy. The British Columbia Court of Appeal had found that while the Crown could not seek repayment of GST source deductions in priority to other claims during a *CCAA* or *BIA* proceeding, it could do so after the reorganization efforts had failed and prior to the commencement of a *BIA* proceeding, such that the trial judge was bound to allow the motion and apply the provisions of the *Excise Tax Act*. The majority of the Supreme Court rejected this reasoning noting at para. 47 that an interpretation giving the *Excise Tax Act* priority over the *CCAA* would result in a "strange asymmetry" which would encourage statute shopping.

[160] Justice Deschamps, writing for the majority, rejected the contention that Brenner C.J. had exceeded his authority by continuing the stay of the Crown's GST claims while temporarily lifting the general stay to allow for the assignment in bankruptcy. Section 11 of the *CCAA*, subject to certain restrictions, provides the court with broad authority to make an order that is appropriate in the circumstances – a power which is not subject to explicit temporal limitations and is buttressed by the court's inherent jurisdiction, as well as s. 20 (now s. 42) of the *CCAA.*

[161] At para. 76 of *Century Services,* it is noted that the *CCAA*'s objectives permit for a bridge between the *CCAA* and *BIA* proceedings. As recently noted by the Supreme Court of Canada regarding section 20 of the *CCAA*:

> That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament … that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. <u>Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate in tandem with other insolvency legislation, such as the *BIA*</u>.

[162] Further, Deschamps J. wrote at para. 78:

> Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy.

[163] This passage from *Century Services* clearly states, in my view, that the courts should be taking a pragmatic approach in determining issues which arise in proceedings where the *CCAA* overlaps with the *BIA*. This is one such proceeding. The overall objective should be to create a system under which the court can review transactions entered into between the debtor and creditors in the period just prior to formal insolvency proceedings. The policy should be to ensure that there is an appropriate review mechanism in place to challenge transactions that are not consistent with ordinary course activities and have had the effect of unfairly transferring value to a third party during the review period. It seems to me that the *CCAA* can operate in tandem with the *BIA* in an effort to return matters to the *status quo*.

[164] Applying the principles of *Century Services*, it seems to me, that the preference motion should proceed in the *BIA* proceedings. However, in my view, this can be accomplished by a procedural order in *CCAA* proceedings which transitions the matter to the *BIA*. There is no necessity or principled reasons to require the trustee to start from square one. This outcome is consistent with my endorsement of February 24, 2010 at paras. 29 – 32.

[165] It is also appropriate, at this time, and in view of the contemplated continuation of the preference motion, that proceedings be regularized with the Trustee taking the necessary steps to comply with its obligation under the *BIA*.

DISPOSITION

[166] In the result, a declaration shall issue to incorporate the conclusions set out at [151] which, for ease of reference, is repeated:

(i) a trustee in bankruptcy (or a Section 38 *BIA* assignee) is the only party that can bring a preference action in bankruptcy proceedings;

(ii) the proceeds recovered by the trustee are brought into the estate;

(iii) distribution under the *BIA* is subject to the rights of recovery of secured creditors;

(iv) the bringing of a preference action and the recovery of proceeds does not preclude secured creditors from pursuing whatever remedies they may have under the provisions of the security agreement and relevant statutes.

[167] I have also concluded that, if it is determined that the transaction is void as being a preference, at that point, the appropriate determination can be made as to which party, be it either the trustee or the secured party, is entitled to the proceeds. This determination should be based on whether the secured party has the right to recover the assets transferred, or any proceeds resulting from such transfer. In my view, it is premature to comment on this issue, in the circumstances of this case, as the factual record has not been fully determined.

[168] In the context of this particular case, if it is the intention of the secured party to work in conjunction with the Trustee and for the Trustee to utilize the preference provisions, the appropriate notifications should be provided in accordance with s. 13.4 of the *BIA* and the Trustee should move forward to fulfill its statutory obligations in the conduct of its administration.

[169] To the extent that further directions are required in respect of this endorsement, the parties may contact the Commercial List Office to set up a 9:30 a.m. appointment.

MORAWETZ J.

Date: August 18, 2011

TAB 4

1996 CarswellOnt 5598
Ontario Court of Justice (General Division) [Commercial List]

Beatrice Foods Inc., Re

1996 CarswellOnt 5598, 43 C.B.R. (4th) 10

In the Matter of Beatrice Foods Inc.

And In the Matter of an application under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 for a compromise and arrangement with respect to Beatrice Foods Inc. and a reorganization of share capital and appointment of directors of Beatrice Foods Inc. under the Canada Business Corporations Act, R.S.C. 1985, c. C-44

Application Under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36

Houlden J.A. (ex officio)

Judgment: October 21, 1996
Docket: 295-96

Counsel: *Joseph Groia*, *Barry I. Goldberg* and *Jonathan Stainsby*, for Beatrice Foods Inc. and Beatrice Foods Holdings Corp.
Patricia D.S. Jackson, *David E. Baird* and *Thomas J. Matz*, for Informal Committee of Noteholders
Ronald Walker, *Sheryl Seigel* for the Senior Banks
Malcolm M. Mercer, *Terry Dolan* and *Norma Priday*, for Merrill Lynch Funds

Subject: Corporate and Commercial; Insolvency

APPLICATION for order approving plan of compromise and arrangement and for order amending applicant's articles and appointing directors.

***Houlden J.A. (ex officio)* (orally)::**

1 Beatrice Foods Inc. ("Beatrice") is applying for an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") for approval of a plan of compromise and arrangement and under s. 191 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*") for an order amending the articles of the applicant to effect a concurrent reorganization of share capital of Beatrice and to appoint directors.

2 Beatrice is a corporation under the *CBCA* and operates in the dairy, food products and baked goods businesses in both Canada and the United States. It has some 3,200 employees. Beatrice owes approximately $172,000,000 to a group of senior banks. It defaulted on its obligations to the senior banks in 1995. The senior banks entered into a standstill arrangement with Beatrice, but under the arrangement Beatrice must pay $100,000,000 to the senior banks on October 31, 1996. If the plan is not approved, Beatrice lacks the means to make the payment.

3 Beatrice is also indebted to the holders of 12 % senior subordinated notes. The amount owing to the noteholders, together with interest is approximately $240,000,000.

4 Beatrice Foods Holdings Corp. ("Holdings") holds 100% of Beatrice's issued and outstanding shares. Ninety-eight percent of Holdings is owed by Funds which are represented by Merrill Lynch Capital Partners Inc. The Funds are opposing these applications.

5 The plan in essence, provides for the following:

(a) the repayment in full of indebtedness to the Senior Banks;

(b) the exchange of 12% Senior Subordinated Notes held by Beatrice noteholders for new common shares in Beatrice, rights to buy additional new common shares, new subordinated notes maturing in 30 years bearing interest at 1% and a small amount of cash; and

(c) the cancellation of all issued and outstanding common shares and the issuance to the holder of such shares of:

(1) warrants entitling the holder to purchase new common shares at a specified exercise price; and

(2) a right to purchase all issued new common shares at a fixed price for four weeks after implementation of the Plan.

6 Since Beatrice is a large company with a substantial work force, I propose to say very little about the financial affairs of the company. Detailed information concerning all relevant aspects of Beatrice's finances is contained, however, in the material which has been put before me and I have carefully reviewed it.

7 In January, 1996, Beatrice retained R.B.C. Dominion Securities Inc. for the purpose of exploring all recapitalization, restructuring and disposition alternatives and opportunities available to Beatrice. Although R.B.C. Dominion Securities contacted over 150 prospective investors, only two binding proposals were received and only one proposal was for the purchase of the entire company. The offer received for the whole company would have paid the claims of the senior banks, but the noteholders would have had a substantial deficiency. In the past two weeks, a further offer has been received but this offer again is not sufficient to pay the noteholders in full. I am satisfied that the common shares held by the Funds have no value and that there is no likelihood in the foreseeable future that they will have any value. The 1995 annual review of operations for Merrill Lynch Capital Appreciation Fund II valued the equity in Beatrice at zero as of May 1996.

8 Dealing first with the *CCAA* application, I am satisfied that the statutory requirements have been complied with, that nothing has been done which is not authorized by the *CCAA* and that the plan is fair and reasonable. Mr. Mercer, for the Funds, has requested that the plan be amended to allocate to the Funds seven percent of the new equity including seven percent of the rights (with the resulting capital contribution applied thereby) or to accord dissent and appraisal rights to the existing common shareholders. I have pointed out to Mr. Mercer that, in my opinion, I have no jurisdiction to make such an amendment. In any event, to make either of those amendments would, in my opinion, render the plan unworkable.

9 Mr. Mercer's principal ground of opposition is that s. 191 of the *CBCA* does not confer jurisdiction on the court to amend the articles of Beatrice as requested by the applicant. Section 191 reads as follows:

191. (1) In this section, "reorganization" means a court order made under

(a) section 241;

(b) the *Bankruptcy Act* approving a proposal; or

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.

(3) If a court makes an order referred to in subsection (1), the court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) After an order referred to in subsection (1) has been made, articles of reorganization in prescribed form shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

(5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.

(6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

10 For an order to be made under s. 191(1)(c), it is necessary, Mr. Mercer submitted, that the other Act of Parliament affect the rights among the corporation and its shareholders and the *CCAA* is not such an act. Under the *CCAA*, the court can, he submits, sanction a compromise or arrangement between a debtor company and its creditors, but it cannot sanction a compromise or arrangement between a debtor company and shareholders Accordingly, the *CCAA* is not an Act of Parliament that falls within s. 191(1)(c).

11 I have on occasion made orders under the *CCAA* in conjunction with orders under the *CBCA*. Sections 4 and 5 of the *CCAA* contemplates that the court may order a meeting of shareholders. In addition, s. 20 of the *CCAA* provides:

20. The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them

12 When discussing the reorganization provisions in the *Proposals for a New Business Corporations Law*, the *Dickerson Report*, which formed the basis for the comprehensive reform of Canada's corporations law, clearly anticipated that s. 191 would permit the elimination of issued shares. The Report (*Proposals for a New Business Corporations Law*, Robert W.V. Dickerson et at., v.1: Commentary, Part 14.00: Fundamental Changes, (Toronto: Information Canada, 1971) states, with reference to the section in the draft bill which became s. 191 (at p. 124):

To clear up the obscure meaning of "reorganization", subsection (1) of s. 14.18 states that the term includes a court order made under the *Bankruptcy Act*, s. 19.04 [the oppression remedy] and any other federal law. The object of the section is to enable the court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with all the formalities of the Draft Act, particularly shareholder approval of the proposed amendment. For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured note holders or preferred shareholders.

Presumably then the corporation will be in a position to borrow further upon the security of its assets. In addition, the court will have power to reconstitute the board of directors, thus permitting representatives of the creditors of the corporation to take over the administration of the corporation until the corporation is one again solvent.

13 In discussing s. 191 of the *CBCA*, the authors of Fraser & Stewart, *Company Law of Canada*, (6th ed.: 1993), at p. 581, state that:

> A reorganization, for purposes of s. 191, is defined in s. 191(1) to be a court order which is made pursuant either to the oppression remedy powers of s. 241, or an order under the *Bankruptcy and Insolvency Act* approving a proposal in bankruptcy, or any other federal act that affects the rights of a corporation, its shareholders and creditors. An example of such a federal statute would be the *Companies' Creditors Arrangement Act*.

14 In *Central Capital Corp., Re* (1996), 132 D.L.R. (4th) 223 (Ont. C.A.), Weiler J.A. said (at p. 257):

> By virtue of s. 20 of the *CCAA*, arrangements under the Act mesh with the reorganization provisions of the *CBCA* so as to affect the company's relations with its shareholders. Shareholders have no right to dissent to a reorganization: s. 191(7). On a reorganization, among other things, the articles may be amended to alter or remove rights and privileges attached to a class of shares and to create new classes of shares: s. 173, *CBCA*. These statutory provisions provide a clear indication that, on a reorganization, the interests of all shareholders, including shareholders with a right of redemption, are subordinated to the interests of the creditors. Where the debts exceed the assets of the company, a sound commercial result militates in favour of resolving this problem in a manner that allows creditors to obtain repayment of their debt in the manner which is most advantageous to them.

15 I agree with the interpretation of the relevant provisions of the *CCAA* and the *CBCA*. I am of the opinion that a court order under the *CCAA* is an order under an Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

16 Section 191(2) of the *CBCA* gives substantive, not simply procedural, powers to amend the articles of a *CBCA* corporation. The court may amend the articles to effect any change that might lawfully be made by an amendment under s. 173 of the *CBCA*. Section 173(1)(o) provides that:

> 173. (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> . . . . .
>
> (o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

17 Section 173 is supported by s. 176(1)(b) which contemplates amendments to the articles of a corporation to effect a cancellation of all or part of the shares of a class of shares. Section 176(1)(b) provides:

> 176. (1) The holders of shares of a class or, subject to subsection (4), of a series are, unless the articles otherwise provide in the case of an amendment referred to in paragraphs (a), (b) and (e), entitled to vote separately as a class or series on a proposal to amend the articles to
>
> . . . . .
>
> (b) effect an exchange, reclassification or cancellation of all or part of the shares of such class.

18 I have found that the common shares have no value. I agree with the applicant that, in these circumstances, the shareholders have no status to object to the plan. An order will therefore go as requested. In the circumstances, there will be no order as to costs.

Application granted.

End of Document

TAB 5

2012 NBQB 355
New Brunswick Court of Queen's Bench

Landdrill International Inc., Re

2012 CarswellNB 686, 2012 NBQB 355, 1024 A.P.R. 197, 224 A.C.W.S. (3d) 23, 396 N.B.R. (2d) 197, 99 C.B.R. (5th) 211

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 Landdrill International Inc. (a British Columbia Corporation), Landdrill International Ltd. (a New Brunswick Corporation), Landdrill Atlantic Ltd. (a New Brunswick Corporation), Landdrill Contract Mining Ltd. (a New Brunswick Corporation), Landdrill International Mexico S.A. de C.V. (a Mexican Corporation), Landdrill International LLC (a Mongolian Corporation) and Landdrill International Inc. (a Barbados Corporation)

David Smith C.J.Q.B.

Heard: November 2, 2012
Judgment: November 5, 2012
Docket: M/M/114/12

Counsel: Stephen Hutchinson for Applicants, Landdrill International Inc. et al
Jeff M. Lee, R. Gary Faloon, Q.C. for Crown Capital Partners Inc., Norrep Credit Opportunities Fund, LP
Ashley John Taylor for Ernst & Young Inc.
Mary Buttery for Sprott Resource Lending Partnership
Alissa K. Mitchell for GE Canada Equipment Financing G.P.
Kelly Van Buskirk for Roger Rogers and Michael Tripp
G. Robert Basque, Q.C. for Ronald J. Goguen

Subject: Insolvency

MOTION by creditor to increase powers of monitor in hearings pursuant to *Bankruptcy and Insolvency Act*.

***David Smith C.J.Q.B.*:**

1 Norrep Credit Opportunities Fund LP, a principal secured creditor, moves to vary the Court's initial order dated August 31st, 2012, as amended on September 17th, 2012 and September 27th, 2012, under the *Creditors Arrangement Act* R.S.C. 1985, C-36:

> 2. [...]
>
> > (a) to enhance the powers of the Monitor to make and implement decisions related to the continued employment, dismissal, termination, lay-off and/or rationalization of personnel employed by the Applicants (including all executive and senior management personnel employed by the Applicants);
> >
> > (b) to authorize and direct the Monitor to have and exercise sole and exclusive authority (in the name of and on

behalf of the Applicants, but in consultation with the Senior Lenders) to make and implement decisions related to rationalizing and reducing operating costs of the Applicants, including (without limitation) decisions to wind up, discontinue, reduce, cease and downsize the business operations of the Applicants (in whole or in part);

The alleged grounds for the variations are:

1. Contrary to and in breach of paragraphs 27 and 28 of the Initial Order, the Applicants have failed or refused to co-operate fully with the Monitor and have failed or refused to provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions, particulars of which failures or refusals are as follows:

(a) The Monitor has conducted the Sale Process in accordance with the Initial Order and has identified a potential purchaser of the assets of the Applicants, which purchaser, in the opinion of the Monitor, has submitted the optimal bid (the 'Proposed Purchaser');

(b) Ronald J. Goguen, Chief Executive Officer of Landdrill International Inc., has informed the Monitor that he objects to the Monitor concluding a transaction with the Proposed Purchaser;

(c) Mr. Goguen has informed the Monitor that he intends to cause the Applicants to contest and oppose the decision by the Monitor to conclude a transaction with the Proposed Purchaser;

(d) Mr. Goguen has instructed counsel for the Applicants to deny, limit or restrict access by the Monitor to communications with Mexican counsel for the Applicants, thereby actively impairing, disrupting or interfering with the ability of the Monitor to exercise its power under paragraph 28(g) of the Initial Order to have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to negotiate with the Potential Purchaser to conclude a transaction for the sale of the Mexican assets of the Applicants.

2. Contrary to and in breach of paragraph 35 of the Initial Order, Mr. Goguen is causing the Applicants to withhold, delay and disrupt payment of the professional fees of the Monitor and its legal counsel on a weekly basis as authorized and directed by the Court in the Initial Order.

3. The acts and omissions of Mr. Goguen more particularly described above have caused or contributed to the present situation in which the Applicants:

(a) have failed to meet the Sale Process timelines set out in Schedule "B" to the Initial Order and have thereby breached the August 31, 2012 DIP Term Sheet;

(b) are operating without access to operating credit and/or debtor-in-possession financing; and

(c) are very quickly reaching the point where they will have run out of cash entirely and will be unable to fund continued business operations.

Facts

2 The Landdrill group (Applicants) of companies operates an International Industrial drilling business (with operations in Canada, Mexico, Mongolia, Russia and Nicaragua) providing drilling services to mineral exploration companies worldwide.

The Landdrill Group has credit facilities with three principal service creditors, namely:

1) Norrep Credit Opportunities Fund LLP

2) Sprott Resource Lending Partnership

3) GE Canada Equipment Financing G.P.

3 On August 31, 2012, the Applicants sought and were granted CCAA protection. D.I.P. financing was in place but some conditions were not met. The Monitor advises that Landdrill probably has enough cash flow to continue to operate until the asset purchase approval hearing on November 13th, 2012.

4 The Initial Order of August 31st, 2012, states under paragraph 28 (e) through (i):

”These *sui generis* provisions included paragraphs 28(e), 28(f), 28(g), 28(h) and 28(i) of the Initial Order, which paragraphs read as follows:

THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

. . .

e) (after having discussed such matters with the Applicants, where circumstances permit it to do so), have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to instruct Clarus Securities Inc. with respect to the development and implementation of an orderly process for the sale of the Business and/or the Property to be completed within 90 days (the “Sale Process”) in accordance with the timelines set out in Schedule “B” hereto, and to take such steps and execute such documentation in the name of and on behalf of the Applicants as may be necessary or incidental to the Sale Process;

f) have and exercise the authority (in the name of and on behalf of the Applicants), with the consent of the Senior Lenders, to replace Clarus Securities Inc. and disclaim the engagement letter with Clarus Securities Inc.;

g) have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to negotiate with potential purchasers of the Business and/or the Property pursuant to the Sale Process;

h) have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants), with the consent of the Senior Lenders, to dispose of redundant or non-material assets not exceeding $100,000.00 in any one transaction or $1,000,000 in the aggregate;

i) have and exercise sole and exclusive authority (in the name of and on behalf of the Applicants) to accept one or more offers to purchase the Business and/or the Property pursuant to the Sale Process (subject to approval of the Court);

5 Norrep (Crown) supported by the other principal secured lenders alleges that Mr. Ronald Goguen Sr., the CEO of the Landdrill Companies is interfering with the sales process of the assets. Norrep (Crown) offers three specific examples of Mr. Goguen’s interference:

27. More particularly, Mr. Goguen has informed the Monitor that he intends to cause the Applicants to contest and oppose the decision by the Monitor to conclude a transaction with the proposed purchaser.

28. Further, Mr. Goguen has instructed counsel for the Applicants to deny, limit or restrict access by the Monitor to communications with Mexican counsel for the Applicants by discontinuing an extant practice where counsel to the Monitor had been copied on all correspondence between the Applicants and Mexican counsel. When this extant practice was abruptly stopped by counsel for the Applicants, Monitor's counsel requested of counsel for the Applicants that this practice be reinstated and that he be copied with correspondence between the Applicants and Mexican counsel. Counsel for the Applicants refused, stating that: "given the situation that has unfolded as between the Monitor and the Companies, I am not in a position to do that" 15.

29. An additional act or omission of Mr. Goguen relied upon by Crown in the Amended Notice of Motion was that, contrary to and in breach of paragraph 35 of the Initial Order, Mr. Goguen caused the Applicants to withhold, delay and disrupt payment of the professional fees of the Monitor and its legal counsel on a weekly basis as authorized and directed by the Court in the Initial Order. Since this ground for the Crown Application was first brought forward by Crown in its Amended Notice of Motion, Mr. Goguen appears to have "seen the error of his ways". Payments of professional fees required to put the Applicants back in compliance with paragraph 35 of the Initial Order appear now to have been made.

Issues

6 Does the Court have authority to confer powers on the Monitor to remove Mr. Goguen from management and assume management of Landdrill.

7 If the answer is "yes" to the first question, then should Mr. Goguen be removed from the management of Landdrill for his actions in regard to the sales process.

8 There is no authority found in the CCAA which allows the Court to remove or replace management with the Monitor.

9 Counsel for Norrep cites 843504 Alberta Ltd;

2003 CarswellAlta 1786, 2003 ABQB 1015, 30 Alta. L.R. (4th) 91, 351 A.R. 222, 4 C.B.R. (5th) 306 (Alta. Q.B.) *843504 Alberta Ltd., Re*

In the Matter of the Bankruptcy and Insolvency Act R.S.C. 1985, C.B-3, As Amended and the Companies' Creditors Arrangement Act. R.S.C. 1985, C.C-36, As Amended

And In the Matter of a Plan of Compromise or Arrangement of 843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

An Alberta Court of Queen's Bench case in support of its motion. In 843504 Alberta Ltd. the company made arrangements with its creditors to seek protection under the CCAA, but days later changed its position and filed a Notice of Intention to make a proposal to its creditors under the *Bankruptcy and Insolvency Act*. The creditor applied for a CCAA stay of proceedings with the creditor being successful with a 30 day stay and an accounting firm appointed Monitor with power to operate the business. The creditor and the Monitor applied to have the stay extended at the end of the 30 day period. At the extension hearing, the creditor and Monitor relied on the Monitor's third report with an affidavit from the creditor stating that the Monitor was acting diligently, in good faith and that circumstances exist to warrant an extension. At the extension hearing, the company took no position.

10 The company in the Alberta case acquiesced to the Monitor to manage its affairs during the CCAA proceedings.

11 The facts before the Court are that the Landdrill Group is clearly not acquiescing to the present motion to have the Monitor manage its affairs and, in fact, vigorously oppose it. The decision in the Alberta case is irrelevant to the matter before the Court.

12 There is no statutory authority for the Court to authorize the Monitor to make managerial decisions for a debtor

company, that is, to replace management.

13 The Court must now examine if it has the inherent jurisdiction to dismiss management. Justice Robert Blair of the Ontario Court of Appeal in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (Ont. C.A.), holds that a Court cannot authorize a Monitor to remove management of a debtor company under a CCAA arrangement. He gives his reasons throughout the decision, but one in particular is worth noting at paragraph 51:

> Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power - which the courts are disinclined to exercise in any event - except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

14 Counsel for the Applicants also cites *Jameson House Properties Ltd., Re*, 2009 BCSC 844 (B.C. S.C. [In Chambers]) aff'd, 2009 BCCA 339, 96 B.C.L.R. (4th) 208 (B.C. C.A.) and in conclusion, I adopt the reasoning of Chief Justice Donald Brenner wherein he states at paragraph 25:

> No receiver, liquidator or trustee in bankruptcy has been appointed. The court-appointed monitor in this case is in a materially different position from those parties. Unlike a receiver, liquidator or trustee, the monitor has no control over the management of the business. That remains in the hands of the petitioners.

15 Having decided that the Court has no authority to confer powers on the Monitor to remove Mr. Goguen, there is no need to examine Mr. Goguen's actions in relation to the sales process.

The second report of the Monitor is hereby approved.

The request to enhance the powers of the Monitor to manage the company is denied for the reasons above.

A hearing on costs will be scheduled on request of counsel.

Motion dismissed.

End of Document

TAB 6

Re Canadian Airlines Corporation, 2000 ABQB 442

Date: 20000627

Action No. 0001-05071

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF 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* (ALBERTA) S.A. 1981, c. B-15, AS AMENDED, SECTION 185

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD.

REASONS FOR DECISION

of the

HONOURABLE MADAM JUSTICE M. S. PAPERNY

I. INTRODUCTION

[1] After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation (“CAC”) and Canadian Airlines International Ltd. (“CAIL”) seek the court’s sanction to a plan of arrangement filed under the ***Companies’ Creditors Arrangement Act*** (“CCAA”) and sponsored by its historic rival, Air Canada Corporation (“Air Canada”). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

[2] The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada’s financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

[3] Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court’s role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

II. BACKGROUND

Canadian Airlines and its Subsidiaries

[4] CAC and CAIL are corporations incorporated or continued under the ***Business Corporations Act*** of Alberta, S.A. 1981, c. B-15 (“ABCA”). 82% of CAC’s shares are held by 853350 Alberta Ltd.(“853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC’s principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited (“CRAL”). Where the context requires, I will refer to CAC and CAIL jointly as “Canadian” in these reasons.

[5] In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

[6] By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

[7] CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. (“CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

[8] CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

[9] Canadian’s financial difficulties significantly predate these proceedings.

[10] In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing $200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for $246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of $120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately $712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

[11] In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by

pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

[12] Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

[13] The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

[14] The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

[15] The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of $5.4 million, the best results in 9 years.

[16] In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. $175,000,000 of senior secured notes in April, 1998 (“Senior Secured Notes”) and U.S. $100,000,000 of unsecured notes in August, 1998 (“Unsecured Notes”).

[17] The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial

performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

[18] As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the **oneworldTM** Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL 's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

[19] Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

[20] Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

[21] Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

[22] Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

[23] Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity

investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

[24] In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

[25] On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

[26] On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

[27] There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the *Air Canada Public Participation Act*. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

[28] Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

[29] On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on

October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

[30] As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

[31] Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

[32] After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

[33] On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

[34] As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
b) sales for future air travel were down by approximately 10% compared to 1998;
c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

[35] In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

[36] If Air Canada had not provided the approximate $45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

[37] On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian’s debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

[38] Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada (“Royal Bank”) to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian’s operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal’s $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

[39] Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

[40] Prior to the acquisition of majority control of CAC by 853350, Canadian’s management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described

above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

[41] On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

[42] Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

[43] Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

[44] Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

[45] On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

[46] Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

[47] On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

[48] On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

[49] The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

[50] The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;
(b) allow for the return of aircraft not required by Canadian; and
(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

[51] The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a $53 million note payable by CRAL to CAIL.

The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
> The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.
Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;
e. Claims of tax authorities against Canadian; and
f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

[52] There are over $700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately $1.059 million.

[53] The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable

alternative would be a liquidation of Canadian's assets by a receiver and/or a trustee in bankruptcy. Under the Plan, Canadian's obligations to parties essential to ongoing operations, including employees, customers, travel agents, fuel, maintenance and equipment suppliers, and airport authorities are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights and statutory priorities, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if Canadian were to cease operations as a going concern and be forced into liquidation would be in excess of $1.1 billion.

[54] In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

[55] There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

[56] Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

[57] Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of $83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

[58] The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the ***Alberta Business Corporations Act*** (“ABCA”). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

<u>III. ANALYSIS</u>

[59] Section 6 of the CCAA provides that:

> 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 receiving 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.

[60] Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

> (1) there must be compliance with all statutory requirements;
> (2) 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
> (3) the plan must be fair and reasonable.

[61] A leading articulation of this three-part test appears in ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and has been regularly followed, see for example ***Re Sammi Atlas Inc***. (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.) at 172 and ***Re T. Eaton Co.***, [1999] O.J. No. 5322 (Ont. Sup. Ct.) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

[62] Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

> (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;
(c) the notice calling the meeting was sent in accordance with the order of the court;
(d) the creditors were properly classified;
(e) the meetings of creditors were properly constituted;
(f) the voting was properly carried out; and
(g) the plan was approved by the requisite double majority or majorities.

[63] I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC (“Resurgence”), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading “Fair and Reasonable”.

2. Matters Unauthorized

[64] This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in ***Olympia & York Developments Ltd.* v. *Royal Trust Co.*** (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in ***Cadillac Fairview (Re)*** (1995), 53 A.C.W.S. (3d) 305 (Ont. Gen. Div.), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

[65] In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario

Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

[66] Subsection 185(2) of the ABCA provides:

(2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

[67] Sections 6.1(2)(d) and (e) and Schedule "D" of the Plan contemplate that:

a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and
b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

[68] The Articles of Reorganization in Schedule "D" to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

(a) consolidating all of the issued and outstanding common shares into one common share;
(b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;
(c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
(d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
(e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
(f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

[69] Reorganizations under section 185 of the ABCA are subject to two preconditions:
a. The corporation must be "subject to an order for re-organization"; and
b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

[70] The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

[71] The relevant portions of section 167 provide as follows:

> 167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to
> (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,
> (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,
> (g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

[72] Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

Proposed Amendment in Schedule "D"	Subsection 167(1), ABCA
(a) – consolidation of Common Shares	167(1)(f)
(b) – change of designation and rights	167(1)(e)
(c) – cancellation	167(1)(g.1)
(d) – change in shares	167(1)(f)
(e) – change of designation and rights	167(1)(e)
(f) – cancellation	167(1)(g.1)

[73] The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

[74] In R. Dickerson et al, ***Proposals for a New Business Corporation Law for Canada***, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

[75] The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

> For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

[76] The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

[77] The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of ***Royal Oak Mines Inc.***, [1999] O.J. No. 4848 and ***Re T Eaton Co.,*** *supra* in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

[78] Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

[79] In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

[80] The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

[81] I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in ***Savage v.***

Amoco Acquisition Company Ltd, [1988] A.J. No. 68 (Q.B.), aff'd, 68 C.B.R. (3d) 154 (Alta. C.A.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

[82] The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

[83] These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

[84] To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

[85] Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

[86] The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

[87] Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 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 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.

(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.

(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.

[88] Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on ***Barrette v. Crabtree Estate,*** [1993], 1 S.C.R. 1027 at 1044 and ***Bruce Agra Foods Limited v. Proposal of Everfresh Beverages Inc. (Receiver of)*** (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

[89] With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words **"excluding the claims excepted by s. 5.1(2) of the CCAA"** immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

[90] In my view it is appropriate to amend the proposed release to expressly comply with section 5. 1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

[91] Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

[92] While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

[93] Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

[94] In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in ***Olympia and York Dev. Ltd. v. Royal Trust Co.***, *supra*, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

[95] The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: ***Norcen Energy Resources Ltd.* v. *Oakwood Petroleums Ltd.***, [1989] 2 W.W.R. 566 at 574 (Alta.Q.B.); ***Northland Properties Ltd.* v. *Excelsior Life Insurance Co. of Canada***, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).

[96] The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;
b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
c. Alternatives available to the Plan and bankruptcy;
d. Oppression;
e. Unfairness to Shareholders of CAC; and
f. The public interest.

a. Composition of the unsecured vote

[97] As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of ***Olympia & York Developments Ltd.,*** *supra:*

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or 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.

[98] However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example ***Quintette Coal Ltd.,*** (1992) 13 C.B.R. (3rd) 14 (B.C.S.C) and ***Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*** (1890) 60 L.J. Ch. 221 (C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

[99] The results of the unsecured vote, as reported by the Monitor, are:

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);
2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and
3. Abstentions: 15 representing $968,036 in value.

[100] The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

[101] The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, ***Hochberger* v. *Rittenberg*** (1916), 36 D.L.R. 450 (S.C.C.)

[102] ***In Northland Properties Ltd. (Re)*** (1988), 73 C.B.R. (N.S.) 175 at 192-3 (B.C.S.C) aff'd 73 C.B.R. (N.S.) 195 (B.C.C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
> > Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

[103] Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed There

is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in ***Northland Properties Ltd. (Re)***.

[104] If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

[105] The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents

[106] The authorities which address minority creditors' complaints speak of "substantial injustice" (***Keddy Motor Inns Ltd. (Re)*** (1992) 13 C.B.R. (3d) 245 (N.S.C.A.), "confiscation" of rights (***Campeau Corp. (Re)*** (1992), 10 C.B.R. (3d) 104 (Ont. Ct. (Gen.Div.); ***Skydome Corp. (Re)*** (1999), 87 A.C.W.S (3d) 421 (Ont. Ct. Gen. Div.)) and majorities "feasting upon" the rights of the minority (***Quintette Coal Ltd. (Re)***, (1992), 13 C.B.R.(3d) 146 (B.C.S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: ***Algoma Steel Corp.* v. *Royal Bank*** (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.)and ***Northland Properties (Re)***, *supra* at 9.

[107] Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

[108] Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The

affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

[109] The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from $673 million to $1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

[110] The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

b. Receipts on liquidation or bankruptcy

[111] As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

[112] The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

[113] Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

[114] While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

Pension Plan Surplus

[115] The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

[116] The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

[117] The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

[118] It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

[119] Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

[120] There is a suggestion that there might be a total of $40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that a surplus could in fact be realized on liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over $2 billion, a surplus of $40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

CRAL

[121] The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately $30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately $56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan Lokey Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

[122] For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

[123] Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

[124] There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

[125] If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

International Routes

[126] The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are <u>not</u> treated as assets by airlines, but rather as rights in the control of the Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

[127] Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for $400 million cash plus $125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of $2 billion would be required.

[128] CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto - Tokyo route for $25 million. The evidence, however, indicated that the price for the Toronto - Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

[129] Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of $66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the ***Aeronautics Act*** and the ***Canada Transportation Act***, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto - Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

[130] Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million , which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

[131] There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

Capital Loss Pools

[132] The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses

can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

[133] There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately $700 million . There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

Operating Losses

[134] The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

[135] The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is $297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

[136] Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

c. Alternatives to the Plan

[137] When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the

future. As Farley J. stated in ***Re T. Eaton Co.*** (1999) O.J. No. 4216 (Ont. Sup. Ct.) at paragraph 6:

> One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

[138] The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in ***T. Eaton Co,*** *supra*, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

d. Oppression

Oppression and the CCAA

[139] Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

[140] Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: ***First Edmonton Place Ltd. v. 315888 Alberta Ltd.***, (1988) 40 B.L.R.28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: ***Re Diligenti v. RWMD Operations Kelowna*** (1976), 1 B.C.L.R. 36 (S.C).

[141] The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in ***First Edmonton Place,*** *supra* at 57***:***

> In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

[142] While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: ***Pente Investment Management Ltd. v. Schneider Corp.*** (1998), 42 O.R. (3d) 177 (C.A.).

[143] Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: ***Re Royal Oak Mines Ltd.***, *supra*, para. 4., ***Re Cadillac Fairview***, [1995] O.J. 707 (Ont. Sup. Ct), and ***Re T. Eaton Company,*** *supra*.

[144] To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

[145] It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

Oppression allegations by Resurgence

[146] Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

[147] The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this

moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

[148] The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

[149] It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

[150] At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to <u>all</u> creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

[151] Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

[152] The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

[153] Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

[154] The evidence demonstrates that the sales of the Toronto - Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The

evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

[155] Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

[156] I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

[157] Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between $500 and $700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from 12 to 14 cents on the dollar.

[158] The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am unable to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

e. Unfairness to Shareholders

[159] The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC - the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any

vote. When the reorganization is completed as contemplated by the Plan , their shares will remain in CAC but CAC will be a bare shell.

[160] They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

[161] Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

[162] That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

[163] The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased <u>after</u> the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350 , if any, is unaffected by the Plan and may be pursued after the stay is lifted.

[164] In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

[165] The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

[166] These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

[167] The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of $790 million. The Preferred Shares have a liquidation preference of $347 million. There is no evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

[168] The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

[169] The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

[170] Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion , it is not unfair that shareholders receive nothing.

e. The Public Interest

[171] In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

[172] In his often cited article, ***Reorganizations Under the Companies' Creditors Arrangement Act*** (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

[173] In ***Re Repap British Columbia Inc.*** (1998), 1 C.B.R. 449 (B.C.S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In ***Re Quintette Coal Ltd.,*** *supra*, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include ***Canadian Red Cross Society (Re)***, (1998),5

C.B.R.(4th) (Ont. Gen. Div.) and ***Algoma Steel Corp. v. Royal Bank of Canada (Trustee of***), [1992] O.J. No. 795 (Ont. Gen. Div.)

[174] The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

[175] More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

[176] The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

[177] The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the ***Transportation Act*** , which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

[178] In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example ***Wandlyn Inns Ltd. (Re)*** (1992), 15 C.B.R. (3d)

316 (N.BQ.B), ***Quintette Coal***, *supra* and ***Repap***, *supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the “big picture” of the plan and assess its impact as a whole. I return to ***Algoma Steel v. Royal Bank of Canada***., *supra* at 9 in which Farley J. endorsed this approach:

> What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

[179] Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in ***Re Sammi Atlas Inc***., (1998), 3C.B.R. (4th) 171 at 173 (Ont. Sup. Ct.) at 173:

> A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

[180] I find that in all the circumstances, the Plan is fair and reasonable.

IV. CONCLUSION

[181] The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

[182] Use of these proceedings has avoided triggering more than $1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

[183] This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

[184] I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

[185] The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

HEARD on the 5th day of June to the 19th day of June, 2000.
DATED at Calgary, Alberta this 27th day of June, 2000.

J.C.Q.B.A.

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TAB 7

BCE Inc. and Bell Canada *Appellants/Respondents on cross-appeals*

v.

A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation

A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc.

A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited *Respondents/Appellants on cross-appeals*

and

BCE Inc. et Bell Canada *Appelantes/Intimées aux pourvois incidents*

c.

Un groupe de détenteurs de débentures de 1976 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Régie de retraite de la fonction publique du Manitoba, Gestion de Placements TD inc. et Société Financière Manuvie

Un groupe de détenteurs de débentures de 1996 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurances (Canada) Limitée, Gestion globale d'actifs CIBC inc., Régie de retraite de la fonction publique du Manitoba et Gestion de Placements TD inc.

Un groupe de détenteurs de débentures de 1997 composé de : Addenda Capital Management Inc., Société Financière Manuvie, Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Compagnie d'assurance-vie Wawanesa, Gestion de Placements TD inc., Société de Placements Franklin Templeton et Barclays Global Investors Canada Limited *Intimés/Appelants aux pourvois incidents*

et

Computershare Trust Company of Canada and CIBC Mellon Trust Company *Respondents*

and

Director Appointed Pursuant to the *CBCA*, Catalyst Asset Management Inc. and Matthew Stewart *Interveners*

- and -

6796508 Canada Inc. *Appellant/Respondent on cross-appeals*

v.

A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation

A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc.

A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada,

Société de fiducie Computershare du Canada et Société de fiducie CIBC Mellon *Intimées*

et

Directeur nommé en vertu de la *LCSA*, Catalyst Asset Management Inc. et Matthew Stewart *Intervenants*

- et -

6796508 Canada Inc. *Appelante/Intimée aux pourvois incidents*

c.

Un groupe de détenteurs de débentures de 1976 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Régie de retraite de la fonction publique du Manitoba, Gestion de Placements TD inc. et Société Financière Manuvie

Un groupe de détenteurs de débentures de 1996 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurances (Canada) Limitée, Gestion globale d'actifs CIBC inc., Régie de retraite de la fonction publique du Manitoba et Gestion de Placements TD inc.

Un groupe de détenteurs de débentures de 1997 composé de : Addenda Capital Management Inc., Société Financière Manuvie, Phillips, Hager & North Investment Management Ltd., Sun Life du Canada,

CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited *Respondents/Appellants on cross-appeals*

and

Computershare Trust Company of Canada and CIBC Mellon Trust Company *Respondents*

and

Director Appointed Pursuant to the *CBCA*, Catalyst Asset Management Inc. and Matthew Stewart *Interveners*

Indexed as: BCE Inc. *v.* 1976 Debentureholders

Neutral citation: 2008 SCC 69.

File No.: 32647.

2008: June 17; 2008: June 20.

Reasons delivered: December 19, 2008.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Commercial law — Corporations — Oppression — Fiduciary duty of directors of corporation to act in accordance with best interests of corporation — Reasonable expectation of security holders of fair treatment — Directors approving change of control transaction which would affect economic interests of security holders — Whether evidence supported reasonable expectations

* Bastarache J. joined in the judgment of June 20, 2008, but took no part in these reasons for judgment.

compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Compagnie d'assurance-vie Wawanesa, Gestion de Placements TD inc., Société de Placements Franklin Templeton et Barclays Global Investors Canada Limited *Intimés/Appelants aux pourvois incidents*

et

Société de fiducie Computershare du Canada et Société de fiducie CIBC Mellon *Intimées*

et

Directeur nommé en vertu de la *LCSA*, Catalyst Asset Management Inc. et Matthew Stewart *Intervenants*

Répertorié : BCE Inc. *c.* Détenteurs de débentures de 1976

Référence neutre : 2008 CSC 69.

N^o du greffe : 32647.

2008 : 17 juin; 2008 : 20 juin.

Motifs déposés : 19 décembre 2008.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit commercial — Sociétés par actions — Abus — Obligation fiduciaire des administrateurs envers la société d'agir au mieux des intérêts de la société — Attente raisonnable des détenteurs de valeurs mobilières d'être traités équitablement — Approbation par les administrateurs d'une opération de changement de contrôle qui porterait atteinte aux intérêts financiers de

* Le juge Bastarache a pris part au jugement du 20 juin 2008, mais n'a pas pris part aux présents motifs de jugement.

asserted by security holders — Whether reasonable expectation was violated by conduct found to be oppressive, unfairly prejudicial or that unfairly disregards a relevant interest — Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 122(1)(a), 241.

Commercial law — Corporations — Plan of arrangement — Proposed plan of arrangement not arranging rights of security holders but affecting their economic interests — Whether plan of arrangement was fair and reasonable — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192.

At issue is a plan of arrangement that contemplates the purchase of the shares of BCE Inc. ("BCE") by a consortium of purchasers (the "Purchaser") by way of a leveraged buyout. After BCE was put "in play", an auction process was held and offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada, a wholly owned subsidiary of BCE, would be liable. BCE's board of directors found that the Purchaser's offer was in the best interests of BCE and BCE's shareholders. Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser represents a premium of approximately 40 percent over the market price of BCE shares at the relevant time. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

The plan of arrangement was approved by 97.93 percent of BCE's shareholders, but was opposed by a group of financial and other institutions that hold debentures issued by Bell Canada. These debentureholders sought relief under the oppression remedy under s. 241 of the *Canada Business Corporations Act* ("*CBCA*"). They also alleged that the arrangement was not "fair and reasonable" and opposed court approval of the arrangement under s. 192 of the *CBCA*. The crux of their complaints is that, upon the completion of the arrangement, the short-term trading value of the debentures would decline by an average of 20 percent and could lose investment grade status.

détenteurs de valeurs mobilières — Les attentes raisonnables invoquées par les détenteurs de valeurs mobilières étaient-elles étayées par la preuve? — Une attente raisonnable a-t-elle été frustrée par un comportement constituant un abus, un préjudice injuste ou une omission injuste de tenir compte d'un intérêt pertinent? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 122(1)a), 241.

Droit commercial — Sociétés par actions — Plan d'arrangement — Plan d'arrangement proposé ne visant pas les droits de détenteurs de valeurs mobilières, mais portant atteinte à leurs intérêts financiers — Le plan d'arrangement était-il équitable et raisonnable? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 192.

Le litige porte sur un plan d'arrangement concernant l'achat des actions de BCE Inc. (« BCE ») par un consortium (l'« acquéreur ») au moyen d'une acquisition par emprunt. BCE ayant été « mise en jeu », un processus d'enchères a été lancé et trois groupes ont présenté des offres. Chaque offre prévoyait une hausse sensible du niveau d'endettement de Bell Canada, une filiale en propriété exclusive de BCE. Le conseil d'administration de BCE a conclu que l'offre d'achat de l'acquéreur servait les intérêts de BCE et des actionnaires de BCE. Essentiellement, l'entente prévoit l'acquisition forcée de toutes les actions en circulation de BCE. Le prix offert par l'acquéreur représente une prime d'environ 40 p. 100 par rapport au cours de clôture des actions de BCE à la date pertinente. Le capital requis pour l'opération s'élève au total à environ 52 milliards de dollars, dont 38,5 milliards de dollars sont à la charge de BCE. Bell Canada fournira une garantie d'emprunt d'environ 30 milliards de dollars pour la dette de BCE. L'acquéreur investira près de 8 milliards de dollars de nouveaux capitaux propres dans BCE.

Les actionnaires de BCE ont approuvé l'entente dans une proportion de 97,93 p. 100, mais des détenteurs de débentures de Bell Canada, notamment des institutions financières, s'y sont opposés. Ces détenteurs de débentures ont intenté un recours pour abus prévu à l'art. 241 de la *Loi canadienne sur les sociétés par actions* (« *LCSA* »). Ils ont aussi allégué que l'arrangement n'était pas « équitable et raisonnable » et contesté l'approbation de l'arrangement exigée par l'art. 192 *LCSA*. Leur principal argument est que, une fois la transaction achevée, la valeur marchande à court terme de leurs débentures fléchirait de 20 p. 100 en moyenne, et leurs débentures ne seraient plus cotées comme admissibles pour des placements.

The Quebec Superior Court approved the arrangement as fair and dismissed the claim for oppression. The Court of Appeal set aside that decision, finding the arrangement had not been shown to be fair and held that it should not have been approved. It held that the directors had not only the duty to ensure that the debentureholders' contractual rights would be respected, but also to consider their reasonable expectations which, in its view, required directors to consider whether the adverse impact on debentureholders' economic interests could be alleviated. Since the requirements of s. 192 of the *CBCA* were not met, the court found it unnecessary to consider the oppression claim. BCE and Bell Canada appealed the overturning of the trial judge's approval of the plan of arrangement, and the debentureholders cross-appealed the dismissal of the claims for oppression.

Held: The appeals should be allowed and the cross-appeals dismissed.

The s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. The Court of Appeal's decision rested on an approach that erroneously combined the substance of the s. 241 oppression remedy with the onus of the s. 192 arrangement approval process, resulting in a conclusion that could not have been sustained under either provision, read on its own terms. [47] [165]

1. *The Section 241 Oppression Remedy*

The oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders affected by oppressive acts of a corporation or its directors. This remedy gives a court a broad jurisdiction to enforce not just what is legal but what is fair. Oppression is also fact specific: what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. [45] [58-59]

In assessing a claim of oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard"

La Cour supérieure du Québec a approuvé l'arrangement, le jugeant équitable, et elle a rejeté la demande de redressement pour abus. La Cour d'appel a annulé cette décision, jugeant que le caractère équitable de l'arrangement n'avait pas été démontré et qu'il n'aurait pas dû être approuvé. Elle a statué que les administrateurs avaient l'obligation non seulement de s'assurer du respect des droits contractuels des détenteurs de débentures, mais aussi de tenir compte de leurs attentes raisonnables, ce qui, selon elle, les obligeait à examiner s'il était possible d'atténuer l'effet préjudiciable de l'arrangement sur les intérêts financiers des détenteurs de débentures. Les conditions fixées par l'art. 192 n'étant pas remplies, la cour a jugé inutile d'examiner la demande de redressement pour abus. BCE et Bell Canada ont interjeté appel de l'annulation de l'approbation du plan d'arrangement par le juge de première instance, et les détenteurs de débentures ont formé un appel incident contre le rejet des demandes de redressement pour abus.

Arrêt : Les pourvois sont accueillis et les pourvois incidents sont rejetés.

La demande de redressement pour abus prévue à l'art. 241 et l'approbation judiciaire d'une modification de structure exigée par l'art. 192 sont des recours différents qui soulèvent des questions différentes. La décision de la Cour d'appel s'appuie sur un raisonnement qui combine à tort les éléments substantiels de la demande de redressement pour abus de l'art. 241 et le fardeau de la preuve applicable à l'approbation d'un arrangement exigée par l'art. 192, ce qui l'a menée à une conclusion qu'aucune de ces dispositions, isolément, n'aurait pu justifier. [47] [165]

1. *La demande de redressement pour abus prévue à l'art. 241*

La demande de redressement pour abus vise la réparation d'une atteinte aux intérêts en law ou en equity d'un vaste éventail de parties intéressées touchées par le comportement abusif d'une société ou de ses administrateurs. Ce recours confère au tribunal un vaste pouvoir d'imposer le respect non seulement du droit, mais de l'équité. Le sort d'une demande de redressement pour abus dépend en outre des faits : ce qui est juste et équitable est fonction des attentes raisonnables des parties intéressées compte tenu du contexte et des rapports entre les parties. [45] [58-59]

Le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement pouvant être qualifié d'« abus », de « préjudice injuste » ou d'« omission injuste of a relevant interest? For the first question, useful factors from the case law in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. For the second question, a claimant must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences under s. 241. [68] [72] [89] [95]

Where conflicting interests arise, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation. The cases on oppression, taken as a whole, confirm that this duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including — but not confined to — the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen. Where it is impossible to please all stakeholders, it will be irrelevant that the directors rejected alternative transactions that were no more beneficial than the chosen one. [81-83]

Here, the debentureholders did not establish that they had a reasonable expectation that the directors of BCE would protect their economic interests by putting forth a plan of arrangement that would maintain the investment grade trading value of their debentures. The trial judge concluded that this expectation was not made out on the evidence, given the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, the fact that the claimants could have protected themselves against reductions in market value by negotiating appropriate contractual terms, and that any statements by Bell Canada suggesting a commitment to retain investment grade ratings for the debentures were accompanied by warnings precluding such expectations. The trial judge recognized that the content of the directors' fiduciary duty to act in the best interests of the corporation was affected by the various interests at stake in the context of the auction process, and that they might have to approve transactions that were in the best interests of the corporation

de tenir compte » d'un intérêt pertinent? En ce qui a trait à la première question, les facteurs utiles d'appréciation d'une attente raisonnable qui ressortent de la jurisprudence incluent : les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées. En ce qui concerne la deuxième question, le plaignant doit prouver que le défaut de répondre à son attente raisonnable est imputable à une conduite injuste et qu'il en a résulté des conséquences préjudiciables au sens de l'art. 241. [68] [72] [89] [95]

Lorsque surgit un conflit d'intérêts, les administrateurs doivent le résoudre conformément à leur obligation fiduciaire d'agir au mieux des intérêts de la société. Dans son ensemble, la jurisprudence en matière d'abus confirme que cette obligation inclut le devoir de traiter de façon juste et équitable chaque partie intéressée touchée par les actes de la société. Il n'existe pas de règles absolues ni de principe voulant que les intérêts d'un groupe doivent prévaloir sur ceux d'un autre groupe. Il faut se demander chaque fois si, dans les circonstances, les administrateurs ont agi au mieux des intérêts de la société, en prenant en considération tous les facteurs pertinents, ce qui inclut, sans s'y limiter, la nécessité de traiter les parties intéressées touchées de façon équitable, conformément aux obligations de la société en tant qu'entreprise socialement responsable. Lorsqu'il est impossible de satisfaire toutes les parties intéressées, il importe peu que les administrateurs aient écarté d'autres transactions qui n'étaient pas plus avantageuses que celle qui a été choisie. [81-83]

En l'espèce, les détenteurs de débentures n'ont pas démontré qu'ils s'attendaient raisonnablement à ce que les administrateurs de BCE protègent leurs intérêts financiers en proposant un plan d'arrangement qui maintiendrait la valeur marchande de leurs débentures cotées comme admissibles pour des placements. Le juge de première instance a conclu que la preuve de cette attente n'avait pas été établie compte tenu du contexte global de la relation, de la nature de la société, de sa situation en tant que cible de plusieurs offres d'achat, du fait que les plaignants auraient pu se protéger eux-mêmes contre le fléchissement de la valeur marchande en négociant des clauses contractuelles appropriées et que les déclarations de Bell Canada concernant son engagement à conserver aux débentures une cote de placements admissibles s'accompagnaient de mises en garde excluant pareilles attentes. Le juge de première instance a reconnu que le contenu de l'obligation fiduciaire des administrateurs d'agir au mieux des intérêts de la société dépendait des divers intérêts en jeu dans le contexte du processus but which benefited some groups at the expense of others. All three competing bids required Bell Canada to assume additional debt. Under the business judgment rule, deference should be accorded to the business decisions of directors acting in good faith in performing the functions they were elected to perform. In this case, there was no error in the principles applied by the trial judge nor in his findings of fact. [96-100]

d'enchères et qu'ils pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada. La règle de l'appréciation commerciale commande la retenue à l'égard des décisions commerciales prises de bonne foi par les administrateurs dans l'exécution des fonctions pour lesquelles ils ont été élus. En l'espèce, le juge de première instance n'a pas commis d'erreur dans son application des principes ni dans ses conclusions de fait. [96-100]

The debentureholders had also argued that they had a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures. While the evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration, it is apparent that the directors considered the interests of debentureholders, and concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests and did not amount to "unfair disregard" of the interests of debentureholders. What the claimants contend is, in reality, an expectation that the directors would take positive steps to restructure the purchase in a way that would provide a satisfactory price to shareholders and preserve the high market value of the debentures. There was no evidence that it was reasonable to suppose this could be achieved, since all three bids involved a substantial increase in Bell Canada's debt. Commercial practice and reality also undermine their claim. Leveraged buyouts are not unusual or unforeseeable, and the debentureholders could have negotiated protections in their contracts. Given the nature and the corporate history of Bell Canada, it should not have been outside the contemplation of debentureholders that plans of arrangements could occur in the future. While the debentureholders rely on the past practice of maintaining the investment grade rating of the debentures, the events precipitating the leveraged buyout transaction were market realities affecting what were reasonable practices. No representations had been made to debentureholders upon which they could reasonably rely. [96] [102] [104-106] [108-110]

Les détenteurs de débentures avaient aussi fait valoir qu'ils s'attendaient raisonnablement à ce que les administrateurs tiennent compte de leurs intérêts financiers en préservant la valeur marchande des débentures. La preuve, considérée objectivement, permet de conclure qu'il était raisonnable de s'attendre à ce que les administrateurs tiennent compte de la position des détenteurs de débentures dans leurs décisions sur les diverses offres à l'étude, mais ils ont manifestement pris en considération les intérêts des détenteurs de débentures et conclu qu'ils ne pouvaient prendre aucun autre engagement que celui de respecter les dispositions contractuelles rattachées aux débentures. Cela répondait à l'obligation des administrateurs de tenir compte des intérêts des détenteurs de débentures et ne constituait pas une « omission injuste de tenir compte » de leurs intérêts. Ce que les plaignants font valoir en réalité, c'est qu'ils comptaient que les administrateurs adoptent des mesures concrètes pour restructurer l'acquisition de manière à assurer un prix d'achat satisfaisant pour les actionnaires et à préserver la valeur marchande élevée des débentures. Rien dans la preuve n'indique qu'il était raisonnable de supposer que ce résultat pouvait être atteint, puisque les trois offres comportaient toutes un accroissement substantiel de l'endettement de Bell Canada. Le réalité et les pratiques commerciales affaiblissent aussi leur prétention. Les acquisitions par emprunt n'ont rien d'inhabituel ou d'imprévisible, et les détenteurs de débentures auraient pu négocier des mesures de protection contractuelles. Compte tenu de la nature et de l'historique de Bell Canada, les détenteurs de débentures devaient savoir que des arrangements pouvaient être conclus dans l'avenir. Bien que les détenteurs de débentures invoquent les pratiques antérieures selon lesquelles la cote des débentures comme admissibles pour des placements avait toujours été maintenue, les événements qui ont conduit à la transaction d'acquisition par emprunt faisaient partie des conditions du marché au gré desquelles les pratiques raisonnables peuvent changer. Aucune déclaration à laquelle les détenteurs de débentures auraient pu raisonnablement se fier ne leur avait été faite. [96] [102] [104-106] [108-110]

With respect to the duty on directors to resolve the conflicting interests of stakeholders in a fair manner that reflected the best interests of the corporation, the corporation's best interests arguably favoured acceptance of the offer at the time. The trial judge accepted the evidence that Bell Canada needed to undertake significant changes to be successful, and the momentum of the market made a buyout inevitable. Considering all the relevant factors, the debentureholders failed to establish a reasonable expectation that could give rise to a claim for oppression. [111-113]

En ce qui a trait à l'obligation des administrateurs de résoudre les conflits entre parties intéressées de façon équitable conformément aux intérêts de la société, il est possible de soutenir que les intérêts de la société favorisaient à l'époque l'acceptation de l'offre. Le juge de première instance a retenu la preuve tendant à démontrer que Bell Canada devait procéder à des changements substantiels pour continuer à prospérer et la dynamique du marché rendait l'acquisition inévitable. Compte tenu de tous les facteurs pertinents, les détenteurs de débentures n'ont pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus. [111-113]

2. *The Section 192 Approval Process*

The s. 192 approval process is generally applicable to change of control transactions where the arrangement is sponsored by the directors of the target company and the goal is to require some or all shareholders to surrender their shares. The approval process focuses on whether the arrangement, viewed objectively, is fair and reasonable. Its purpose is to permit major changes in corporate structure to be made while ensuring that individuals whose rights may be affected are treated fairly, and its spirit is to achieve a fair balance between conflicting interests. In seeking court approval of an arrangement, the onus is on the corporation to establish that (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is "fair and reasonable". [119] [126] [128] [137]

To approve a plan of arrangement as fair and reasonable, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups. Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan. Courts must focus on the terms and impact of the arrangement itself, rather than the process by which it was reached, and must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. Courts on a

2. *Le processus d'approbation prévu à l'art. 192*

Le processus d'approbation prévu à l'art. 192 s'applique en général aux changements de contrôle lorsque l'arrangement est appuyé par les administrateurs de la société ciblée et vise la remise d'une partie ou de la totalité des actions. Le processus d'approbation est axé sur la question de savoir si l'arrangement est équitable et raisonnable, d'un point de vue objectif. Il a pour but de permettre la réalisation de changements importants dans la structure d'une société tout en assurant un traitement équitable aux personnes dont les droits peuvent être touchés, et l'esprit du processus consiste à établir un juste équilibre entre des intérêts opposés. La société qui demande l'approbation d'un arrangement doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est « équitable et raisonnable ». [119] [126] [128] [137]

Pour approuver un plan d'arrangement, parce qu'il le juge équitable et raisonnable, un tribunal doit être convaincu que l'arrangement a) poursuit un objectif commercial légitime et b) répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés. Pour décider si un arrangement répond à ces critères, on tient compte de divers facteurs pertinents, dont la nécessité de l'arrangement pour la continuité de la société, l'approbation du plan par la majorité des actionnaires et des autres détenteurs de valeurs mobilières ayant droit de vote, le cas échéant, et la proportionnalité des effets du plan sur les groupes touchés. En l'absence de vote, les tribunaux peuvent se demander si une femme ou un homme d'affaires intelligent et honnête, en tant que membre de la catégorie en cause et agissant dans son propre intérêt, approuverait raisonnablement le plan. Le tribunal doit s'attacher aux modalités et aux effets de l'arrangement lui-même plutôt qu'au processus suivi pour y parvenir, et être convaincu que l'intérêt de la société justifie le fardeau imposé par

s. 192 application should refrain from substituting their views of the "best" arrangement, but should not surrender their duty to scrutinize the arrangement. [136] [138] [145] [151] [154-155]

The purpose of s. 192 suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. It is the fact that the corporation is permitted to alter individual rights that places the matter beyond the power of the directors and creates the need for shareholder and court approval. However, in some circumstances, interests that are not strictly legal could be considered. The fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities generally does not, without more, constitute a circumstance where non-legal interests should be considered on a s. 192 application. [133-135]

Here, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192, and the trial judge was correct in concluding that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests, and he did not err in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The arrangement did not fundamentally alter the debentureholders' rights, as the investment and return they contracted for remained intact. It was well known that alteration in debt load could cause fluctuations in the trading value of the debentures, and yet the debentureholders had not contracted against this contingency. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada. No superior arrangement had been put forward and BCE had been assisted throughout by expert legal and financial advisors. Recognizing that there is no such thing as a perfect arrangement, the trial judge correctly concluded that the arrangement

l'arrangement aux détenteurs de valeurs mobilières. Les tribunaux appelés à approuver un plan en vertu de l'art. 192 doivent s'abstenir d'y substituer leur propre conception du « meilleur » arrangement, mais ne doivent pas renoncer pour autant à s'acquitter de leur obligation d'examiner l'arrangement. [136] [138] [145] [151] [154-155]

L'objet de l'art. 192 laisse croire qu'il ne vise que les détenteurs de valeurs mobilières dont les droits sont touchés par la proposition. C'est le fait que la société puisse modifier les droits des parties qui place la transaction hors du ressort des administrateurs et engendre la nécessité d'obtenir l'approbation des actionnaires et du tribunal. Toutefois, dans certaines circonstances, des intérêts qui ne constituent pas des droits à strictement parler peuvent être pris en considération. Une diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits demeurent par ailleurs intacts ne constitue généralement pas, à elle seule, une situation où de simples intérêts doivent être pris en compte pour l'examen d'une demande sous le régime de l'art. 192. [133-135]

En l'espèce, les détenteurs de débentures ne contestent plus que l'arrangement poursuive un objectif commercial légitime. Le débat porte sur la question de savoir si les objections de ceux dont les droits sont visés par l'arrangement ont été résolues de façon équitable et équilibrée. Puisque la transaction proposée touchait uniquement les intérêts financiers des détenteurs de débentures, et non leurs droits, et puisqu'ils ne se trouvaient pas dans des circonstances particulières commandant la prise en compte de simples intérêts sous le régime de l'art. 192, les détenteurs de débentures ne constituaient pas une catégorie touchée pour l'application de cette disposition et le juge de première instance était fondé à conclure qu'ils ne pouvaient être autorisés à opposer un veto à près de 98 p. 100 des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Même s'il n'en avait pas l'obligation, le juge de première instance avait le droit de tenir compte des intérêts financiers des détenteurs de débentures et il n'a pas commis d'erreur en concluant que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. L'arrangement ne modifiait pas fondamentalement les droits des détenteurs de débentures, l'investissement et le rendement prévus par leur contrat demeurant inchangés. Il était bien connu qu'une variation de l'endettement pouvait faire fluctuer la valeur marchande des débentures et les détenteurs de débentures ne se sont malgré tout pas prémunis contractuellement contre cette éventualité. Il était clair pour le juge que, pour la continuité de la société, l'approbation had been shown to be fair and reasonable. [157] [161] [163-164]

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Referred to: *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68; *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438; *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015; *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177; *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44; *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324; *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36; *Stech v. Davies*, [1987] 5 W.W.R. 563; *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28, var'd (1989), 45 B.L.R. 110; *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113; *Westfair Foods Ltd. v. Watt* (1991), 79 D.L.R. (4th) 48; *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368; *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200; *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251; *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275; *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300, var'd (1998), 110 O.A.C. 160; *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289, leave to appeal refused, [2002] 1 S.C.R. vi; *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718; *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294, aff'd (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194; *Lyall v. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304; *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613, aff'd (1993), 113 Sask. R. 3; *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302; *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7, var'd (1998), 38 O.R. (3d) 749; *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (1986); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (1985); *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d)

d'un arrangement comportant un accroissement de l'endettement et des garanties à la charge de Bell Canada était nécessaire. Aucun arrangement supérieur n'avait été soumis et BCE avait bénéficié, pendant tout le processus, des conseils de spécialistes du droit et de la finance. Reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a conclu à bon droit que le caractère équitable et raisonnable de l'arrangement avait été démontré. [157] [161] [163-164]

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Veasey, E. Norman, with Christine T. Di Guglielmo. « What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments » (2005), 153 *U. Pa. L. Rev.* 1399.

APPEALS and CROSS-APPEALS from judgments of the Quebec Court of Appeal (Robert C.J.Q. and Otis, Nuss, Pelletier and Dalphond JJ.A.), [2008]

POURVOIS PRINCIPAUX et POURVOIS INCIDENTS contre des arrêts de la Cour d'appel du Québec (le juge en chef Robert et les juges Otis, R.J.Q. 1298, 43 B.L.R. (4th) 157, [2008] Q.J. No. 4173 (QL), 2008 CarswellQue 4179, 2008 QCCA 935; [2008] Q.J. No. 4170 (QL), 2008 QCCA 930; [2008] Q.J. No. 4171 (QL), 2008 QCCA 931; [2008] Q.J. No. 4172 (QL), 2008 QCCA 932; [2008] Q.J. No. 4174 (QL), 2008 QCCA 933; [2008] Q.J. No. 4175 (QL), 2008 QCCA 934, setting aside decisions by Silcoff J., [2008] R.J.Q. 1029, 43 B.L.R. (4th) 39, [2008] Q.J. No. 4376 (QL), 2008 CarswellQue 1805, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, [2008] Q.J. No. 1728 (QL), 2008 CarswellQue 2226, 2008 QCCS 899; [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1, [2008] Q.J. No. 1788 (QL), 2008 CarswellQue 2227, 2008 QCCS 905; (2008), 43 B.L.R. (4th) 135, [2008] Q.J. No. 1789 (QL), 2008 CarswellQue 2228, 2008 QCCS 906; [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79, [2008] Q.J. No. 1790 (QL), 2008 CarswellQue 2229, 2008 QCCS 907. Appeals allowed and cross-appeals dismissed.

Guy Du Pont, *Kent E. Thomson*, *William Brock*, *James Doris*, *Louis-Martin O'Neill*, *Pierre Bienvenu* and *Steve Tenai*, for the appellants/respondents on cross-appeals BCE Inc. and Bell Canada.

Benjamin Zarnett, *Jessica Kimmel*, *James A. Woods* and *Christopher L. Richter*, for the appellant/respondent on cross-appeals 6796508 Canada Inc.

John Finnigan, *John Porter*, *Avram Fishman* and *Mark Meland*, for the respondents/appellants on cross-appeals Group of 1976 Debentureholders and Group of 1996 Debentureholders.

Markus Koehnen, *Max Mendelsohn*, *Paul Macdonald*, *Julien Brazeau* and *Erin Cowling*, for the respondent/appellant on cross-appeals Group of 1997 Debentureholders.

Written submissions only by *Robert Tessier* and *Ronald Auclair*, for the respondent Computershare Trust Company of Canada.

Christian S. Tacit, for the intervener Catalyst Asset Management Inc.

Nuss, Pelletier et Dalphond), [2008] R.J.Q. 1298, 43 B.L.R. (4th) 157, [2008] J.Q. n° 4173 (QL), 2008 CarswellQue 4179, 2008 QCCA 935; [2008] J.Q. n° 4170 (QL), 2008 QCCA 930; [2008] J.Q. n° 4171 (QL), 2008 QCCA 931; [2008] J.Q. n° 4172 (QL), 2008 QCCA 932; [2008] J.Q. n° 4174 (QL), 2008 QCCA 933; [2008] J.Q. n° 4175 (QL), 2008 QCCA 934, qui ont infirmé des décisions du juge Silcoff, [2008] R.J.Q. 1029, 43 B.L.R. (4th) 39, [2008] J.Q. n° 4376 (QL), 2008 CarswellQue 1805, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, [2008] J.Q. n° 1728 (QL), 2008 CarswellQue 2226, 2008 QCCS 899; [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1, [2008] J.Q. n° 1788 (QL), 2008 CarswellQue 2227, 2008 QCCS 905; (2008), 43 B.L.R. (4th) 135, [2008] J.Q. n° 1789 (QL), 2008 CarswellQue 2228, 2008 QCCS 906; [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79, [2008] J.Q. n° 1790 (QL), 2008 CarswellQue 2229, 2008 QCCS 907. Pourvois principaux accueillis et pourvois incidents rejetés.

Guy Du Pont, *Kent E. Thomson*, *William Brock*, *James Doris*, *Louis-Martin O'Neill*, *Pierre Bienvenu* et *Steve Tenai*, pour les appelantes/intimées aux pourvois incidents BCE Inc. et Bell Canada.

Benjamin Zarnett, *Jessica Kimmel*, *James A. Woods* et *Christopher L. Richter*, pour l'appelante/intimée aux pourvois incidents 6796508 Canada Inc.

John Finnigan, *John Porter*, *Avram Fishman* et *Mark Meland*, pour les intimés/appelants aux pourvois incidents un groupe de détenteurs de débentures de 1976 et un groupe de détenteurs de débentures de 1996.

Markus Koehnen, *Max Mendelsohn*, *Paul Macdonald*, *Julien Brazeau* et *Erin Cowling*, pour l'intimé/appelant aux pourvois incidents un groupe de détenteurs de débentures de 1997.

Argumentation écrite seulement par *Robert Tessier* et *Ronald Auclair*, pour l'intimée la Société de fiducie Computershare du Canada.

Christian S. Tacit, pour l'intervenante Catalyst Asset Management Inc.

Raynold Langlois, *Q.C.*, and *Gerald Apostolatos*, for the intervener Matthew Stewart.

The following is the judgment delivered by

THE COURT —

I. Introduction

[1] These appeals arise out of an offer to purchase all shares of BCE Inc. ("BCE"), a large telecommunications corporation, by a group headed by the Ontario Teachers Pension Plan Board ("Teachers"), financed in part by the assumption by Bell Canada, a wholly owned subsidiary of BCE, of a $30 billion debt. The leveraged buyout was opposed by debentureholders of Bell Canada on the ground that the increased debt contemplated by the purchase agreement would reduce the value of their bonds. Upon request for court approval of an arrangement under s. 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), the debentureholders argued that it should not be found to be fair. They also opposed the arrangement under s. 241 of the *CBCA* on the ground that it was oppressive to them.

[2] The Quebec Superior Court, *per* Silcoff J., approved the arrangement as fair under the *CBCA* and dismissed the claims for oppression. The Quebec Court of Appeal found that the arrangement had not been shown to be fair and held that it should not have been approved. Thus, it found it unnecessary to consider the oppression claim.

[3] On June 20, 2008, this Court allowed the appeals from the Court of Appeal's disapproval of the arrangement and dismissed two cross-appeals from the dismissal of the claims for oppression, with reasons to follow. These are those reasons.

Raynold Langlois, *c.r.*, et *Gerald Apostolatos*, pour l'intervenant Matthew Stewart.

Version française du jugement rendu par

LA COUR —

I. Introduction

[1] Les pourvois ont pour origine une offre d'acquisition visant la totalité des actions d'une grande société de télécommunications, BCE Inc. (« BCE »), offre émanant d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario (« RREO ») et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, filiale en propriété exclusive de BCE. Les détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations. Lors de l'examen de la demande d'approbation d'un arrangement exigée par l'art. 192 de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, ch. C-44 (« *LCSA* »), ils ont fait valoir que l'arrangement ne devait pas être jugé équitable. Ils ont également plaidé qu'il constituait un abus de leurs droits au sens de l'art. 241 de la *LCSA*.

[2] Le juge Silcoff de la Cour supérieure du Québec a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus. La Cour d'appel du Québec a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé. Elle n'a donc pas jugé utile d'examiner la demande de redressement pour abus.

[3] Le 20 juin 2008, notre Cour a accueilli les pourvois interjetés contre le refus de la Cour d'appel d'approuver l'arrangement et elle a rejeté deux pourvois incidents formés à l'encontre du rejet des demandes de redressement pour abus, avec motifs à suivre. Voici maintenant ces motifs.

II. Facts

[4] At issue is a plan of arrangement valued at approximately $52 billion, for the purchase of the shares of BCE by way of a leveraged buyout. The arrangement was opposed by a group, comprised mainly of financial institutions, that hold debentures issued by Bell Canada. The crux of their complaints is that the arrangement would diminish the trading value of their debentures by an average of 20 percent, while conferring a premium of approximately 40 percent on the market price of BCE shares.

[5] Bell Canada was incorporated in 1880 by a special Act of the Parliament of Canada. The corporation was subsequently continued under the *CBCA*. BCE, a management holding company, was incorporated in 1970 and continued under the *CBCA* in 1979. Bell Canada became a wholly owned subsidiary of BCE in 1983 pursuant to a plan of arrangement under which Bell Canada's shareholders surrendered their shares in exchange for shares of BCE. BCE and Bell Canada are separate legal entities with separate charters, articles and bylaws. Since January 2003, however, they have shared a common set of directors and some senior officers.

[6] At the time relevant to these proceedings, Bell Canada had $7.2 billion in outstanding long-term debt comprised of debentures issued pursuant to three trust indentures: the 1976, the 1996 and the 1997 trust indentures. The trust indentures contain neither change of control nor credit rating covenants, and specifically allow Bell Canada to incur or guarantee additional debt subject to certain limitations.

[7] Bell Canada's debentures were perceived by investors to be safe investments and, up to the time of the proposed leveraged buyout, had maintained an investment grade rating. The debentureholders are some of Canada's largest and most reputable financial institutions, pension funds and insurance

II. Les faits

[4] Le litige porte sur un plan d'arrangement d'une valeur approximative de 52 milliards de dollars concernant l'achat des actions de BCE au moyen d'une acquisition par emprunt. Un groupe de détenteurs de débentures, composé principalement d'institutions financières, s'est opposé à l'arrangement. Son principal argument est que l'arrangement ferait fléchir la valeur marchande de leurs débentures de 20 p. 100 en moyenne, tout en permettant aux actionnaires de toucher une prime d'environ 40 p. 100 par rapport au cours des actions de BCE.

[5] Bell Canada a été constituée en société en 1880 par une loi spéciale du Parlement du Canada. Elle a ensuite été prorogée en vertu de la *LCSA*. BCE est une société de portefeuille de gestion qui a été constituée en 1970, puis prorogée en vertu de la *LCSA* en 1979. Bell Canada est devenue une filiale en propriété exclusive de BCE en 1983, conformément à un plan d'arrangement en vertu duquel les actionnaires de Bell Canada ont reçu des actions de BCE en échange de leurs actions. BCE et Bell Canada sont des entités juridiques distinctes possédant chacune leurs propres chartes, statuts constitutifs et règlements administratifs. Depuis janvier 2003, elles ont les mêmes administrateurs et quelques hauts dirigeants en commun.

[6] À l'époque pertinente pour l'examen des pourvois, Bell Canada avait une dette à long terme de 7,2 milliards de dollars composée de débentures émises en vertu de trois actes de fiducie établis respectivement en 1976, 1996 et 1997. Ces actes ne comportent aucune disposition concernant le changement de contrôle ou la cote financière et ils autorisent expressément Bell Canada à contracter ou à garantir de nouvelles dettes sous réserve de certaines restrictions.

[7] Les débentures de Bell Canada étaient considérées comme des placements sûrs par les investisseurs et, jusqu'à la proposition d'acquisition par emprunt, elles étaient cotées admissibles pour des placements. Les détenteurs de débentures sont des institutions financières, des caisses de retraite et

companies. They are major participants in the debt markets and possess an intimate and historic knowledge of the financial markets.

des sociétés d'assurance comptant parmi les plus importantes et les plus renommées du Canada. Ce sont des participants d'envergure dans les marchés de la dette, qui ont une expérience approfondie et une connaissance historique des marchés financiers.

[8] A number of technological, regulatory and competitive changes have significantly altered the industry in which BCE operates. Traditionally highly regulated and focused on circuit-switch line telephone service, the telecommunication industry is now guided primarily by market forces and characterized by an ever-expanding group of market participants, substantial new competition and increasing expectations regarding customer service. In response to these changes, BCE developed a new business plan by which it would focus on its core business, telecommunications, and divest its interest in unrelated businesses. This new business plan, however, was not as successful as anticipated. As a result, the shareholder returns generated by BCE remained significantly less than the ones generated by its competitors.

[8] Le secteur d'activité de BCE a connu des changements d'ordre technologique, réglementaire et concurrentiel qui en ont profondément modifié le cadre. Auparavant très réglementée et axée sur la téléphonie classique par ligne téléphonique, l'industrie des télécommunications obéit aujourd'hui principalement aux forces du marché et se caractérise par l'augmentation continue des participants, l'arrivée de nouveaux concurrents et des attentes croissantes en matière de services aux consommateurs. Pour s'ajuster à ces changements, BCE a établi un nouveau plan d'entreprise mettant l'accent sur son activité centrale, les télécommunications, et prévoyant l'abandon de sa participation dans des entreprises non liées à ce secteur. Ce plan, toutefois, n'a pas donné les résultats escomptés, de sorte que les gains des actionnaires de BCE sont demeurés beaucoup moindres que ceux des actionnaires de ses concurrents.

[9] Meanwhile, by the end of 2006, BCE had large cash flows and strong financial indicators, characteristics perceived by market analysts to make it a suitable target for a buyout. In November 2006, BCE was made aware that Kohlberg Kravis Roberts & Co. ("KKR"), a United States private equity firm, might be interested in a transaction involving BCE. Mr. Michael Sabia, President and Chief Executive Officer of BCE, contacted KKR to inform them that BCE was not interested in pursuing such a transaction at that time.

[9] En outre, à la fin de 2006, BCE disposait d'un important flux de trésorerie et ses indicateurs financiers étaient très positifs, caractéristiques qui en faisaient une cible toute désignée pour une acquisition aux yeux des analystes financiers. Au mois de novembre 2006, BCE a appris que Kohlberg Kravis Roberts & Co. (« KKR »), une société américaine gérant un fonds privé d'investissement, pouvait être intéressée par une transaction visant BCE. Monsieur Michael Sabia, président et chef de la direction de BCE, a pris contact avec KKR pour lui indiquer que BCE n'était alors pas intéressée par une telle transaction.

[10] In February 2007, new rumours surfaced that KKR and the Canada Pension Plan Investment Board were arranging financing to initiate a bid for BCE. Shortly thereafter, additional rumours began to circulate that an investment banking firm was assisting Teachers with a potential transaction involving BCE. Mr. Sabia, after meeting with

[10] Au mois de février 2007, la rumeur que KKR et l'Office d'investissement du régime de pensions du Canada préparaient le montage financier d'une offre d'achat de BCE a recommencé à courir. Peu après, d'autres rumeurs se sont propagées, selon lesquelles une société bancaire d'investissement assistait le RREO relativement à une éventuelle

BCE's board of directors ("Board"), contacted the representatives of both KKR and Teachers to reiterate that BCE was not interested in pursuing a "going-private" transaction at the time because it was set on creating shareholder value through the execution of its 2007 business plan.

transaction visant BCE. Après avoir rencontré le conseil d'administration de BCE (« Conseil d'administration »), M. Sabia a communiqué avec les représentants de KKR et avec ceux du RREO et leur a réitéré que BCE n'était pas intéressée à une « opération de fermeture » parce que BCE avait pour objectif de créer une valeur actionnariale par la réalisation de son plan d'entreprise de 2007.

[11] On March 29, 2007, after an article appeared on the front page of the *Globe and Mail* that inaccurately described BCE as being in discussions with a consortium comprised of KKR and Teachers, BCE issued a press release confirming that there were no ongoing discussions being held with private equity investors with respect to a "going-private" transaction for BCE.

[11] Le 29 mars 2007, à la suite de la parution à la une du *Globe and Mail* d'un article faisant incorrectement état de discussions entre BCE et un consortium constitué de KKR et du RREO, BCE a publié un communiqué de presse dans lequel elle affirmait qu'aucune discussion n'était en cours avec des fonds privés d'investissement au sujet d'une « opération de fermeture » de BCE.

[12] On April 9, 2007, Teachers filed a report (Schedule 13D) with the United States Securities and Exchange Commission reflecting a change from a passive to an active holding of BCE shares. This filing heightened press speculation concerning a potential privatization of BCE.

[12] Le 9 avril 2007, le RREO a déposé un formulaire 13D auprès de la Securities and Exchange Commission des États-Unis, dans lequel il indiquait que, de passive, sa participation comme actionnaire de BCE devenait active. Le dépôt de ce formulaire est venu renforcer l'hypothèse, véhiculée par les médias, de la transformation possible de BCE en société fermée.

[13] Faced with renewed speculation and BCE having been put "in play" by the filing by Teachers of the Schedule 13D report, the Board met with its legal and financial advisors to assess strategic alternatives. It decided that it would be in the best interests of BCE and its shareholders to have competing bidding groups and to guard against the risk of a single bidding group assembling such a significant portion of available debt and equity that the group could preclude potential competing bidding groups from participating effectively in an auction process.

[13] Devant la recrudescence des conjectures et la « mise en jeu » de BCE résultant du dépôt du formulaire 13D par le RREO, le Conseil d'administration a convoqué ses conseillers juridiques et financiers afin d'examiner différentes options stratégiques. Il en est venu à la conclusion qu'il était dans l'intérêt de BCE et de ses actionnaires de bénéficier de la concurrence entre plusieurs groupes soumissionnaires et de parer au risque qu'un groupe soumissionnaire mobilise à lui seul une telle part des prêts et des capitaux disponibles qu'il empêcherait les groupes concurrents potentiels de participer efficacement au processus d'enchères.

[14] In a press release dated April 17, 2007, BCE announced that it was reviewing its strategic alternatives with a view to further enhancing shareholder value. On the same day, a Strategic Oversight Committee ("SOC") was created. None of its members had ever been part of management at BCE. Its

[14] Dans un communiqué de presse daté du 17 avril 2007, BCE a annoncé qu'elle examinait les options stratégiques qui s'offraient à elle en vue d'améliorer davantage la valeur actionnariale. Le même jour, elle a mis sur pied un comité de surveillance stratégique (« CSS »), dont aucun des

mandate was, notably, to set up and supervise the auction process.

[15] Following the April 17 press release, several debentureholders sent letters to the Board voicing their concerns about a potential leveraged buyout transaction. They sought assurance that their interests would be considered by the Board. BCE replied in writing that it intended to honour the contractual terms of the trust indentures.

[16] On June 13, 2007, BCE provided the potential participants in the auction process with bidding rules and the general form of a definitive transaction agreement. The bidders were advised that, in evaluating the competitiveness of proposed bids, BCE would consider the impact that their proposed financing arrangements would have on BCE and on Bell Canada's debentureholders and, in particular, whether their bids respected the debentureholders' contractual rights under the trust indentures.

[17] Offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada would be liable. All would have likely resulted in a downgrade of the debentures below investment grade. The initial offer submitted by the appellant 6796508 Canada Inc. (the "Purchaser"), a corporation formed by Teachers and affiliates of Providence Equity Partners Inc. and Madison Dearborn Partners LLC, contemplated an amalgamation of Bell Canada that would have triggered the voting rights of the debentureholders under the trust indentures. The Board informed the Purchaser that such an amalgamation made its offer less competitive. The Purchaser submitted a revised offer with an alternative structure for the transaction that did not involve an amalgamation of Bell Canada. Also, the Purchaser's revised offer increased the initial price per share from $42.25 to $42.75.

membres n'avait déjà fait partie de la direction de BCE. Le mandat du CSS consistait notamment à mettre en marche et à surveiller le processus d'enchères.

[15] À la suite du communiqué de presse du 17 avril, plusieurs détenteurs de débentures ont écrit au Conseil d'administration pour exprimer leurs craintes concernant la possibilité d'une acquisition par emprunt. Ils voulaient recevoir l'assurance que le Conseil d'administration tiendrait compte de leurs intérêts. BCE leur a répondu par écrit qu'elle avait l'intention de respecter les dispositions contractuelles des actes de fiducie.

[16] Le 13 juin 2007, BCE a communiqué aux soumissionnaires potentiels les règles de soumission des propositions ainsi qu'une ébauche générale d'entente définitive. Elle les a informés que, lorsqu'elle étudierait les offres, elle tiendrait compte de l'incidence du mécanisme de financement proposé sur BCE et sur les détenteurs de débentures de Bell Canada et, en particulier, du fait que leurs offres respectent ou non les droits contractuels que les actes de fiducie conféraient aux détenteurs de débentures.

[17] Trois groupes ont présenté des offres. Chaque offre prévoyait une hausse sensible du niveau d'endettement de Bell Canada. Les trois offres auraient probablement pour effet d'abaisser la cote des débentures au-dessous de celle requise pour qu'elles constituent un placement admissible. L'offre initiale présentée par l'appelante 6796508 Canada Inc. (l'« Acquéreur »), une société constituée par le RREO, et des membres du groupe de Providence Equity Partners Inc. et de Madison Dearborn Partners LLC, prévoyait une fusion de Bell Canada qui aurait déclenché l'exercice des droits de vote des détenteurs de débentures en vertu des actes de fiducie. Le Conseil d'administration a informé l'Acquéreur que ce projet de fusion rendait son offre moins attrayante. L'Acquéreur a donc présenté une nouvelle offre dans laquelle il proposait une structure différente pour la transaction qui n'impliquait pas de fusion de Bell Canada. De plus, il haussait à 42,75 $ le prix de 42,25 $ initialement offert pour chaque action.

[18] The Board, after a review of the three offers and based on the recommendation of the SOC, found that the Purchaser's revised offer was in the best interests of BCE and BCE's shareholders. In evaluating the fairness of the consideration to be paid to the shareholders under the Purchaser's offer, the Board and the SOC received opinions from several reputable financial advisors. In the meantime, the Purchaser agreed to cooperate with the Board in obtaining a solvency certificate stating that BCE would still be solvent (and hence in a position to meet its obligations after completion of the transaction). The Board did not seek a fairness opinion in respect of the debentureholders, taking the view that their rights were not being arranged.

[18] Après avoir étudié les trois offres, le Conseil d'administration a conclu, suivant la recommandation du CSS, que l'offre révisée de l'Acquéreur servait les intérêts de BCE et des actionnaires de BCE. Pour évaluer le caractère équitable de la contrepartie qui serait versée aux actionnaires selon cette offre, le Conseil d'administration et le CSS ont sollicité l'avis de plusieurs conseillers financiers réputés. Par ailleurs, l'Acquéreur a accepté de prêter son concours au Conseil d'administration pour l'obtention d'un certificat de solvabilité attestant que BCE demeurerait solvable (et serait donc en mesure de respecter ses obligations une fois la transaction achevée). Le Conseil d'administration n'a pas sollicité l'avis d'experts sur le caractère équitable de la transaction pour les détenteurs de débentures, estimant que l'arrangement ne visait pas leurs droits.

[19] On June 30, 2007, the Purchaser and BCE entered into a definitive agreement. On September 21, 2007, BCE's shareholders approved the arrangement by a majority of 97.93 percent.

[19] Le 30 juin 2007, l'Acquéreur et BCE ont conclu une entente définitive. Le 21 septembre suivant, les actionnaires de BCE ont approuvé l'entente dans une proportion de 97,93 p. 100.

[20] Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser is $42.75 per common share, which represents a premium of approximately 40 percent to the closing price of the shares as of March 28, 2007. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

[20] Essentiellement, l'entente prévoit l'acquisition forcée de toutes les actions en circulation de BCE au prix de 42,75 $ l'action ordinaire, ce qui représente une prime d'environ 40 p. 100 par rapport au cours de clôture des actions en date du 28 mars 2007. Le capital requis pour la transaction s'élève à environ 52 milliards de dollars, dont 38,5 milliards de dollars sont à la charge de BCE. Bell Canada fournira une garantie d'emprunt d'environ 30 milliards de dollars pour la dette de BCE. Enfin, l'Acquéreur investira près de 8 milliards de dollars de nouveaux capitaux propres dans BCE.

[21] As a result of the announcement of the arrangement, the credit ratings of the debentures by the time of trial had been downgraded from investment grade to below investment grade. From the perspective of the debentureholders, this downgrade was problematic for two reasons. First, it caused the debentures to decrease in value by an average of approximately 20 percent. Second, the downgrade could oblige debentureholders with credit-rating restrictions on their holdings to sell their debentures at a loss.

[21] L'annonce de cette entente a entraîné une baisse de la cote de crédit des débentures de sorte que, lors du procès, elles n'étaient plus considérées comme des placements admissibles. Du point de vue des détenteurs de débentures, cette décote pose problème à deux égards. Premièrement, elle a entraîné une diminution de la valeur des débentures de l'ordre d'environ 20 p. 100 en moyenne. Deuxièmement, elle risque d'obliger les détenteurs de débentures qui sont assujettis à des restrictions concernant la cote de crédit des titres qu'ils détiennent à vendre leurs débentures à perte.

[22] The debentureholders at trial opposed the arrangement on a number of grounds. First, the debentureholders sought relief under the oppression provision in s. 241 of the *CBCA*. Second, they opposed court approval of the arrangement, as required by s. 192 of the *CBCA*, alleging that the arrangement was not "fair and reasonable" because of the adverse effect on their economic interests. Finally, the debentureholders brought motions for declaratory relief under the terms of the trust indentures, which are not before us: (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899.

[22] En première instance, les détenteurs de débentures ont invoqué plusieurs motifs d'opposition à l'arrangement. Ils ont d'abord invoqué la disposition de la *LCSA* applicable en cas d'abus, l'art. 241. Ils ont ensuite contesté la demande d'approbation de l'arrangement exigée par l'art. 192 de la *LCSA* en alléguant que l'arrangement n'était pas « équitable et raisonnable » en raison de ses effets préjudiciables sur leurs intérêts financiers. Enfin, ils ont présenté des demandes de jugement déclaratoire fondées sur les actes de fiducie, sur lesquelles la Cour n'est pas appelée à se prononcer : (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899.

III. Judicial History

[23] The trial judge reviewed the s. 241 oppression claim as lying against both BCE and Bell Canada, since s. 241 refers to actions by the "corporation or any of its affiliates". He dismissed the claims for oppression on the grounds that the debt guarantee to be assumed by Bell Canada had a valid business purpose; that the transaction did not breach the reasonable expectations of the debentureholders; that the transaction was not oppressive by reason of rendering the debentureholders vulnerable; and that BCE and its directors had not unfairly disregarded the interests of the debentureholders: (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907; (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906.

III. Historique judiciaire

[23] Le juge de première instance a examiné les demandes de redressement pour abus à la fois contre Bell Canada et contre BCE, puisque l'art. 241 vise la situation provoquée par « la société ou l'une des personnes morales de son groupe ». Il a rejeté ces recours parce que, selon lui, la garantie d'emprunt fournie par Bell Canada poursuivait un objectif commercial légitime, la transaction ne frustrait pas les attentes raisonnables des détenteurs de débentures, la prétention que la transaction constituait un abus parce qu'elle rendait les détenteurs de débentures vulnérables n'était pas fondée et celle selon laquelle BCE et ses administrateurs s'étaient montrés injustes en ne tenant pas compte des intérêts des détenteurs de débentures ne pouvait être retenue : (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907; (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906.

[24] In arriving at these conclusions, the trial judge proceeded on the basis that the BCE directors had a fiduciary duty under s. 122 of the *CBCA* to act in the best interests of the corporation. He held that while the best interests of the corporation are not to be confused with the interests of the shareholders or other stakeholders, corporate law recognizes fundamental differences between shareholders and debt security holders. He held that these differences affect the content of the directors' fiduciary duty. As a result, the directors' duty to act in the best interests of the corporation might require them to approve transactions that, while in the interests

[24] Pour parvenir à ces conclusions, le juge a considéré que l'art. 122 de la *LCSA* imposait aux administrateurs de BCE l'obligation fiduciaire d'agir au mieux des intérêts de la société. Selon lui, bien que les intérêts de la société ne doivent pas être confondus avec ceux des actionnaires ou d'autres parties intéressées, le droit des sociétés reconnaît l'existence de différences fondamentales entre les actionnaires et les détenteurs de titres de créance. À son avis, ces différences ont une incidence sur le contenu de l'obligation fiduciaire des administrateurs. Ainsi, leur devoir d'agir au mieux des intérêts de la société pourrait les obliger à

of the corporation, might also benefit some or all shareholders at the expense of other stakeholders. He also noted that in accordance with the business judgment rule, Canadian courts tend to accord deference to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by shareholders.

[25] The trial judge held that the debentureholders' reasonable expectations must be assessed on an objective basis and, absent compelling reasons, must derive from the trust indentures and the relevant prospectuses issued in connection with the debt offerings. Statements by Bell Canada indicating a commitment to retaining investment grade ratings did not assist the debentureholders, since these statements were accompanied by warnings, repeated in the prospectuses pursuant to which the debentures were issued, that negated any expectation that this policy would be maintained indefinitely. The reasonableness of the alleged expectation was further negated by the fact that the debentureholders could have guarded against the business risks arising from a change of control by negotiating protective contract terms. The fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that the bidders were prepared to treat the debentureholders any differently. The materialization of certain risks as a result of decisions taken by the directors in accordance with their fiduciary duty to the corporation did not constitute oppression against the debentureholders or unfair disregard of their interests.

[26] Having dismissed the claim for oppression, the trial judge went on to consider BCE's application for approval of the transaction under s. 192 of the *CBCA*: (2008), 43 B.L.R. (4th) 1, 2008 QCCS

approuver des transactions qui, tout en servant les intérêts de la société, privilégient une partie ou la totalité des actionnaires au détriment d'autres parties intéressées. Le juge a aussi indiqué que, suivant la règle de l'appréciation commerciale, les tribunaux canadiens ont tendance à faire preuve de retenue à l'égard des décisions commerciales que les administrateurs prennent de bonne foi et dans l'exécution des fonctions que les actionnaires leur ont confiées en les élisant.

[25] Le juge de première instance a statué que les attentes raisonnables des détenteurs de débentures doivent être évaluées objectivement et qu'elles doivent, à moins de motifs impérieux, découler des actes de fiducie et des prospectus d'émission des débentures. Les déclarations de Bell Canada concernant son engagement à conserver une cote de placements admissibles n'ont été d'aucun secours pour les détenteurs de débentures, car ces déclarations étaient accompagnées de mises en garde, réitérées dans les prospectus d'émission des débentures, qui excluaient toute attente quant au maintien indéfini de cette politique. En outre, le fait que les détenteurs de débentures auraient pu se protéger contractuellement contre les risques associés à un changement de contrôle en négociant des clauses de protection rendait leurs prétendues attentes déraisonnables. Le fait que la transaction serait profitable pour les actionnaires alors qu'elle désavantagerait les détenteurs de débentures ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada, et rien dans la preuve n'indiquait que leurs auteurs étaient disposés à traiter les détenteurs de débentures différemment. Par conséquent, la réalisation de certains risques par suite des décisions prises par les administrateurs en conformité avec leur obligation fiduciaire envers la société ne constituait ni un abus des droits des détenteurs de débentures ni une omission injuste de tenir compte de leurs intérêts.

[26] Après avoir rejeté les demandes de redressement pour abus, le juge de première instance a examiné la demande d'approbation de la transaction exigée par l'art. 192 de la *LCSA* : (2008), 43 B.L.R.

905. He dismissed the debentureholders' claim for voting rights on the arrangement on the ground that their legal interests were not compromised by the arrangement and that it would be unfair to allow them in effect to veto the shareholder vote. However, in determining whether the arrangement was fair and reasonable — the main issue on the application for approval — he considered the fairness of the transaction with respect to both the shareholders and the debentureholders, and concluded that the arrangement was fair and reasonable. He considered the necessity of the arrangement for Bell Canada's continued operations; that the Board, comprised almost entirely of independent directors, had determined the arrangement was fair and reasonable and in the best interests of BCE and the shareholders; that the arrangement had been approved by over 97 percent of the shareholders; that the arrangement was the culmination of a robust strategic review and auction process; the assistance the Board received throughout from leading legal and financial advisors; the absence of a superior proposal; and the fact that the proposal did not alter or arrange the debentureholders' legal rights. While the proposal stood to alter the debentureholders' economic interests, in the sense that the trading value of their securities would be reduced by the added debt load, their contractual rights remained intact. The trial judge noted that the debentureholders could have protected themselves against this eventuality through contract terms, but had not. Overall, he concluded that taking all relevant matters into account, the arrangement was fair and reasonable and should be approved.

(4th) 1, 2008 QCCS 905. Il a refusé aux détenteurs de débentures le droit de voter sur l'arrangement, estimant que celui-ci ne compromettait pas leurs droits et qu'il serait injuste de leur permettre en fait d'opposer leur veto au vote des actionnaires. Toutefois, pour déterminer si l'arrangement était équitable et raisonnable — la question déterminante pour l'octroi de l'approbation — le juge a examiné le caractère équitable de la transaction à l'égard à la fois des actionnaires et des détenteurs de débentures, et il a conclu que l'arrangement était équitable et raisonnable. Il a pris en compte la nécessité de l'arrangement pour la continuité des activités de Bell Canada; le fait que le Conseil d'administration — constitué presque entièrement d'administrateurs indépendants — avait déterminé que l'arrangement était équitable et raisonnable et qu'il servait au mieux les intérêts de BCE et des actionnaires; l'approbation de l'arrangement par plus de 97 p. 100 des actionnaires; le fait que l'arrangement était l'aboutissement d'un processus rigoureux d'analyse stratégique et d'enchères; l'aide de conseillers juridiques et financiers renommés reçue par le Conseil d'administration pendant tout le processus; l'absence d'offre supérieure; et le fait que l'offre ne modifiait ni ne visait les droits contractuels des détenteurs de débentures. Bien que l'offre modifie les intérêts financiers des détenteurs de débentures, au sens où l'accroissement de l'endettement ferait fléchir la valeur marchande de leurs titres, leurs droits contractuels demeuraient intacts. Le juge de première instance a souligné que les détenteurs de débentures auraient pu se protéger contractuellement contre ce risque, mais qu'ils ne l'avaient pas fait. Il a conclu dans l'ensemble que, compte tenu de tous les facteurs pertinents, l'arrangement était équitable et raisonnable et devait être approuvé.

[27] The Court of Appeal allowed the appeals on the ground that BCE had failed to meet its onus on the test for approval of an arrangement under s. 192, by failing to show that the transaction was fair and reasonable to the debentureholders. Basing its analysis on this Court's decision in *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68, the Court of Appeal found that the directors were required to consider

[27] La Cour d'appel a accueilli les appels, jugeant que BCE n'avait pas démontré que la transaction était équitable et raisonnable pour les détenteurs de débentures, de sorte qu'elle ne satisfaisait pas au critère d'approbation d'un arrangement en vertu de l'art. 192. S'appuyant sur nos motifs dans l'affaire *Magasins à rayons Peoples inc. (Syndic de) c. Wise*, [2004] 3 R.C.S. 461, 2004 CSC 68, elle a conclu que les administrateurs avaient l'obligation

the non-contractual interests of the debentureholders. It held that representations made by Bell Canada over the years could have created reasonable expectations above and beyond the contractual rights of the debentureholders. In these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on the debentureholders. In the absence of such efforts, BCE had not discharged its onus under s. 192 of showing that the arrangement was fair and reasonable. The Court of Appeal therefore overturned the trial judge's order approving the plan of arrangement: (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935.

d'examiner les intérêts non contractuels des détenteurs de débentures. À son avis, les déclarations que Bell Canada avaient faites au cours des années pouvaient avoir créé des attentes raisonnables qui s'ajoutaient aux droits contractuels des détenteurs de débentures. Les administrateurs n'avaient donc pas simplement l'obligation d'accepter la meilleure offre, mais aussi celle de déterminer si l'arrangement pouvait être restructuré de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures. Comme cet examen n'avait pas été fait, BCE ne s'était pas acquittée de son obligation d'établir le caractère équitable et raisonnable de l'arrangement pour l'application de l'art. 192. La Cour d'appel a donc infirmé l'ordonnance d'approbation rendue par le juge de première instance : (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935.

[28] The Court of Appeal found it unnecessary to consider the s. 241 oppression claim, holding that its rejection of the s. 192 approval application effectively disposed of the oppression claim. In its view, where approval is sought under s. 192 and opposed, there is generally no need for an affected security holder to assert an oppression remedy under s. 241.

[28] La Cour d'appel a jugé inutile d'examiner les demandes de redressement pour abus fondées sur l'art. 241, estimant que le rejet de la demande d'approbation visée à l'art. 192 en scellait en fait le sort. Selon elle, lorsqu'une demande d'approbation présentée en vertu de l'art. 192 est contestée, les détenteurs de valeurs mobilières touchés n'ont généralement nullement besoin de présenter une demande de redressement pour abus sous le régime de l'art. 241.

[29] BCE and Bell Canada appeal to this Court arguing that the Court of Appeal erred in overturning the trial judge's approval of the plan of arrangement. While formally cross-appealing on s. 241, the debentureholders argue that the Court of Appeal was correct to consider their complaints under s. 192, such that their appeals under s. 241 became moot.

[29] BCE et Bell Canada se pourvoient devant notre Cour, soutenant que la Cour d'appel a infirmé à tort l'approbation du plan d'arrangement par le juge de première instance. Bien qu'ils aient officiellement formé un pourvoi incident fondé sur l'art. 241, les détenteurs de débentures font valoir que la Cour d'appel a statué à bon droit sur leurs prétentions sous le régime de l'art. 192, ce qui rendait théoriques leurs appels fondés sur l'art. 241.

IV. Issues

IV. Les questions en litige

[30] The issues, briefly stated, are whether the Court of Appeal erred in dismissing the debentureholders' s. 241 oppression claim and in overturning the Superior Court's s. 192 approval of the plan

[30] En résumé, la Cour doit décider si la Cour d'appel a commis une erreur en rejetant les demandes de redressement pour abus des détenteurs de débentures fondée sur l'art. 241 et en infirmant

of arrangement. These questions raise the issue of what is required to establish oppression of debentureholders in a situation where a corporation is facing a change of control, and how a judge on an application for approval of an arrangement under s. 192 of the *CBCA* should treat claims such as those of the debentureholders in these actions. These reasons will consider both issues.

l'ordonnance d'approbation du plan d'arrangement prononcée par la Cour supérieure en vertu de l'art. 192. Pour ce faire, la Cour doit déterminer quelle preuve doit être faite pour établir l'existence d'un abus des droits des détenteurs de débentures dans le contexte du changement de contrôle d'une société et comment le juge saisi d'une demande d'approbation d'un arrangement en vertu de l'art. 192 de la *LCSA* doit traiter des prétentions de la nature de celles formulées en l'espèce par les détenteurs de débentures. Les présents motifs traitent de ces deux questions.

[31] In order to situate these issues in the context of Canadian corporate law, it may be useful to offer a preliminary description of the remedies provided by the *CBCA* to shareholders and stakeholders in a corporation facing a change of control.

[31] Pour situer ces questions dans le contexte du droit canadien des sociétés, il peut être utile de décrire d'abord les recours que peuvent exercer les actionnaires et les autres parties intéressées sous le régime de la *LCSA* devant la perspective d'un changement de contrôle de la société.

[32] Accordingly, these reasons will consider:

(1) the rights, obligations and remedies under the *CBCA* in overview;

(2) the debentureholders' entitlement to relief under the s. 241 oppression remedy;

(3) the debentureholders' entitlement to relief under the requirement for court approval of an arrangement under s. 192.

[32] Par conséquent, les présents motifs comportent :

(1) un aperçu des droits, obligations et recours prévus par la *LCSA*;

(2) un examen du droit des détenteurs de débentures à un redressement en cas d'abus en application de l'art. 241;

(3) une analyse du droit des détenteurs de débentures à un redressement dans le contexte de l'approbation d'un arrangement exigée par l'art. 192.

[33] We note that it is unnecessary for the purposes of these appeals to distinguish between the conduct of the directors of BCE, the holding company, and the conduct of the directors of Bell Canada. The same directors served on the boards of both corporations. While the oppression remedy was directed at both BCE and Bell Canada, the courts below considered the entire context in which the directors of BCE made their decisions, which included the obligations of Bell Canada in relation to its debentureholders. It was not found by the lower courts that the directors of BCE and Bell Canada should have made different decisions with respect to the two corporations. Accordingly, the

[33] Il n'est pas nécessaire pour trancher les pourvois de faire une distinction entre le comportement des administrateurs de BCE, la société de portefeuille, et celui des administrateurs de Bell Canada. Les mêmes administrateurs siégeaient aux conseils d'administration de l'une et l'autre de ces sociétés. Bien que la demande de redressement pour abus ait été dirigée à la fois contre Bell Canada et contre BCE, les juridictions inférieures ont tenu compte de toutes les circonstances dans lesquelles les administrateurs ont été appelés à prendre leurs décisions, ce qui incluait les obligations de Bell Canada envers ses détenteurs de débentures. Elles n'ont pas conclu que les administrateurs de BCE et de Bell

distinct corporate character of the two entities does not figure in our analysis.

Canada auraient dû prendre des décisions différentes relativement aux deux sociétés. Par conséquent, le caractère distinct des deux entités ne sera pas pris en considération dans notre analyse.

V. Analysis

A. *Overview of Rights, Obligations and Remedies Under the CBCA*

[34] An essential component of a corporation is its capital stock, which is divided into fractional parts, the shares: *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744 (H.L.), at p. 767; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438. While the corporation is ongoing, shares confer no right to its underlying assets.

[35] A share "is not an isolated piece of property . . . [but] a 'bundle' of interrelated rights and liabilities": *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at p. 1025, *per* La Forest J. These rights include the right to a proportionate part of the assets of the corporation upon winding-up and the right to oversee the management of the corporation by its board of directors by way of votes at shareholder meetings.

[36] The directors are responsible for the governance of the corporation. In the performance of this role, the directors are subject to two duties: a fiduciary duty to the corporation under s. 122(1)(*a*) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s. 122(1)(*b*) (the duty of care). The second duty is not at issue in these proceedings as this is not a claim against the directors of the corporation for failing to meet their duty of care. However, this case does involve the fiduciary duty of the directors to the corporation, and particularly the "fair treatment" component of this duty, which, as will be seen, is fundamental to the reasonable expectations of stakeholders claiming an oppression remedy.

V. Analyse

A. *Aperçu des droits, obligations et recours prévus par la LCSA*

[34] Une composante essentielle d'une société est son capital social, qui est fractionné en actions : *Bradbury c. English Sewing Cotton Co.*, [1923] A.C. 744 (H.L.), p. 767; *Zwicker c. Stanbury*, [1953] 2 R.C.S. 438. Tant que la société continue d'exister, les actions ne confèrent aucun droit sur ses éléments d'actifs.

[35] Une action « n'est pas un bien pris isolément [. . .] [mais] un "ensemble" de droits et d'obligations étroitement liés entre eux » : *Sparling c. Québec (Caisse de dépôt et placement du Québec)*, [1988] 2 R.C.S. 1015, p. 1025, le juge La Forest. Ces droits comprennent le droit à une part proportionnelle des éléments d'actif de la société lors de sa liquidation et un droit de regard sur la façon dont le conseil d'administration gère la société, qui s'exprime par l'exercice du droit de vote lors des assemblées des actionnaires.

[36] Les administrateurs sont responsables de la gouvernance de la société. À ce titre, ils doivent s'acquitter de deux obligations : leur obligation fiduciaire envers la société prévue à l'al. 122(1)*a*) (l'obligation fiduciaire) et l'obligation d'agir avec le soin, la diligence et la compétence dont ferait preuve une personne prudente en pareilles circonstances, prévue à l'al. 122(1)*b*) (l'obligation de diligence). Cette deuxième obligation n'est pas en cause en l'espèce, car on ne reproche pas aux administrateurs d'avoir manqué à leur obligation de diligence. L'obligation fiduciaire des administrateurs envers la société est toutefois en cause, plus particulièrement en ce qui concerne l'une de ses composantes, soit l'obligation de « traitement équitable » qui, comme on le verra, est fondamentale pour ce qui est des attentes raisonnables des parties intéressées qui présentent une demande de redressement pour abus.

[37] The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear — it is to the corporation: *Peoples Department Stores*.

[38] The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.

[39] In *Peoples Department Stores*, this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders. As stated by Major and Deschamps JJ., at para. 42:

> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

As will be discussed, cases dealing with claims of oppression have further clarified the content of the fiduciary duty of directors with respect to the range of interests that should be considered in determining what is in the best interests of the corporation, acting fairly and responsibly.

[37] L'obligation fiduciaire des administrateurs envers la société tire son origine de la common law. Elle leur impose d'agir au mieux des intérêts de la société. Souvent les intérêts des actionnaires et des parties intéressées concordent avec ceux de la société. Toutefois, lorsque ce n'est pas le cas, l'obligation des administrateurs est claire : elle est envers la société (*Magasins à rayons Peoples*).

[38] L'obligation fiduciaire des administrateurs est un concept large et contextuel. Elle ne se limite pas à la valeur des actions ou au profit à court terme. Dans le contexte de la continuité de l'entreprise, cette obligation vise les intérêts à long terme de la société. Son contenu varie selon la situation. Elle exige à tous le moins des administrateurs qu'ils veillent à ce que la société s'acquitte de ses obligations légales mais, selon le contexte, elle peut aussi englober d'autres exigences. Quoi qu'il en soit, l'obligation fiduciaire des administrateurs est de nature impérative; ils sont tenus d'agir au mieux des intérêts de la société.

[39] Selon l'arrêt *Magasins à rayons Peoples* de notre Cour, bien que les administrateurs *doivent* agir au mieux des intérêts de la société, il peut également être opportun, *sans être obligatoire*, qu'ils tiennent compte de l'effet des décisions concernant la société sur l'actionnariat ou sur un groupe particuliers de parties intéressées. Comme l'ont indiqué les juges Major et Deschamps au par. 42 :

> Nous considérons qu'il est juste d'affirmer en droit que, pour déterminer s'il agit au mieux des intérêts de la société, il peut être légitime pour le conseil d'administration, vu l'ensemble des circonstances dans un cas donné, de tenir compte notamment des intérêts des actionnaires, des employés, des fournisseurs, des créanciers, des consommateurs, des gouvernements et de l'environnement.

On verra plus loin que la jurisprudence sur les recours en cas d'abus a clarifié davantage le contenu de l'obligation fiduciaire des administrateurs quant à l'éventail des intérêts qu'ils doivent prendre en compte pour déterminer ce qui est au mieux des intérêts de la société, en agissant de façon équitable et responsable.

[40] In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

[40] En déterminant ce qui sert au mieux les intérêts de la société, les administrateurs peuvent examiner notamment les intérêts des actionnaires, des employés, des créanciers, des consommateurs, des gouvernements et de l'environnement. Les tribunaux doivent faire preuve de la retenue voulue à l'égard de l'appréciation commerciale des administrateurs qui tiennent compte de ces intérêts connexes, comme le veut la « règle de l'appréciation commerciale ». Cette règle appelle les tribunaux à respecter une décision commerciale, pourvu qu'elle s'inscrive dans un éventail de solutions raisonnables possibles : voir *Maple Leaf Foods Inc. c. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr c. Danier Leather Inc.*, [2007] 3 R.C.S. 331, 2007 CSC 44. Elle rend compte du fait que les administrateurs qui, aux termes du par. 102(1) de la *LCSA*, ont pour fonction de gérer les activités commerciales et les affaires internes de la société, sont souvent plus à même de déterminer ce qui sert au mieux ses intérêts. Cela vaut tant pour les décisions touchant les intérêts des parties intéressées que pour d'autres décisions relevant des administrateurs.

[41] Normally only the beneficiary of a fiduciary duty can enforce the duty. In the corporate context, however, this may offer little comfort. The directors who control the corporation are unlikely to bring an action against themselves for breach of their own fiduciary duty. The shareholders cannot act in the stead of the corporation; their only power is the right to oversee the conduct of the directors by way of votes at shareholder assemblies. Other stakeholders may not even have that.

[41] Normalement, seul le bénéficiaire d'une obligation fiduciaire peut en réclamer l'exécution. Toutefois, dans le contexte du droit des sociétés, suivre cette règle se révélerait souvent illusoire. Il est en effet invraisemblable que les administrateurs qui contrôlent la société intentent contre eux-mêmes une action pour manquement à leur propre obligation fiduciaire. Les actionnaires ne peuvent agir à la place de la société. Leur seul pouvoir réside dans leur droit de regard sur le comportement des administrateurs qui s'exprime par l'exercice de leur droit de vote aux assemblées des actionnaires. D'autres parties intéressées n'ont même pas ce pouvoir.

[42] To meet these difficulties, the common law developed a number of special remedies to protect the interests of shareholders and stakeholders of the corporation. These remedies have been affirmed, modified and supplemented by the *CBCA*.

[42] Pour pallier ces difficultés, la common law a élaboré des recours spéciaux visant à protéger les intérêts des actionnaires et des parties intéressées. La *LCSA* a maintenu, modifié et complété ces recours.

[43] The first remedy provided by the *CBCA* is the s. 239 derivative action, which allows stakeholders to enforce the directors' duty to the corporation when the directors are themselves unwilling

[43] Le premier recours prévu par la *LCSA* est l'action oblique, décrite à l'art. 239, qui permet aux parties intéressées de forcer les administrateurs récalcitrants à s'acquitter de leurs obligations

to do so. With leave of the court, a complainant may bring (or intervene in) a derivative action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation, including the rights correlative with the directors' duties to the corporation. (The requirement of leave serves to prevent frivolous and vexatious actions, and other actions which, while possibly brought in good faith, are not in the interest of the corporation to litigate.)

envers la société. Le plaignant peut, avec l'autorisation du tribunal, intenter une action oblique au nom et pour le compte de la société ou de l'une de ses filiales (ou y intervenir) pour faire respecter un droit de la société, et notamment un droit corrélatif à une obligation des administrateurs envers la société. (L'obligation d'obtenir une autorisation vise à prévenir les actions frivoles ou vexatoires ainsi que les actions qui, même intentées de bonne foi, ne servent pas les intérêts de la société.)

[44] A second remedy lies against the directors in a civil action for breach of duty of care. As noted, s. 122(1)(*b*) of the *CBCA* requires directors and officers of a corporation to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". This duty, unlike the s. 122(1)(*a*) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability: *Peoples Department Stores*. Section 122(1)(*b*) does not provide an independent foundation for claims. However, applying the principles of *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, courts may take this statutory provision into account as to the standard of behaviour that should reasonably be expected.

[44] Deuxièmement, les administrateurs peuvent faire l'objet d'une action civile pour manquement à leur obligation de diligence. Comme il en a été fait mention, l'al. 122(1)*b*) de la *LCSA* oblige les administrateurs et les dirigeants d'une société à agir « avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente ». Cette obligation, à la différence de l'obligation fiduciaire énoncée à l'al. 122(1)*a*), n'est pas uniquement envers la société. Elle peut donc engager la responsabilité des administrateurs envers les autres parties intéressées, conformément aux principes régissant la responsabilité délictuelle et extracontractuelle : *Magasins à rayons Peoples*. L'alinéa 122(1)*b*) ne peut servir de fondement indépendant à un recours, mais les tribunaux peuvent s'en inspirer, conformément aux principes énoncés dans *La Reine du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205, pour définir la norme de conduite à laquelle on peut raisonnablement s'attendre.

[45] A third remedy, grounded in the common law and endorsed by the *CBCA*, is a s. 241 action for oppression. Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.

[45] Un troisième recours de common law codifié par la *LCSA* est la demande de redressement pour abus prévue à l'art. 241. Contrairement à l'action oblique, qui a pour objet le respect d'un droit de la société proprement dite, la demande de redressement pour abus vise la réparation d'une atteinte aux intérêts en law ou en equity des parties intéressées touchées par le comportement abusif d'une société ou de ses administrateurs. Ce recours est ouvert à un large éventail de parties intéressées — détenteurs de valeurs mobilières, créanciers, administrateurs et dirigeants.

[46] Additional "remedial" provisions are found in provisions of the *CBCA* providing for court

[46] Enfin, les dispositions de la *LCSA* qui exigent l'obtention d'une approbation judiciaire

approval in certain cases. An arrangement under s. 192 of the *CBCA* is one of these. While s. 192 cannot be described as a remedy *per se*, it has remedial-like aspects. It is directed at the situation of corporations seeking to effect fundamental changes to the corporation that affects stakeholder rights. The Act provides that such arrangements require the approval of the court. Unlike the civil action and oppression, which focus on the conduct of the directors, a s. 192 review requires a court approving a plan of arrangement to be satisfied that: (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is fair and reasonable. If the corporation fails to discharge its burden of establishing these elements, approval will be withheld and the proposed change will not take place. In assessing whether the arrangement should be approved, the court will hear arguments from opposing security holders whose rights are being arranged. This provides an opportunity for security holders to argue against the proposed change.

dans certains cas ont aussi une vocation réparatrice. L'article 192, relatif aux arrangements, en est un exemple. Bien que cet article ne puisse pas être décrit comme une disposition qui établit un recours à proprement parler, il comporte des aspects qui s'y apparentent. Il vise les situations où une société envisage des changements fondamentaux qui modifient les droits d'une partie intéressée. La *LCSA* prévoit que de tels arrangements doivent être approuvés par le tribunal. Contrairement à l'action civile et à la demande de redressement pour abus, qui mettent l'accent sur le comportement des administrateurs, l'examen prévu à l'art. 192 exige simplement que le tribunal qui approuve un plan d'arrangement soit convaincu que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est équitable et raisonnable. Si la société ne s'acquitte pas de son fardeau de prouver ces éléments, sa demande d'approbation sera rejetée et elle ne pourra procéder au changement proposé. Pour décider s'il approuvera l'arrangement, le tribunal entend les détenteurs de valeurs mobilières dont les droits sont visés par l'arrangement et qui s'y opposent, ce qui leur donne la possibilité de faire valoir leurs objections au changement proposé.

[47] Two of these remedies are in issue in these actions: the action for oppression and approval of an arrangement under s. 192. The trial judge treated these remedies as involving distinct considerations and concluded that the debentureholders had failed to establish entitlement to either remedy. The Court of Appeal, by contrast, viewed the two remedies as substantially overlapping, holding that both turned on whether the directors had properly considered the debentureholders' expectations. Having found on this basis that the requirements of s. 192 were not met, the Court of Appeal concluded that the action for oppression was moot. As will become apparent, we do not endorse this approach. In our view, the s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. Accordingly, we find it necessary to consider both the claims

[47] Deux de ces recours sont en cause en l'espèce : la demande de redressement pour abus et l'approbation d'un arrangement sous le régime de l'art. 192. Le juge de première instance a appliqué des considérations distinctes à chacun de ces recours, et conclu que les détenteurs de débentures n'avaient établi le bien-fondé ni de l'un ni de l'autre. La Cour d'appel a considéré, au contraire, que les recours se chevauchaient de façon importante, en ce qu'ils posaient tous deux la question de savoir si les administrateurs avaient suffisamment tenu compte des attentes des détenteurs de débentures. Ayant conclu, à cet égard, que les exigences de l'art. 192 n'avaient pas été respectées, elle a considéré la demande de redressement pour abus comme théorique. La Cour ne souscrit pas à ce raisonnement, comme elle l'expliquera plus loin. À notre avis, la demande de redressement pour abus et l'approbation judiciaire d'une modification

for oppression and the s. 192 application for approval.

de structure exigée par l'art. 192 sont des recours différents qui soulèvent des questions différentes. Par conséquent, la Cour estime nécessaire d'examiner tant les demandes de redressement pour abus que la demande d'approbation fondée sur l'art. 192.

[48] The debentureholders have formally cross-appealed on the oppression remedy. However, due to the Court of Appeal's failure to consider this issue, the debentureholders did not advance separate arguments before this Court. As certain aspects of their position are properly addressed within the context of an analysis of oppression under s. 241, we have considered them here.

[48] Les détenteurs de débentures ont formé officiellement un pourvoi incident relativement à la demande de redressement pour abus. Toutefois, la Cour d'appel ne s'étant pas prononcée sur ce recours, ils n'ont pas présenté d'argumentation distincte à cet égard devant notre Cour. Néanmoins, comme certains aspects de leur position sont traités à bon droit dans le cadre de l'analyse de la demande de redressement pour abus en vertu de l'art. 241, ils seront examinés dans les présents motifs.

[49] Against this background, we turn to a more detailed consideration of the claims.

[49] À la lumière de ce qui précède, la Cour passe maintenant à l'examen plus approfondi des demandes.

B. *The Section 241 Oppression Remedy*

B. *La demande de redressement pour abus prévue à l'art. 241*

[50] The debentureholders in these appeals claim that the directors acted in an oppressive manner in approving the sale of BCE, contrary to s. 241 of the *CBCA*.

[50] Les détenteurs de débentures soutiennent que les administrateurs ont agi de façon abusive en l'espèce en approuvant la vente de BCE, contrevenant ainsi à l'art. 241 de la *LCSA*.

[51] Security holders of a corporation or its affiliates fall within the class of persons who may be permitted to bring a claim for oppression under s. 241 of the *CBCA*. The trial judge permitted the debentureholders to do so, although in the end he found the claim had not been established. The question is whether the trial judge erred in dismissing the claim.

[51] Les détenteurs de valeurs mobilières d'une société ou de l'une des personnes morales de son groupe appartiennent à la catégorie des personnes qui peuvent être autorisées à demander un redressement pour abus en vertu de l'art. 241 de la *LCSA*. Le juge de première instance a autorisé les détenteurs de débentures à présenter une telle demande, mais il a conclu en bout de ligne qu'ils n'en avaient pas établi le bien-fondé. Il faut maintenant déterminer si le juge de première instance a commis une erreur en rejetant cette demande.

[52] We will first set out what must be shown to establish the right to a remedy under s. 241, and then review the conduct complained of in the light of those requirements.

[52] La Cour décrira d'abord la preuve exigée pour que soit établi le droit à un redressement en vertu de l'art. 241, puis elle examinera le comportement visé à la lumière de ces exigences.

(1) The Law

[53] Section 241(2) provides that a court may make an order to rectify the matters complained of where

(*a*) any act or omission of the corporation or any of its affiliates effects a result,

(*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer . . . .

[54] Section 241 jurisprudence reveals two possible approaches to the interpretation of the oppression provisions of the *CBCA*: M. Koehnen, *Oppression and Related Remedies* (2004), at pp. 79-80 and 84. One approach emphasizes a strict reading of the three types of conduct enumerated in s. 241 (oppression, unfair prejudice and unfair disregard): see *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324 (H.L.); *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (S.C.); *Stech v. Davies*, [1987] 5 W.W.R. 563 (Alta. Q.B.). Cases following this approach focus on the precise content of the categories "oppression", "unfair prejudice" and "unfair disregard". While these cases may provide valuable insight into what constitutes oppression in particular circumstances, a categorical approach to oppression is problematic because the terms used cannot be put into watertight compartments or conclusively defined. As Koehnen puts it (at p. 84), "[t]he three statutory components of oppression are really adjectives that try to describe inappropriate conduct. . . . The difficulty with adjectives is they provide no assistance in formulating principles that should underlie court intervention."

(1) L'état du droit

[53] Le paragraphe 241(2) permet au tribunal de redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

a) soit en raison de son comportement;

b) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;

c) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[54] Deux façons différentes d'aborder les dispositions de la *LCSA* applicables en cas d'abus se dégagent de la jurisprudence relative à l'art. 241 : M. Koehnen, *Oppression and Related Remedies* (2004), p. 79-80 et 84. L'une d'elles appelle à une interprétation stricte des trois types de comportement énumérés à l'art. 241 (abus, préjudice injuste et omission injuste de tenir compte des intérêts) : voir *Scottish Co-operative Wholesale Society Ltd. c. Meyer*, [1959] A.C. 324 (H.L.); *Diligenti c. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (C.S.); *Stech c. Davies*, [1987] 5 W.W.R. 563 (B.R. Alb.). Les arrêts guidés par cette interprétation s'intéressent à la teneur exacte d'un « abus », d'un « préjudice injuste » ou d'une « omission injuste de tenir compte » des intérêts en cause. Bien que ces décisions puissent fournir des indications valables sur ce qui constitue un abus dans une situation donnée, envisager la notion d'abus à partir de catégories définies pose problème parce que les termes utilisés ne peuvent être classés dans des compartiments étanches ni définis une fois pour toutes. Comme le dit Koehnen (p. 84) : [TRADUCTION] « Les trois composantes légales de l'abus sont en fait des qualificatifs destinés à décrire un comportement incorrect. [. . .] Le problème lié aux qualificatifs tient à ce qu'ils ne sont d'aucun secours pour la formulation des principes qui doivent fonder l'intervention du tribunal. »

[55] Other cases have focused on the broader principles underlying and uniting the various aspects of oppression: see *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.), var'd (1989), 45 B.L.R. 110 (Alta. C.A.); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.); *Westfair Foods Ltd. v. Watt* (1991), 79 D.L.R. (4th) 48 (Alta. C.A.).

[56] In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.

[57] We preface our discussion of the twin prongs of the oppression inquiry by two preliminary observations that run throughout all the jurisprudence.

[58] First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.

[59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the

[55] D'autres décisions sont axées sur les principes plus larges qui sous-tendent et unifient les différents aspects de la notion d'abus : voir *First Edmonton Place Ltd. c. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (B.R. Alb.), mod. par (1989), 45 B.L.R. 110 (C.A. Alb.); *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (C. div. Ont.); *Westfair Foods Ltd. c. Watt* (1991), 79 D.L.R. (4th) 48 (C.A. Alb.).

[56] À notre avis, la meilleure façon d'interpréter le par. 241(2) est de combiner les deux approches exposées dans la jurisprudence. Il faut d'abord considérer les principes sur lesquels repose la demande de redressement pour abus et, en particulier, le concept des attentes raisonnables. S'il est établi qu'une attente raisonnable a été frustrée, il faut déterminer si le comportement reproché constitue un « abus », un « préjudice injuste » ou une « omission injuste de tenir compte » des intérêts en cause au sens du par. 241(2) de la *LCSA*.

[57] En guise d'introduction aux deux volets de l'examen d'une allégation d'abus, la Cour formulera deux remarques préliminaires issues de l'ensemble de la jurisprudence.

[58] Premièrement, la demande de redressement pour abus est un recours en equity. Elle vise à rétablir la justice — ce qui est « juste et équitable ». Elle confère au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité : *Wright c. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (C. Ont. (Div. gén.)), p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (C.A. Alb.), p. 374; voir, de façon plus générale, Koehnen, p. 78-79. Par conséquent, les tribunaux saisis d'une demande de redressement pour abus doivent tenir compte de la réalité commerciale, et pas seulement de considérations strictement juridiques : *Scottish Co-operative Wholesale Society*, p. 343.

[59] Deuxièmement, comme beaucoup de recours en equity, le sort d'une demande de redressement pour abus dépend des faits en cause. On détermine ce qui est juste et équitable selon les

relationships at play. Conduct that may be oppressive in one situation may not be in another.

[60] Against this background, we turn to the first prong of the inquiry, the principles underlying the remedy of oppression. In *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), at p. 379, Lord Wilberforce, interpreting s. 222 of the U.K. *Companies Act, 1948*, described the remedy of oppression in the following seminal terms:

> The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

[61] Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the *CBCA*. It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.

[62] As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

attentes raisonnables des parties intéressées en tenant compte du contexte et des rapports en jeu. Un comportement abusif dans une situation donnée ne sera pas nécessairement abusif dans une situation différente.

[60] À partir de ces considérations générales, la Cour passe maintenant au premier volet de l'analyse, soit à l'examen des principes qui sous-tendent la demande de redressement pour abus. Dans *Ebrahimi c. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), p. 379, lord Wilberforce, qui interprétait l'art. 222 de la *Companies Act, 1948* du Royaume-Uni, a décrit la demande de redressement pour abus en ces termes novateurs :

> [TRADUCTION] Par ces mots [« juste et équitable »] on reconnaît le fait qu'une société à responsabilité limitée est davantage qu'une simple entité légale dotée d'une personnalité morale propre. Il y a place, en droit des sociétés, pour la reconnaissance du fait que, derrière cette société, ou au sein de celle-ci, il y a des individus et que ces individus ont des droits, des attentes et des obligations entre eux qui ne se dissolvent pas nécessairement dans la structure de la société.

[61] Lord Wilberforce a présenté le recours en equity en faisant référence aux « droits », « attentes » et « obligations » des individus. Les mots « droits » et « obligations » renvoient à des intérêts dont on peut exiger le respect en droit sans faire appel à des recours spéciaux, par exemple, au moyen d'un recours contractuel ou de l'action oblique prévue à l'art. 239 de la *LCSA*. Restent donc les « attentes » des parties intéressées comme objet de la demande de redressement pour abus. Les attentes raisonnables de ces parties intéressées constituent la pierre angulaire de la demande de redressement pour abus.

[62] Comme le suggère le mot « raisonnable », le concept d'attentes raisonnables est objectif et contextuel. Les attentes réelles d'une partie intéressée en particulier ne sont pas concluantes. Lorsqu'il s'agit de déterminer s'il serait « juste et équitable » d'accueillir un recours, la question est de savoir si ces attentes sont raisonnables compte tenu des faits propres à l'espèce, des rapports en cause et de l'ensemble du contexte, y compris la possibilité d'attentes et de demandes opposées.

[63] Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.

[64] Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".

[65] Section 241(2) speaks of the "act or omission" of the corporation or any of its affiliates, the conduct of "business or affairs" of the corporation and the "powers of the directors of the corporation or any of its affiliates". Often, the conduct complained of is the conduct of the corporation or of its directors, who are responsible for the governance of the corporation. However, the conduct of other actors, such as shareholders, may also support a claim for oppression: see Koehnen, at pp. 109-10; *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Ct. (Gen. Div.)). In the appeals before us, the claims for oppression are based on allegations that the directors of BCE and Bell Canada failed to comply with the reasonable

[63] Des circonstances particulières suscitent des attentes particulières. Les parties intéressées entretiennent des rapports entre elles et avec la société, sur le fondement de perceptions et d'attentes sur lesquelles elles sont en droit de miser, sous réserve de leur caractère raisonnable dans les circonstances : voir *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (C.S.J. Ont.). Le recours en cas d'abus vise précisément à assurer le respect de ces attentes.

[64] La possibilité d'un conflit entre les intérêts et les attentes de différentes parties intéressées ajoute à la complexité de l'appréciation du caractère raisonnable d'une attente particulière. La demande de redressement pour abus reconnaît qu'une société est une entité qui comprend et touche différents groupes et individus dont les intérêts peuvent être opposés. Les administrateurs ou d'autres parties impliquées dans les affaires de la société peuvent, en prenant des décisions à son égard ou en tentant de résoudre des conflits, retenir des solutions qui maximisent abusivement ou injustement les intérêts d'un groupe en particulier au détriment d'autres parties intéressées. Certes, la société et les actionnaires ont le droit de maximiser les bénéfices et la valeur des actions, mais ils ne peuvent le faire en traitant des parties intéressées inéquitablement. Un traitement équitable est, fondamentalement, ce à quoi les parties intéressées peuvent « raisonnablement s'attendre » — et le thème central récurrent de toute la jurisprudence en matière d'abus.

[65] Le paragraphe 241(2) parle du « comportement » de la société ou de l'une des personnes morales de son groupe, de la conduite de « ses activités commerciales ou ses affaires internes » et de l'exercice par « ses administrateurs » de leurs « pouvoirs ». La situation dont on se plaint est souvent provoquée par le comportement de la société ou de ses administrateurs, qui sont responsables de la gouvernance de la société. Une demande de redressement pour abus peut toutefois découler du comportement d'autres parties impliquées dans les affaires de la société, comme des actionnaires : voir Koehnen, p. 109-110; *GATX Corp. c. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (C. Ont. (Div. gén.)). Dans les présents pourvois,

expectations of the debentureholders, and it is unnecessary to go beyond this.

les demandes de redressement pour abus sont fondées sur des allégations selon lesquelles les administrateurs de BCE et de Bell Canada ont frustré les attentes raisonnables des détenteurs de débentures et il est inutile d'étendre notre examen au-delà de ces allégations.

[66] The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

[66] Le fait que le comportement des administrateurs soit souvent au centre des actions pour abus peut sembler indiquer que les administrateurs sont assujettis à une obligation directe envers les parties intéressées qui risquent d'être touchées par une décision de la société. En agissant au mieux des intérêts de la société, les administrateurs peuvent être obligés de considérer les effets de leurs décisions sur les parties intéressées, comme les détenteurs de débentures en l'espèce. C'est ce qu'on entend lorsqu'on affirme qu'un administrateur doit agir au mieux des intérêts de la société en tant qu'entreprise socialement responsable. Toutefois, les administrateurs ont une obligation fiduciaire envers la société, et uniquement envers la société. Certes, on parle parfois de l'obligation des administrateurs envers la société et envers les parties intéressées. Cela ne porte habituellement pas à conséquence, puisque les attentes raisonnables d'une partie intéressée quant à un résultat donné coïncident souvent avec les intérêts de la société. Il peut néanmoins arriver (comme en l'espèce) que ce ne soit pas le cas. Il importe de préciser que l'obligation des administrateurs est alors envers la société et non envers les parties intéressées, et que les parties intéressées ont pour seule attente raisonnable celle que les administrateurs agissent au mieux des intérêts de la société.

[67] Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of

[67] Après avoir examiné le concept des attentes raisonnables qui sous-tend la demande de redressement pour abus, la Cour passe au second volet du recours prévu à l'art. 241. Toutes les attentes déçues, même lorsqu'elles sont raisonnables, ne donnent pas ouverture à une demande sous le régime de l'art. 241. Cette disposition exige que le comportement visé constitue un « abus », un « préjudice injuste » ou une « omission injuste de tenir compte » des intérêts en cause. Le terme « abus » désigne un comportement coercitif et excessif et évoque la mauvaise foi. Le « préjudice injuste »

interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

[68] In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[69] Against the background of this overview, we turn to a more detailed discussion of these inquiries.

(a) *Proof of a Claimant's Reasonable Expectations*

[70] At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

[71] It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is

peut impliquer un état d'esprit moins coupable, mais dont les conséquences sont néanmoins injustes. Enfin, l'« omission injuste de tenir compte » d'intérêts donnés étend l'application de ce recours à une situation où un intérêt n'est pas pris en compte parce qu'il est perçu comme sans importance, contrairement aux attentes raisonnables des parties intéressées : voir Koehnen, p. 81-88. Ces expressions décrivent, à l'aide de qualificatifs, des façons dont les parties impliquées dans les affaires d'une société peuvent frustrer les attentes raisonnables des parties intéressées.

[68] En résumé, les considérations qui précèdent indiquent que le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions interreliées : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement qui correspond à la définition d'un « abus », d'un « préjudice injuste » ou d'une « omission injuste de tenir compte » d'un intérêt pertinent?

[69] C'est sur cette toile de fond que la Cour examinera maintenant ces questions de façon plus approfondie.

a) *La preuve de l'attente raisonnable*

[70] L'auteur de la demande de redressement doit d'abord préciser quelles attentes ont censément été frustrées par le comportement en cause et en établir le caractère raisonnable. Comme cela a déjà été mentionné, on peut d'emblée déduire qu'une partie intéressée s'attend raisonnablement à être traitée équitablement. Toutefois, comme on l'a vu, l'abus touche généralement une attente particulière propre à une situation donnée. Il faut dès lors établir l'existence de cette attente raisonnable de la partie intéressée. La preuve d'une attente peut se faire de différentes façons selon les faits.

[71] Il est impossible de dresser une liste exhaustive des situations qui peuvent susciter une attente raisonnable, compte tenu de leur nature circonstancielle. Il est toutefois possible d'énoncer quelques

not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R. W. V. Dickerson, J. L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. I, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.

[72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

(i) Commercial Practice

[73] Commercial practice plays a significant role in forming the reasonable expectations of the parties. A departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of his or her legal rights will generally (although not inevitably) give rise to a remedy: *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J.); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Ct. (Gen. Div.)), var'd (1998), 110 O.A.C. 160 (Div. Ct.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.), leave to appeal refused, [2002] 1 S.C.R. vi.

(ii) The Nature of the Corporation

[74] The size, nature and structure of the corporation are relevant factors in assessing reasonable

principes généraux. Le recours prévu par l'art. 241 n'exige pas qu'il y ait illégalité; cet article entre en jeu « lorsque la conduite attaquée est [fautive], même si elle n'est pas en fait illégale » : Comité Dickerson (R. W. V. Dickerson, J. L. Howard et L. Getz), *Propositions pour un nouveau droit des corporations commerciales canadiennes* (1971), vol. I, p. 188. Ce recours est axé sur les notions de justice et d'équité plutôt que sur les droits. Pour déterminer si des intérêts ou attentes raisonnables doivent être pris en considération, les tribunaux vont au-delà de la légalité et se demandent ce qui est équitable compte tenu de tous les intérêts en jeu : *Re Keho Holdings Ltd. and Noble*. Il s'ensuit que toute conduite préjudiciable pour une partie intéressée ne donnera pas nécessairement ouverture à une demande de redressement pour abus contre la société.

[72] Des facteurs utiles pour l'appréciation d'une attente raisonnable ressortent de la jurisprudence. Ce sont notamment les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées.

(i) Les pratiques commerciales

[73] Les pratiques commerciales jouent un rôle important dans la formation des attentes raisonnables des parties. Une dérogation aux pratiques commerciales habituelles qui entrave ou rend impossible l'exercice de ses droits par le plaignant donnera généralement (mais pas inévitablement) ouverture à un recours : *Adecco Canada Inc. c. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (C.S.J. Ont.); *SCI Systems Inc. c. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (C. Ont. (Div. gén.)), mod. par (1998), 110 O.A.C. 160 (C. div.); *Downtown Eatery (1993) Ltd. c. Ontario* (2001), 200 D.L.R. (4th) 289 (C.A. Ont.), autorisation d'appel refusée, [2002] 1 R.C.S. vi.

(ii) La nature de la société

[74] La taille, la nature et la structure de la société constituent également des facteurs pertinents

expectations: *First Edmonton Place*; G. Shapira, "Minority Shareholders' Protection — Recent Developments" (1982), 10 *N.Z. Univ. L. Rev.* 134, at pp. 138 and 145-46. Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.

dans l'appréciation d'une attente raisonnable : *First Edmonton Place*; G. Shapira, « Minority Shareholders' Protection — Recent Developments » (1982), 10 *N.Z. Univ. L. Rev.* 134, p. 138 et 145-146. Il est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une petite société fermée qu'à ceux d'une société ouverte de plus grande taille.

(iii) Relationships

[75] Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).

(iii) Les rapports existants

[75] Les rapports personnels entre le plaignant et d'autres parties impliquées dans les affaires de la société peuvent également donner naissance à des attentes raisonnables. Par exemple, il se peut que les rapports entre actionnaires fondés sur des liens familiaux ou des liens d'amitié n'obéissent pas aux mêmes normes que les rapports entre actionnaires sans lien de dépendance d'une société ouverte. Pour reprendre les propos tenus dans l'affaire *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (C.A. Ont.), [TRADUCTION] « lorsqu'une société fermée est en cause, le tribunal peut tenir compte du rapport entre les actionnaires et non simplement des droits » (p. 727).

(iv) Past Practice

[76] Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance: *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario*. For instance, in *Gibbons*, the court found that the shareholders had a legitimate expectation that all monies paid out of the corporation would be paid to shareholders in proportion to the percentage of shares they held. The authorization by the new directors to pay fees to themselves, for which the shareholders would not receive any comparable payments, was in breach of those expectations.

(iv) Les pratiques antérieures

[76] Les pratiques antérieures peuvent faire naître des attentes raisonnables, plus particulièrement chez les actionnaires d'une société fermée quant à leur participation aux profits et à la gouvernance de la société : *Gibbons c. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario*. Dans *Gibbons*, par exemple, la Cour a jugé que les actionnaires pouvaient légitimement s'attendre à ce que tous les versements faits aux actionnaires par la société soient proportionnels au pourcentage d'actions qu'ils détenaient. La décision des nouveaux administrateurs de se verser des honoraires, pour lesquels les actionnaires ne recevraient pas de paiements correspondants, était contraire à ces attentes.

[77] It is important to note that practices and expectations can change over time. Where valid commercial reasons exist for the change and the

[77] Il importe de souligner que les pratiques et les attentes peuvent changer avec le temps. Lorsqu'un changement est motivé par des raisons

change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice: *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (Alta. Q.B.), aff'd (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

commerciales valides et qu'il ne porte pas atteinte aux droits du plaignant, il ne saurait exister d'attente raisonnable que les administrateurs s'abstiendront de déroger aux pratiques antérieures : *Alberta Treasury Branches c. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (B.R. Alb.), conf. par (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

(v) Preventive Steps

[78] In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered: *First Edmonton Place*; *SCI Systems*.

(v) Les mesures préventives

[78] Lorsqu'il apprécie le caractère raisonnable d'une attente d'une partie intéressée, le tribunal peut se demander si le plaignant aurait pu prendre des mesures pour se protéger contre le préjudice qu'il allègue avoir subi. Ainsi, il peut être pertinent de déterminer si un créancier garanti qui se plaint d'un abus aurait pu négocier des mesures de protection contre le préjudice en cause : *First Edmonton Place*; *SCI Systems*.

(vi) Representations and Agreements

[79] Shareholder agreements may be viewed as reflecting the reasonable expectations of the parties: *Main*; *Lyall v. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (B.C.C.A.).

(vi) Les déclarations et conventions

[79] On peut considérer une convention d'actionnaires comme l'expression des attentes raisonnables des parties : *Main*; *Lyall c. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (C.A.C.-B.).

[80] Reasonable expectations may also be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications: *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613 (Sask. Q.B.), aff'd (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (Ont. Ct. (Gen. Div.)); *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Gen. Div.), var'd (1998), 38 O.R. (3d) 749 (C.A.).

[80] Les déclarations faites à des parties intéressées ou au public dans des documents promotionnels, des prospectus, des circulaires d'offre et d'autres communications peuvent également influer sur les attentes raisonnables : *Tsui c. International Capital Corp.*, [1993] 4 W.W.R. 613 (B.R. Sask.), conf. par (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada c. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (C. Ont. (Div. gén.)); *Themadel Foundation c. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Div. gén.), mod. par (1998), 38 O.R. (3d) 749 (C.A.).

(vii) Fair Resolution of Conflicting Interests

[81] As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary

(vii) La conciliation équitable d'intérêts opposés

[81] Comme cela a été souligné, des conflits peuvent surgir soit entre les intérêts de différentes parties intéressées, soit entre les intérêts des parties intéressées et ceux de la société. Lorsque le conflit touche les intérêts de la société, il revient aux administrateurs de la société de le résoudre

duty to act in the best interests of the corporation, viewed as a good corporate citizen.

[82] The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

[83] Directors may find themselves in a situation where it is impossible to please all stakeholders. The "fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction": *Maple Leaf Foods*, *per* Weiler J.A., at p. 192.

[84] There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

[85] On these appeals, it was suggested on behalf of the corporations that the "*Revlon* line" of cases from Delaware support the principle that where the interests of shareholders conflict with the interests of creditors, the interests of shareholders should prevail.

[86] The "*Revlon* line" refers to a series of Delaware corporate takeover cases, the two most important of which are *Revlon, Inc. v. MacAndrews*

conformément à leur obligation fiduciaire d'agir au mieux des intérêts de la société en tant qu'entreprise socialement responsable.

[82] Dans son ensemble, la jurisprudence en matière d'abus confirme que l'obligation des administrateurs d'agir au mieux des intérêts de la société inclut le devoir de traiter de façon juste et équitable chaque partie intéressée touchée par les actes de la société. Il n'existe pas de règles absolues. Il faut se demander chaque fois si, dans les circonstances, les administrateurs ont agi au mieux des intérêts de la société, en prenant en considération tous les facteurs pertinents, ce qui inclut, sans s'y limiter, la nécessité de traiter les parties intéressées qui sont touchées de façon équitable, conformément aux obligations de la société en tant qu'entreprise socialement responsable.

[83] Les administrateurs peuvent se retrouver dans une situation où il leur est impossible de satisfaire toutes les parties intéressées. [TRADUCTION] « Il importe peu que les administrateurs aient écarté d'autres transactions, sauf si on peut démontrer que l'une de ces autres transactions pouvait effectivement être réalisée et était manifestement plus avantageuse pour l'entreprise que celle qui a été choisie » : *Maple Leaf Foods*, la juge Weiler, p. 192.

[84] Aucun principe n'établit que les intérêts d'un groupe — ceux des actionnaires, par exemple — doivent prévaloir sur ceux d'un autre groupe. Tout dépend des particularités de la situation dans laquelle se trouvent les administrateurs et de la question de savoir si, dans les circonstances, ils ont agi de façon responsable dans leur appréciation commerciale.

[85] En l'espèce, les appelantes ont fait valoir que le courant jurisprudentiel émanant du Delaware et représenté par l'arrêt *Revlon* appuie le principe voulant qu'un conflit entre les intérêts des actionnaires et ceux des créanciers doive être résolu en faveur des actionnaires.

[86] Le courant jurisprudentiel dit *Revlon* regroupe une série de décisions rendues au Delaware dans le contexte d'offres publiques d'achat (« OPA ») et

& Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). In both cases, the issue was how directors should react to a hostile takeover bid. *Revlon* suggests that in such circumstances, shareholder interests should prevail over those of other stakeholders, such as creditors. *Unocal* tied this approach to situations where the corporation will not continue as a going concern, holding that although a board facing a hostile takeover "may have regard for various constituencies in discharging its responsibilities, . . . such concern for non-stockholder interests is inappropriate when . . . the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder" (p. 182).

[87] What is clear is that the *Revlon* line of cases has not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces. In a review of trends in Delaware corporate jurisprudence, former Delaware Supreme Court Chief Justice E. Norman Veasey put it this way:

> [I]t is important to keep in mind the precise content of this "best interests" concept — that is, to whom this duty is owed and when. Naturally, one often thinks that directors owe this duty to both the corporation and the stockholders. That formulation is harmless in most instances because of the confluence of interests, in that what is good for the corporate entity is usually derivatively good for the stockholders. There are times, of course, when the focus is directly on the interests of stockholders [i.e., as in *Revlon*]. But, in general, the directors owe fiduciary duties to the *corporation*, not to the stockholders. [Emphasis in original.]

(E. Norman Veasey with Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on

dont les deux plus importantes sont *Revlon, Inc. c. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), et *Unocal Corp. c. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). Dans ces deux décisions, il s'agissait de déterminer comment les administrateurs devaient réagir à une OPA hostile. L'arrêt *Revlon* donne à croire que, dans ce contexte, les intérêts des actionnaires doivent l'emporter sur ceux des autres parties intéressées, comme les créanciers. L'arrêt *Unocal* a appliqué cette approche aux situations dans lesquelles la société ne poursuivra pas ses activités et précisé que, bien que le conseil d'administration d'une société visée par une OPA hostile [TRADUCTION] « puisse tenir compte de diverses parties intéressées lorsqu'il s'acquitte de ses fonctions [. . .] il n'est pas approprié de prendre ainsi en compte les intérêts des non-actionnaires lorsque [. . .] l'objectif n'est plus de protéger la société ou d'en poursuivre les activités, mais de la vendre au plus offrant » (p. 182).

[87] Ce qui est clair, c'est que le courant jurisprudentiel dit *Revlon* n'a pas remplacé la règle fondamentale selon laquelle l'obligation des administrateurs ne peut se réduire à l'application de règles de priorité particulières, mais relève plutôt de l'appréciation commerciale de ce qui sert le mieux les intérêts de la société, dans la situation où elle se trouve. L'ancien juge en chef de la Cour suprême du Delaware, E. Norman Veasey, s'est exprimé ainsi dans une analyse des tendances jurisprudentielles en droit des sociétés au Delaware :

> [TRADUCTION] [I]l faut garder à l'esprit le contenu précis du concept « d'obligation d'agir au mieux des intérêts » — c'est-à-dire envers qui et quand s'applique cette obligation. Naturellement, on pense souvent que les administrateurs sont ainsi obligés tant envers la société qu'envers les actionnaires. Cette façon de voir est le plus souvent inoffensive parce qu'il y a concordance des intérêts, puisque ce qui est bon pour la société est habituellement bon pour les actionnaires. Il arrive bien sûr que l'accent soit mis directement sur les intérêts des actionnaires [comme dans *Revlon*]. En général, cependant, les administrateurs sont obligés envers la *société*, et non envers les actionnaires. [En italique dans l'original.]

(E. Norman Veasey, assisté de Christine T. Di Guglielmo, « What Happened in Delaware Corporate Law and Governance from 1992-2004?

Some Key Developments" (2005), 153 *U. Pa. L. Rev.* 1399, at p. 1431)

[88] Nor does this Court's decision in *Peoples Department Stores* suggest a fixed rule that the interests of creditors must prevail. In *Peoples Department Stores*, the Court had to consider whether, in the case of a corporation under threat of bankruptcy, creditors deserved special consideration (para. 46). The Court held that the fiduciary duty to the corporation did not change in the period preceding the bankruptcy, but that if the directors breach their duty of care to a stakeholder under s. 122(1)(*b*) of the *CBCA*, such a stakeholder may act upon it (para. 66).

(b) *Conduct Which Is Oppressive, Is Unfairly Prejudicial or Unfairly Disregards the Claimant's Relevant Interests*

[89] Thus far we have discussed how a claimant establishes the first element of an action for oppression — a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi*.

A Retrospective on Some Key Developments » (2005), *153 U. Pa. L. Rev.* 1399, p. 1431)

[88] Par ailleurs, l'arrêt *Magasins à rayons Peoples* n'établit pas non plus de règle fixe qui ferait prévaloir les droits des créanciers. Dans cet arrêt, la Cour devait décider s'il fallait accorder une attention particulière aux créanciers d'une société menacée de faillite (par. 46). Elle a statué que l'obligation fiduciaire envers la société ne change pas au cours de la période précédant la faillite, mais qu'une partie intéressée peut intenter un recours en cas de manquement des administrateurs à l'obligation de diligence que leur impose l'al. 122(1)*b*) de la *LCSA* (par. 66).

b) *La conduite abusive ou injuste à l'égard des intérêts du plaignant en ce qu'elle lui porte préjudice ou ne tient pas compte de ses intérêts*

[89] Jusqu'à maintenant, la Cour a examiné la façon dont le plaignant doit établir la preuve du premier élément de la demande de redressement pour abus — à savoir qu'il s'attendait raisonnablement à être traité d'une certaine manière. Or, pour parfaire sa demande de redressement pour abus, le plaignant doit prouver que le défaut de répondre à cette attente est imputable à une conduite injuste et qu'il en a résulté des conséquences préjudiciables au sens de l'art. 241 de la *LCSA*. Ce ne sont pas, en effet, tous les cas où une attente raisonnable a été frustrée qui commandent la prise en compte des considérations en equity sur lesquelles repose la demande de redressement pour abus. Le tribunal doit être convaincu que la conduite en cause relève des notions d'« abus », de « préjudice injuste » ou d'« omission injuste de tenir compte » des intérêts du plaignant, au sens de l'art. 241 de la *LCSA*. Dans cette perspective, l'analyse des attentes raisonnables qui constitue l'assise théorique de la demande de redressement pour abus et les types particuliers de comportement décrits à l'art. 241 apparaissent comme des approches complémentaires, et non des approches distinctes, comme on l'a parfois supposé. Ensemble, ces approches offrent un tableau complet de ce qui constitue une conduite injuste et inéquitable, pour reprendre les termes de l'arrêt *Ebrahimi*.

[90] In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.

[90] Dans la plupart des cas, la preuve d'une attente raisonnable sera liée aux notions d'abus, de préjudice injuste ou d'omission injuste de tenir compte des intérêts, ainsi que le prévoit l'art. 241, et les deux volets de la preuve se trouveront dans les faits réunis. Il faut néanmoins souligner que, comme dans toute action en equity, la demande de redressement pour abus requiert que l'on prouve la conduite fautive, le lien de causalité et le préjudice indemnisable.

[91] The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the *CBCA* is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

[91] Les notions d'abus, de préjudice injuste et d'omission injuste de tenir compte des intérêts pertinents sont de nature descriptive. Elles indiquent le type de faute ou de comportement visé par le recours prévu à l'art. 241 de la *LCSA*. Toutefois, il ne s'agit pas de compartiments étanches. Ces notions se chevauchent et s'enchevêtrent souvent.

[92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.

[92] À l'origine, la jurisprudence décrivait simplement l'acte fautif comme un abus, généralement associé à une conduite qualifiée selon les cas d'[TRADUCTION] « accablante, dure et illégitime », d'« écart marqué par rapport aux normes de traitement équitable », ou d'« abus de pouvoir » mettant en cause la probité dans la conduite des affaires de la société : voir Koehnen, p. 81. C'est de cet acte fautif que le recours tire son nom, lequel sert dorénavant à désigner de façon générale tous les recours fondés sur l'art. 241. Toutefois, ce terme sous-entend également un type particulier de préjudice relevant de la conception moderne de l'abus au sens général, soit un acte fautif très grave.

[93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees

[93] À la notion initiale de la common law, la *LCSA* a ajouté les notions de « préjudice injuste » et d'« omission injuste de tenir compte » des intérêts, indiquant ainsi clairement que les actes fautifs qui ne peuvent être qualifiés d'abusifs peuvent néanmoins tomber sous le coup de l'art. 241. Règle générale, le « préjudice injuste » est considéré comme supposant une conduite moins grave que l'« abus », par exemple l'éviction d'un actionnaire minoritaire, l'omission de divulguer des transactions avec des apparentés, la modification de la structure de la société pour changer radicalement les ratios d'endettement, l'adoption d'une « pilule

and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

[94] "Unfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.

(2) Application to These Appeals

[95] As discussed above (at para. 68), in assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[96] The debentureholders in this case assert two alternative expectations. Their highest position is that they had a reasonable expectation that the directors of BCE would protect their economic interests as debentureholders in Bell Canada by putting forward a plan of arrangement that would maintain the investment grade trading value of their debentures. Before this Court, however, they argued a softer alternative — a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures.

[97] As summarized above (at para. 25), the trial judge proceeded on the debentureholders' alleged expectation that the directors would act in a way that would preserve the investment grade status of their debentures. He concluded that this expectation

empoisonnée » pour éviter une OPA, le versement de dividendes sans déclaration formelle, le fait de privilégier certains actionnaires par le paiement d'honoraires de gestion et le paiement aux administrateurs d'honoraires plus élevés que la norme appliquée dans le secteur d'activité en cause : voir Koehnen, p. 82-83.

[94] L'« omission injuste de tenir compte » des intérêts est considérée comme le moins grave des trois préjudices ou actes fautifs mentionnés à l'art. 241. Favoriser un administrateur en omettant d'engager une poursuite, réduire indûment le dividende d'un actionnaire ou ne pas remettre au plaignant un bien lui appartenant en sont autant d'exemples : voir Koehnen, p. 83-84.

(2) Application aux présents pourvois

[95] Comme cela a déjà été expliqué (au par. 68), le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement pouvant être qualifié d'« abus », de « préjudice injuste » ou d'« omission injuste de tenir compte » d'un intérêt pertinent?

[96] En l'espèce, les détenteurs de débentures soutiennent avoir eu deux attentes distinctes. Leur position première est qu'ils avaient des motifs raisonnables de s'attendre à ce que les administrateurs de BCE protègent leurs intérêts financiers comme détenteurs de débentures de Bell Canada en proposant un plan d'arrangement qui maintiendrait la cote de leurs débentures comme admissibles pour des placements. Devant notre Cour, cependant, ils ont plaidé subsidiairement avoir eu une attente plus limitée — l'attente raisonnable que les administrateurs tiendraient compte de leurs intérêts financiers en préservant la valeur marchande des débentures.

[97] Ainsi que la Cour l'a exposé brièvement plus haut (au par. 25), le juge de première instance a étudié la prétention des détenteurs de débentures qu'ils s'attendaient à ce que les administrateurs agissent de façon à préserver la cote de placements

was not made out on the evidence, since the statements by Bell Canada suggesting a commitment to retaining investment grade ratings were accompanied by warnings that explicitly precluded investors from reasonably forming such expectations, and the warnings were included in the prospectuses pursuant to which the debentures were issued.

[98] The absence of a reasonable expectation that the investment grade of the debentures would be maintained was confirmed, in the trial judge's view, by the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, as well as by the fact that the claimants could have protected themselves against reduction in market value by negotiating appropriate contractual terms.

[99] The trial judge situated his consideration of the relevant factors in the appropriate legal context. He recognized that the directors had a fiduciary duty to act in the best interests of the corporation and that the content of this duty was affected by the various interests at stake in the context of the auction process that BCE was undergoing. He emphasized that the directors, faced with conflicting interests, might have no choice but to approve transactions that, while in the best interests of the corporation, would benefit some groups at the expense of others. He held that the fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that bidders were prepared to accept less leveraged debt. Under the business judgment rule, deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders.

admissibles de leurs débentures. Il a conclu que la preuve de cette attente n'avait pas été établie étant donné que les déclarations de Bell Canada concernant son engagement à conserver une cote de placements admissibles s'accompagnaient de mises en garde faisant explicitement en sorte que les investisseurs ne pourraient former de telles attentes, mises en garde qui figuraient aussi dans les prospectus d'émission des débentures.

[98] L'absence d'une attente raisonnable quant au maintien de la cote de placements admissibles des débentures trouvait confirmation, selon le juge de première instance, dans le contexte global de la relation entre la société et les détenteurs de débentures, la nature de la société, sa situation en tant que cible de plusieurs offres d'achat, de même que dans le fait que les plaignants auraient pu se protéger eux-mêmes contre le fléchissement de la valeur marchande en négociant des clauses contractuelles appropriées.

[99] Le juge de première instance a procédé à l'examen des facteurs pertinents en utilisant le cadre juridique approprié. Il a reconnu que les administrateurs avaient l'obligation fiduciaire d'agir au mieux des intérêts de la société et que le contenu de cette obligation dépendait des divers intérêts en jeu dans le contexte du processus d'enchères dont BCE faisait l'objet. Il a souligné que, face à des intérêts opposés, les administrateurs pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes. Il a conclu que le fait que les actionnaires puissent réaliser un gain alors que les détenteurs de débentures subiraient un préjudice ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada, et rien dans la preuve n'indiquait que les soumissionnaires étaient disposés à accepter un endettement moindre. Selon la règle de l'appréciation commerciale, il faut faire preuve de retenue à l'égard des décisions commerciales que les administrateurs prennent de bonne foi dans l'exécution des fonctions pour lesquelles ils ont été élus par les actionnaires.

[100] We see no error in the principles applied by the trial judge nor in his findings of fact, which were amply supported by the evidence. We accordingly agree that the first expectation advanced in this case — that the investment grade status of the debentures would be maintained — was not established.

[100] La Cour estime que le juge de première instance n'a commis aucune erreur dans son application des principes ni dans ses conclusions de fait, qui étaient amplement étayées par la preuve. La Cour est donc d'accord pour dire que la première attente alléguée en l'espèce — soit le maintien de la cote de placements admissibles des débentures — n'a pas été établie.

[101] The alternative, softer, expectation advanced is that the directors would consider the interests of the bondholders in maintaining the trading value of the debentures. The Court of Appeal, albeit in the context of its reasons on the s. 192 application, accepted this as a reasonable expectation. It held that the representations made over the years, while not legally binding, created expectations beyond contractual rights. It went on to state that in these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on debentureholders.

[101] L'attente subsidiaire, plus limitée, avancée par les plaignants, est que les administrateurs prendraient en compte les intérêts des créanciers obligataires en maintenant la valeur marchande des débentures. Dans le contexte de ses motifs concernant l'application de l'art. 192, la Cour d'appel a reconnu qu'il s'agissait là d'une attente raisonnable. Elle a conclu que les déclarations faites au cours des années, bien que non juridiquement contraignantes, avaient créé des attentes qui s'ajoutaient aux droits contractuels. Elle a ajouté que, dans ces circonstances, il incombait aux administrateurs non seulement de retenir la meilleure offre, mais encore d'examiner s'il était possible de restructurer l'arrangement de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures.

[102] The evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration. As discussed above, reasonable expectations for the purpose of a claim of oppression are not confined to legal interests. Given the potential impact on the debentureholders of the transactions under consideration, one would expect the directors, acting in the best interests of the corporation, to consider their short and long-term interests in the course of making their ultimate decision.

[102] Considérée objectivement, la preuve permet de conclure qu'il était raisonnable de s'attendre à ce que les administrateurs tiennent compte de la position des détenteurs de débentures pour prendre leurs décisions concernant les diverses offres à l'étude. Comme cela a été mentionné, dans le cadre d'une demande de redressement pour abus, les attentes raisonnables ne se limitent pas aux droits. Étant donné les répercussions potentielles des transactions proposées sur les détenteurs de débentures, on s'attendrait à ce que les administrateurs, agissant au mieux des intérêts de la société, tiennent compte de leurs intérêts à court et à long termes dans leur décision ultime.

[103] Indeed, the evidence shows that the directors did consider the interests of the debentureholders. A number of debentureholders sent letters to the Board, expressing concern about the proposed leveraged buyout and seeking assurances that their interests would be considered. One of the directors, Mr. Pattison, met with Phillips, Hager & North,

[103] De fait, la preuve indique que les administrateurs ont effectivement tenu compte des intérêts des détenteurs de débentures. Un certain nombre de détenteurs de débentures ont écrit au Conseil d'administration pour exprimer leurs craintes concernant l'acquisition par emprunt proposée et demander l'assurance que leurs intérêts seraient pris en

representatives of the debentureholders. The directors' response to these overtures was that the contractual terms of the debentures would be met, but no additional assurances were given.

compte. L'un des administrateurs, M. Pattison, a rencontré les représentants des détenteurs de débentures, Phillips, Hager & North. Les administrateurs ont répondu à l'expression de ces inquiétudes en affirmant qu'ils respecteraient les dispositions contractuelles rattachées aux débentures, mais aucune autre assurance n'a été donnée.

[104] It is apparent that the directors considered the interests of the debentureholders and, having done so, concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests. It did not amount to "unfair disregard" of the interests of the debentureholders. As discussed above, it may be impossible to satisfy all stakeholders in a given situation. In this case, the Board considered the interests of the claimant stakeholders. Having done so, and having considered its options in the difficult circumstances it faced, it made its decision, acting in what it perceived to be the best interests of the corporation.

[104] Les administrateurs ont manifestement pris en considération les intérêts des détenteurs de débentures et, cela fait, ils ont conclu qu'ils ne pouvaient prendre aucun autre engagement que celui de respecter les dispositions contractuelles rattachées aux débentures. Cela répondait à l'obligation des administrateurs de tenir compte des intérêts des détenteurs de débentures. Cela ne constituait pas une « omission injuste de tenir compte » des intérêts des détenteurs de débentures. Comme nous l'avons vu, il peut s'avérer impossible de satisfaire toutes les parties intéressées dans une situation donnée. En l'espèce, le Conseil d'administration a pris en compte les intérêts des plaignants. Cela fait, et après avoir examiné ses options dans les circonstances difficiles auxquelles il faisait face, il a pris la décision qui lui paraissait servir le mieux des intérêts de la société.

[105] What the claimants contend for on this appeal, in reality, is not merely an expectation that their interests be considered, but an expectation that the Board would take further positive steps to restructure the purchase in a way that would provide a satisfactory purchase price to the shareholders and preserve the high market value of the debentures. At this point, the second, softer expectation asserted approaches the first alleged expectation of maintaining the investment grade rating of the debentures.

[105] Ce que les plaignants font valoir en réalité dans le présent pourvoi, ce n'est pas simplement qu'ils s'attendaient à ce qu'on tienne compte de leurs intérêts, mais bien qu'ils comptaient que le Conseil d'administration adopte des mesures concrètes pour restructurer l'acquisition de manière à assurer un prix d'achat satisfaisant pour les actionnaires et à préserver la valeur marchande élevée des débentures. Sur ce point, la seconde attente, plus limitée, rejoint la première attente alléguée, soit le maintien de la cote de placements admissibles des débentures.

[106] The difficulty with this proposition is that there is no evidence that it was reasonable to suppose it could have been achieved. BCE, facing certain takeover, acted reasonably to create a competitive bidding process. The process attracted three bids. All of the bids were leveraged, involving a substantial increase in Bell Canada's debt. It was this factor that posed the risk to the trading value

[106] La difficulté rattachée à cette prétention est que rien dans la preuve n'indique qu'il était raisonnable de supposer que ce résultat pouvait être atteint. Dans la perspective d'une prise de contrôle certaine, BCE a agi de façon raisonnable pour créer un processus de soumissions concurrentiel. Le processus a suscité trois offres. Toutes les offres comportaient un emprunt, qui accroîtrait substantiellement

of the debentures. There is no evidence that BCE could have done anything to avoid that risk. Indeed, the evidence is to the contrary.

l'endettement de Bell Canada. C'est ce facteur qui mettait à risque la valeur des débentures. Rien dans la preuve n'indique que BCE aurait pu faire quoi que ce soit pour écarter ce risque. En fait, la preuve démontrait le contraire.

[107] We earlier discussed the factors to consider in determining whether an expectation is reasonable on a s. 241 oppression claim. These include commercial practice; the size, nature and structure of the corporation; the relationship between the parties; past practice; the failure to negotiate protections; agreements and representations; and the fair resolution of conflicting interests. In our view, all these factors weigh against finding an expectation beyond honouring the contractual obligations of the debentures in this particular case.

[107] Il a déjà été fait mention de facteurs à prendre en considération pour déterminer si une attente est raisonnable dans le cadre d'une demande de redressement pour abus fondée sur l'art. 241, notamment les pratiques commerciales, la taille, la nature et la structure de la société, les rapports entre les parties, les pratiques antérieures, l'omission de négocier une protection, les conventions et déclarations, ainsi que la conciliation des intérêts opposés. De l'avis de la Cour, tous ces facteurs militent contre la conclusion qu'il existait en l'espèce une attente allant au-delà du respect des obligations contractuelles rattachées aux débentures.

[108] Commercial practice — indeed commercial reality — undermines the claim that a way could have been found to preserve the trading position of the debentures in the context of the leveraged buyout. This reality must have been appreciated by reasonable debentureholders. More broadly, two considerations are germane to the influence of general commercial practice on the reasonableness of the debentureholders' expectations. First, leveraged buyouts of this kind are not unusual or unforeseeable, although the transaction at issue in this case is noteworthy for its magnitude. Second, trust indentures can include change of control and credit rating covenants where those protections have been negotiated. Protections of that type would have assured debentureholders a right to vote, potentially through their trustee, on the leveraged buyout, as the trial judge pointed out. This failure to negotiate protections was significant where the debentureholders, it may be noted, generally represent some of Canada's largest and most reputable financial institutions, pension funds and insurance companies.

[108] Les pratiques commerciales — en fait la réalité commerciale — affaiblissent la prétention qu'il aurait été possible de trouver une façon de préserver la valeur marchande des débentures dans le cadre d'une acquisition par emprunt. Des détenteurs de débentures raisonnables auraient eu conscience de cette réalité. Plus généralement, deux considérations sont pertinentes en ce qui concerne l'influence des pratiques commerciales générales sur le caractère raisonnable des attentes des détenteurs de débentures. Premièrement, les acquisitions par emprunt de ce type n'ont rien d'inhabituel ou d'imprévisible, bien que la transaction en cause en l'espèce se démarque par son ampleur. Deuxièmement, les actes de fiducie peuvent inclure des dispositions concernant un changement de contrôle et la cote financière dans les cas où ces protections ont été négociées. Des protections de ce type auraient assuré aux détenteurs de débentures un droit de vote, peut-être par l'intermédiaire de leur fiduciaire, sur l'acquisition par emprunt, comme l'a souligné le juge de première instance. Le défaut de négocier des mesures de protection revêtait de l'importance dans un cas où, soulignons-le, les détenteurs de débentures étaient en règle générale des institutions financières, des caisses de retraite et des sociétés d'assurance comptant parmi les plus importantes et les plus renommées du Canada.

[109] The nature and size of the corporation also undermine the reasonableness of any expectation that the directors would reject the offers that had been presented and seek an arrangement that preserved the investment grade rating of the debentures. As discussed above (at para. 74), courts may accord greater latitude to the reasonableness of expectations formed in the context of a small, closely held corporation, rather than those relating to interests in a large, public corporation. Bell Canada had become a wholly owned subsidiary of BCE in 1983, pursuant to a plan of arrangement which saw the shareholders of Bell Canada surrender their shares in exchange for shares of BCE. Based upon the history of the relationship, it should not have been outside the contemplation of debentureholders acquiring debentures of Bell Canada under the 1996 and 1997 trust indentures, that arrangements of this type had occurred and could occur in the future.

[110] The debentureholders rely on past practice, suggesting that investment grade ratings had always been maintained. However, as noted, reasonable practices may reflect changing economic and market realities. The events that precipitated the leveraged buyout transaction were such realities. Nor did the trial judge find in this case that representations had been made to debentureholders upon which they could have reasonably relied.

[111] Finally, the claim must be considered from the perspective of the duty on the directors to resolve conflicts between the interests of corporate stakeholders in a fair manner that reflected the best interests of the corporation.

[112] The best interests of the corporation arguably favoured acceptance of the offer at the time. BCE had been put in play, and the momentum of the market made a buyout inevitable. The evidence, accepted by the trial judge, was that Bell Canada needed to undertake significant changes to continue to be successful, and that privatization

[109] La nature et la taille de la société viennent également ébranler la prétention selon laquelle il aurait été raisonnable de s'attendre à ce que les administrateurs rejettent les offres présentées et recherchent un arrangement susceptible de préserver la cote de placements admissibles des débentures. On a déjà signalé (au par. 74) qu'il est possible que les tribunaux accordent plus de latitude quant aux attentes raisonnables dans le cas d'une petite société fermée que dans celui d'une société ouverte de plus grande taille. Bell Canada était devenue une filiale en propriété exclusive de BCE en 1983, en vertu d'un plan d'arrangement par lequel les actionnaires de Bell Canada cédaient leurs actions en échange d'actions de BCE. Compte tenu de l'historique du rapport en cause, les détenteurs de débentures de Bell Canada de 1996 et 1997 devaient savoir, lorsqu'ils les ont acquises, que des arrangements de ce type avaient déjà été conclus et pouvaient l'être dans l'avenir.

[110] Les détenteurs de débentures invoquent les pratiques antérieures, affirmant que la cote de placements admissibles avait toujours été maintenue. Rappelons toutefois que les pratiques raisonnables peuvent changer au gré des fluctuations de l'économie et des conditions du marché. Les événements qui ont conduit à la transaction d'acquisition par emprunt faisaient partie de ces conditions. Le juge de première instance n'a pas non plus conclu que des déclarations auxquelles les détenteurs de débentures auraient pu raisonnablement se fier leur avaient été faites.

[111] Enfin, il faut examiner la demande sous l'angle de l'obligation des administrateurs de résoudre les conflits entre les parties intéressées de façon équitable, au mieux des intérêts de la société.

[112] À l'époque, les intérêts de la société concordaient sans doute avec l'acceptation de l'offre. BCE avait été mise en jeu, et la dynamique du marché rendait l'acquisition inévitable. La preuve, acceptée par le juge de première instance, indiquait que Bell Canada devait procéder à des changements substantiels pour continuer à

would provide greater freedom to achieve its long-term goals by removing the pressure on short-term public financial reporting, and bringing in equity from sophisticated investors motivated to improve the corporation's performance. Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one.

prospérer, et que la fermeture de la société élargirait la marge de manœuvre nécessaire à l'atteinte de ses objectifs à long terme en supprimant la pression à court terme créée par les obligations de communication de l'information financière au public et en permettant l'injection de capitaux propres par des investisseurs avisés soucieux d'améliorer le rendement de la société. Dans la mesure où il conclut que la décision des administrateurs se situe dans l'éventail des solutions raisonnables qu'ils auraient pu choisir en soupesant des intérêts opposés, le tribunal ne poursuivra pas son examen pour déterminer si cette décision est la solution parfaite.

[113] Considering all the relevant factors, we conclude that the debentureholders have failed to establish a reasonable expectation that could give rise to a claim for oppression. As found by the trial judge, the alleged expectation that the investment grade of the debentures would be maintained is not supported by the evidence. A reasonable expectation that the debentureholders' interests would be considered is established, but was fulfilled. The evidence does not support a further expectation that a better arrangement could be negotiated that would meet the exigencies that the corporation was facing, while better preserving the trading value of the debentures.

[113] Considérant tous les facteurs pertinents, la Cour conclut que les détenteurs de débentures n'ont pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus. Comme l'a dit le juge de première instance, l'allégation selon laquelle on pouvait s'attendre au maintien de la cote de placements admissibles des débentures n'est pas étayée par la preuve. On a démontré que les détenteurs de débentures pouvaient raisonnablement s'attendre à ce que leurs intérêts soient pris en compte, mais cette attente a trouvé satisfaction. La preuve ne permet pas de conclure à une attente plus grande, à savoir qu'il était possible de négocier un meilleur arrangement répondant aux exigences auxquelles la société faisait face, tout en préservant mieux la valeur marchande des débentures.

[114] Given that the debentureholders have failed to establish that the expectations they assert were reasonable, or that they were not fulfilled, it is unnecessary to consider in detail whether conduct complained of was oppressive, unfairly prejudicial, or unfairly disregarded the debentureholders' interests within the terms of s. 241 of the *CBCA*. Suffice it to say that "oppression" in the sense of bad faith and abuse was not alleged, much less proved. At best, the claim was for "unfair disregard" of the interests of the debentureholders. As discussed, the evidence does not support this claim.

[114] Les détenteurs de débentures n'ayant pas démontré que leurs prétendues attentes étaient raisonnables, ou qu'elles avaient été frustrées, il n'est pas utile d'examiner en détail la question de savoir si le comportement dont ils se plaignent constituait un abus, un préjudice injuste ou une omission injuste de tenir compte de leurs intérêts au sens de l'art. 241 de la *LCSA*. Disons simplement que l'« abus », dans son sens où il implique la mauvaise foi, n'a pas été allégué et encore moins prouvé. Au mieux, on a plaidé l'« omission injuste de tenir compte » des intérêts des détenteurs de débentures. Comme cela a été dit plus tôt, cette prétention n'est pas étayée par la preuve.

C. *The Section 192 Approval Process*

[115] The second remedy relied on by the debentureholders is the approval process for complex corporate arrangements set out under s. 192 of the *CBCA*. BCE brought a petition for court approval of the plan under s. 192. At trial, the debentureholders were granted standing to contest such approval. The trial judge concluded that "[i]t seem[ed] only logical and 'fair' to conduct this analysis having regard to the interests of BCE and those of its shareholders and other stakeholders, if any, whose interests are being arranged or affected": (2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 151. On the basis of Corporations Canada's *Policy concerning Arrangements Under Section 192 of the CBCA*, November 2003 ("Policy Statement 15.1"), the trial judge held that the s. 192 approval did not require the Board to afford the debentureholders the right to vote. He nonetheless considered their interests in assessing the fairness of the arrangement. After a full hearing, he approved the arrangement as "fair and reasonable", despite the debentureholders' objections that the arrangement would adversely affect the trading value of their securities.

[116] The Court of Appeal reversed this decision, essentially on the ground that the directors had not given adequate consideration to the debentureholders' reasonable expectations. These expectations, in its view, extended beyond the debentureholders' legal rights and required the directors to consider whether the adverse impact on the debentureholders' economic interests could be alleviated or attenuated. The court held that the corporation had failed to discharge the burden of showing that it was impossible to structure the sale in a manner that avoided the adverse economic effect on debentureholdings, and consequently had failed to establish that the proposed plan of arrangement was fair and reasonable.

C. *Le processus d'approbation prévu à l'art. 192*

[115] La seconde voie de droit empruntée par les détenteurs de débentures est le processus d'approbation des arrangements complexes établi par l'art. 192 de la *LCSA*. BCE a présenté une demande d'approbation sous le régime de cette disposition. À l'instruction, les détenteurs de débentures ont été autorisés à contester la demande. Le juge de première instance a conclu qu'[TRADUCTION] « [i]l n'est que logique et "équitable" de procéder à cette analyse en tenant compte des intérêts de BCE et des intérêts de ses actionnaires et autres parties intéressées, le cas échéant, dont les intérêts sont visés ou touchés par l'arrangement » : (2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, par. 151). En se fondant sur la *Politique à l'égard des arrangements pris en vertu de l'article 192 de la LCSA* de Corporations Canada, datant de novembre 2003 (« Énoncé de politique 15.1 »), le juge de première instance a conclu que le processus d'approbation prévu à l'art. 192 n'obligeait pas le Conseil d'administration à accorder un droit de vote aux détenteurs de débentures. Il a néanmoins pris leurs intérêts en compte dans l'évaluation du caractère équitable de l'arrangement. Après une audition complète, il a approuvé l'arrangement, l'estimant « équitable et raisonnable » en dépit des objections des détenteurs de débentures selon lesquelles il aurait un effet préjudiciable sur la valeur marchande de leurs titres.

[116] La Cour d'appel a infirmé cette décision, concluant essentiellement que les administrateurs n'avaient pas suffisamment tenu compte des attentes raisonnables des détenteurs de débentures, lesquelles ne s'arrêtaient pas, selon elle, à leurs droits, mais commandaient aux administrateurs d'examiner s'il était possible d'atténuer l'effet préjudiciable de l'arrangement sur les intérêts financiers des détenteurs de débentures. Elle a jugé que la société ne s'était pas acquittée du fardeau de prouver qu'il était impossible de structurer la vente de façon à éviter les effets financiers préjudiciables sur les débentures et, par suite, qu'elle n'avait pas établi que le plan d'arrangement proposé était équitable et raisonnable.

[117] Before considering what must be shown to obtain approval of an arrangement under s. 192, it may be helpful to briefly return to the differences between an action for oppression under s. 241 of the *CBCA* and a motion for approval of an arrangement under s. 192 of the *CBCA* alluded to earlier.

[118] As we have discussed (at para. 47), the reasoning of the Court of Appeal effectively incorporated the s. 241 oppression claim into the s. 192 approval proceeding, converting it into an inquiry based on reasonable expectations.

[119] As we view the matter, the s. 241 oppression remedy and the s. 192 approval process are different proceedings, with different requirements. While a conclusion that the proposed arrangement has an oppressive result may support the conclusion that the arrangement is not fair and reasonable under s. 192, it is important to keep in mind the differences between the two remedies. The oppression remedy is a broad and equitable remedy that focuses on the reasonable expectations of stakeholders, while the s. 192 approval process focuses on whether the arrangement, objectively viewed, is fair and reasonable and looks primarily to the interests of the parties whose legal rights are being arranged. Moreover, in an oppression proceeding, the onus is on the claimant to establish oppression or unfairness, while in a s. 192 proceeding, the onus is on the corporation to establish that the arrangement is "fair and reasonable".

[120] These differences suggest that it is possible that a claimant might fail to show oppression under s. 241, but might succeed under s. 192 by establishing that the corporation has not discharged its onus of showing that the arrangement in question is fair and reasonable. For this reason, it is necessary to consider the debentureholders' s. 192 claim on these appeals, notwithstanding our earlier conclusion that the debentureholders have not established oppression.

[117] Avant d'examiner la question de la preuve exigée pour l'approbation d'un arrangement en vertu de l'art. 192, il peut être utile de revenir brièvement à la question, déjà abordée, des différences entre la demande de redressement pour abus prévue à l'art. 241 de la *LCSA* et la demande d'approbation d'un arrangement fondée sur l'art. 192.

[118] Comme on l'a vu (au par. 47), le raisonnement de la Cour d'appel a eu pour effet d'amalgamer la demande de redressement pour abus de l'art. 241 et la procédure d'approbation prévue à l'art. 192 et de convertir cette dernière en un examen axé sur les attentes raisonnables.

[119] La Cour estime que la demande de redressement pour abus de l'art. 241 et le processus d'approbation de l'art. 192 constituent des recours différents comportant des exigences différentes. Bien que la conclusion que l'arrangement proposé a des conséquences abusives puisse étayer celle qu'il ne s'agit pas d'un arrangement équitable et raisonnable au sens de l'art. 192, il importe de garder à l'esprit les différences entre les deux recours. La demande de redressement pour abus est un recours en equity, d'une grande portée, qui met l'accent sur les attentes raisonnables des parties intéressées, alors que le processus d'approbation prévu à l'art. 192 est axé sur la question de savoir si l'arrangement est équitable et raisonnable, d'un point de vue objectif, et tient principalement compte des intérêts des parties dont les droits sont visés par l'arrangement. De plus, dans le cadre d'une demande de redressement pour abus, c'est au plaignant qu'il incombe de prouver l'abus ou l'injustice, tandis que c'est à la société qu'il appartient d'établir que l'arrangement est « équitable et raisonnable » dans le cadre de la procédure prévue à l'art. 192.

[120] Il ressort de ces différences qu'un plaignant pourrait ne pas réussir à prouver l'abus au sens de l'art. 241, mais néanmoins avoir gain de cause sous le régime de l'art. 192 en établissant que la société ne s'est pas acquittée du fardeau de prouver que l'arrangement est équitable et raisonnable. C'est pourquoi la Cour doit examiner les prétentions soumises par les détenteurs de débentures dans le cadre de l'art. 192, en dépit de sa conclusion antérieure selon laquelle ils n'ont pas établi l'abus.

[121] Whether the converse is true is not at issue in these proceedings and need not detain us. It might be argued that in theory, a finding of s. 241 oppression could be coupled with approval of an arrangement as fair and reasonable under s. 192, given the different allocations of burden of proof in the two actions and the different perspectives from which the assessment is made. On the other hand, common sense suggests, as did the Court of Appeal, that a finding of oppression sits ill with the conclusion that the arrangement involved is fair and reasonable. We leave this interesting question to a case where it arises.

[121] La Cour n'a pas à se demander en l'espèce si l'inverse est vrai. Compte tenu des différences entre les deux recours en ce qui concerne le fardeau de la preuve et la perspective dans laquelle l'examen est effectué, on pourrait soutenir qu'il est possible, en théorie, de conclure à l'existence d'un abus au sens de l'art. 241 tout en approuvant l'arrangement en application de l'art. 192. Par contre, le bon sens donne à penser, comme l'a fait la Cour d'appel, qu'on peut difficilement conclure à la fois qu'il y a abus et que l'arrangement est équitable et raisonnable. Cette intéressante question devra toutefois être résolue dans le cadre d'une affaire où elle se posera.

(1) The Requirements for Approval Under Section 192

(1) La preuve exigée pour l'approbation selon l'art. 192

[122] We will first describe the nature and purpose of the s. 192 approval process. We will then consider the philosophy that underlies s. 192 approval; the interests at play in the process; and the criteria to be applied by the judge on a s. 192 proceeding.

[122] La Cour commencera par décrire la nature et l'objet du processus prévu à l'art. 192. Elle examinera ensuite la philosophie sous-jacente à l'approbation requise par cette disposition, les circonstances dans lesquelles elle s'applique, les intérêts en jeu dans le processus et les critères que le juge doit appliquer pour trancher une demande présentée en vertu de l'art. 192.

(a) *The Nature and Purpose of the Section 192 Procedure*

a) *La nature et l'objet de la procédure prévue par l'art. 192*

[123] The s. 192 approval process has its genesis in 1923 legislation designed to permit corporations to modify their share capital: *Companies Act Amending Act, 1923*, S.C. 1923, c. 39, s. 4. The legislation's concern was to permit changes to shareholders' rights, while offering shareholders protection. In 1974, plans of arrangements were omitted from the *CBCA* because Parliament considered them superfluous and feared that they could be used to squeeze out minority shareholders. Upon realizing that arrangements were a practical and flexible way to effect complicated transactions, an arrangement provision was reintroduced in the *CBCA* in 1978: Consumer and Corporate Affairs Canada, *Detailed background paper for an Act to amend the Canada Business Corporations Act* (1977), p. 5 ("Detailed Background Paper").

[123] Le processus d'approbation établi à l'art. 192 remonte à une loi de 1923 qui visait à permettre aux sociétés de modifier leur capital-actions : *Loi de 1923 modifiant la Loi des compagnies*, S.C. 1923, ch. 39, art. 4. Cette loi avait pour but de permettre des modifications aux droits des actionnaires tout en protégeant les actionnaires. En 1974, les plans d'arrangement n'ont pas été inclus dans la *LCSA*, parce que le législateur les jugeait superflus et craignait qu'ils puissent être utilisés pour évincer les actionnaires minoritaires. Après avoir constaté que ces plans offraient un moyen pratique et souple de réaliser des transactions complexes, le législateur a ajouté à la *LCSA* une disposition les régissant, en 1978 : Consommation et Corporations Canada, *Exposé détaillé d'une Loi modifiant la Loi sur les corporations commerciales canadiennes* (1977), p. 5 (« Exposé détaillé »).

[124] In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.

[125] This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76. One of these advantages is that it permits the purchaser to buy shares of the target company without the need to comply with provincial takeover bid rules.

[126] The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company.

[127] Fundamentally, the s. 192 procedure rests on the proposition that where a corporate transaction will alter the rights of security holders, this impact takes the decision out of the scope of management of the corporation's affairs, which is the responsibility of the directors. Section 192 overcomes this impediment through two mechanisms. First, proposed arrangements generally can be submitted to security holders for approval. Although there is no explicit requirement for a security holder vote in s. 192, as will be discussed below, these votes are an important feature of the process for approval of plans of arrangement. Second, the plan of arrangement must receive court approval after a hearing in which parties whose rights are being affected may partake.

[124] La souplesse de cette disposition lui a valu d'être élargie pour s'appliquer, non seulement à la réorganisation du capital-actions, mais plus généralement aux réaménagements d'une société. Suivant le par. 192(1) de la loi actuelle, un arrangement s'entend de la modification des statuts d'une société, de la fusion de deux sociétés ou plus, du fractionnement de l'activité commerciale d'une société, d'une opération de fermeture ou d'éviction, de la liquidation ou de la dissolution d'une société ou de toute combinaison de ces transactions.

[125] Il ne s'agit pas là d'une liste exhaustive, et les tribunaux lui ont donné une interprétation large. L'article 192 est de plus en plus utilisé dans le cadre d'un changement de contrôle en raison des avantages qu'il comporte pour l'acquéreur : C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), p. 76. Il permet notamment à l'acquéreur d'acheter des actions de la société ciblée sans avoir à se conformer aux règles provinciales régissant une OPA.

[126] Le processus prévu à l'art. 192 s'applique, en général, aux changements de contrôle qui présentent deux caractéristiques : l'arrangement est appuyé par les administrateurs de la société ciblée et il vise la remise, à l'acquéreur ou à la société ciblée, d'une partie ou de la totalité des actions.

[127] Fondamentalement, la procédure prévue à l'art. 192 repose sur le principe selon lequel la décision sur une transaction qui modifiera les droits des détenteurs de valeurs mobilières ne constitue pas une décision de simple gestion des affaires de la société, qui relève des administrateurs. L'article 192 crée deux mécanismes pour surmonter cet obstacle. Premièrement, les propositions d'arrangement peuvent généralement être soumises aux détenteurs de valeurs mobilières pour approbation. Bien que l'art. 192 n'exige pas expressément un vote des détenteurs de valeurs mobilières, comme on le verra, leur vote constitue une caractéristique importante du processus d'approbation des plans d'arrangement. Deuxièmement, les plans d'arrangement doivent être approuvés par le tribunal à la suite d'une audience à laquelle peuvent participer les parties dont les droits sont touchés.

(b) *The Philosophy Underlying Section 192*

[128] The purpose of s. 192, as we have seen, is to permit major changes in corporate structure to be made, while ensuring that individuals and groups whose rights may be affected are treated fairly. In conducting the s. 192 inquiry, the judge must keep in mind the spirit of s. 192, which is to achieve a fair balance between conflicting interests. In discussing the objective of the arrangement provision introduced into the *CBCA* in 1978, the Minister of Consumer and Corporate Affairs stated:

> . . . the Bill seeks to achieve a fair balance between flexible management and equitable treatment of minority shareholders in a manner that is consonant with the other fundamental change institutions set out in Part XIV.

(Detailed Background Paper, at p. 6)

[129] Although s. 192 was initially conceived as permitting and has principally been used to permit useful restructuring while protecting minority shareholders against adverse effects, the goal of ensuring a fair balance between different constituencies applies with equal force when considering the interests of non-shareholder security holders recognized under s. 192. Section 192 recognizes that major changes may be appropriate, even where they have an adverse impact on the rights of particular individuals or groups. It seeks to ensure that the interests of these rights holders are considered and treated fairly, and that in the end the arrangement is one that should proceed.

(c) *Interests Protected by Section 192*

[130] The s. 192 procedure originally was aimed at protecting shareholders affected by corporate restructuring. That remains a fundamental concern. However, this aim has been subsequently broadened to protect other security holders in some circumstances.

[131] Section 192 clearly contemplates the participation of security holders in certain situations.

b) *La philosophie qui sous-tend l'art. 192*

[128] Comme cela a été mentionné, l'art. 192 a pour but de permettre la réalisation de changements substantiels dans la structure d'une société tout en assurant un traitement équitable aux personnes dont les droits peuvent être touchés. Le juge qui procède à l'examen exigé par l'art. 192 ne doit pas perdre de vue l'esprit de cette disposition, qui consiste à établir un juste équilibre entre des intérêts opposés. Le ministre de Consommation et Corporations Canada a présenté ainsi l'objectif de la disposition relative aux arrangements introduite dans la *LCSA* en 1978 :

> . . . le projet de loi tente d'atteindre un juste équilibre entre une gestion souple et le traitement équitable des actionnaires minoritaires, d'une façon qui corresponde aux autres pratiques de modification de structure stipulées dans la Partie XIV.

(Exposé détaillé, p. 5-6)

[129] Bien que l'art. 192 ait été conçu initialement et utilisé principalement pour permettre des restructurations utiles tout en protégeant les actionnaires minoritaires contre leurs effets préjudiciables, l'objectif du maintien d'un juste équilibre entre les différentes parties touchées s'applique avec autant de force lorsqu'il s'agit des droits de détenteurs de valeurs mobilières non-actionnaires visés à l'art. 192. L'article 192 reconnaît que des changements substantiels peuvent être opportuns même s'ils ont des effets préjudiciables sur les droits de personnes ou groupes particuliers. Il vise à garantir le traitement équitable et la prise en compte des intérêts de ces titulaires de droits et, en définitive, à confirmer que l'arrangement devrait être mis en œuvre.

c) *Les intérêts protégés par l'art. 192*

[130] La procédure prévue à l'art. 192 visait initialement à protéger les actionnaires touchés par la restructuration de la société. Bien que cet objet demeure fondamental, cette protection s'est par la suite étendue à d'autres détenteurs de valeurs mobilières, dans certaines circonstances.

[131] L'article 192 envisage clairement la participation des détenteurs de valeurs mobilières dans

Section 192(1)(*f*) specifies that an arrangement may include an exchange of securities for property. Section 192(4)(*c*) provides that a court can make an interim order "requiring a corporation to call, hold and conduct a meeting of holders of securities". The Director appointed under the *CBCA* takes the view that, at a minimum, all security holders whose legal rights stand to be affected by the transaction should be permitted to vote on the arrangement: Policy Statement 15.1, s. 3.08.

[132] A difficult question is whether s. 192 applies only to security holders whose *legal rights* stand to be affected by the proposal, or whether it applies to security holders whose legal rights remain intact but whose *economic interests* may be prejudiced.

[133] The purpose of s. 192, discussed above, suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. The distinction between the focus on legal rights under arrangement approval and reasonable expectations under the oppression remedy is a crucial one. The oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in their strict sense.

[134] This general rule, however, does not preclude the possibility that in some circumstances, for example threat of insolvency or claims by certain minority shareholders, interests that are not strictly legal should be considered: see Policy Statement 15.1, s. 3.08, referring to "extraordinary circumstances".

[135] It is not necessary to decide on these appeals precisely what would amount to "extraordinary

certaines situations. L'alinéa 192(1)*f*) précise qu'un arrangement peut inclure l'échange de valeurs mobilières contre des biens. L'alinéa 192(4)*c*) énonce que le tribunal peut rendre une ordonnance enjoignant à la société « de convoquer et de tenir une assemblée des détenteurs de valeurs mobilières ». Le directeur nommé en vertu de la *LCSA* est d'avis, au moins, que tous les détenteurs de valeurs mobilières dont les droits sont touchés par la transaction doivent être autorisés à voter sur l'arrangement : Énoncé de politique 15.1, par. 3.08.

[132] Une question difficile se pose toutefois : l'art. 192 s'applique-t-il uniquement aux détenteurs de valeurs mobilières dont les *droits* sont touchés par la proposition ou aussi à ceux dont les droits demeurent intacts, mais dont les *intérêts financiers* risquent de subir un préjudice.

[133] L'objet de l'art. 192, exposé précédemment, laisse croire que cette disposition ne vise que les détenteurs de valeurs mobilières dont les droits sont touchés par la proposition. La procédure établie par l'art. 192 a été conçue et généralement perçue comme visant à permettre aux sociétés d'effectuer des changements qui ont une incidence sur des *droits* des parties. C'est la modification des droits qui place la transaction hors du ressort des administrateurs et engendre la nécessité d'obtenir l'approbation des actionnaires et du tribunal. Le fait que le processus d'approbation d'un arrangement soit axé sur les droits et la demande de redressement pour abus sur les attentes raisonnables de parties est une distinction cruciale. La demande de redressement pour abus est fondée sur le traitement inéquitable des parties intéressées, plutôt que sur leurs droits au sens strict.

[134] Toutefois, cette règle générale n'écarte pas la possibilité que, dans certaines circonstances — par exemple en présence d'un risque d'insolvabilité ou de réclamations de certains actionnaires minoritaires —, des intérêts qui ne constituent pas des droits à strictement parler soient pris en considération : Énoncé de politique 15.1, par. 3.08, faisant état de « circonstances particulières ».

[135] Il n'est pas nécessaire pour trancher les pourvois de statuer sur ce qui constituerait exactement

circumstances" permitting consideration of non-legal interests on a s. 192 application. In our view, the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not, without more, constitute such a circumstance.

(d) *Criteria for Court Approval*

[136] Section 192(3) specifies that the corporation must obtain court approval of the plan. In determining whether a plan of arrangement should be approved, the court must focus on the terms and impact of the arrangement itself, rather than on the process by which it was reached. What is required is that the arrangement itself, viewed substantively and objectively, be suitable for approval.

[137] In seeking approval of an arrangement, the corporation bears the onus of satisfying the court that: (1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable: see *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (Q.B.), at p. 444. This may be contrasted with the s. 241 oppression action, where the onus is on the claimant to establish its case. On these appeals, it is conceded that the corporation satisfied the first two requirements. The only question is whether the arrangement is fair and reasonable.

[138] In reviewing the directors' decision on the proposed arrangement to determine if it is fair and reasonable under s. 192, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. It is through this two-pronged framework that courts can determine whether a plan is fair and reasonable.

[139] In the past, some courts have answered the question of whether an arrangement is fair and reasonable by applying what is referred to as the

des « circonstances particulières » autorisant la prise en compte de simples intérêts dans l'examen d'une demande fondée sur l'art. 192. La Cour est d'avis qu'une diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits demeurent par ailleurs intacts ne constitue généralement pas, à elle seule, ce type de circonstances.

d) *Les critères d'approbation*

[136] Le paragraphe 192(3) exige que la société fasse approuver le plan par un tribunal. Pour statuer sur la demande d'approbation, le tribunal doit s'attacher aux modalités et aux effets de l'arrangement lui-même plutôt qu'au processus suivi pour y parvenir. Il faut que l'arrangement lui-même, considéré substantiellement et objectivement, soit de nature à pouvoir être approuvé.

[137] La société qui demande l'approbation d'un arrangement doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est équitable et raisonnable : voir *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (B.R.), p. 444. En comparaison, c'est le plaignant qui doit prouver ses prétentions dans le cas de la demande de redressement pour abus prévue par l'art. 241. Le respect des deux premières conditions n'est pas contesté en l'espèce. La seule question en litige est celle du caractère équitable et raisonnable de l'arrangement.

[138] Pour conclure, sous le régime de l'art. 192, que la décision des administrateurs au sujet de l'arrangement proposé est équitable et raisonnable, le tribunal doit être convaincu que l'arrangement : a) poursuit un objectif commercial légitime et b) répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés. C'est en appliquant ce cadre d'analyse à deux volets que les tribunaux peuvent établir si un plan est équitable et raisonnable.

[139] Certains tribunaux ont déjà statué sur le caractère équitable et raisonnable d'un arrangement en appliquant le test dit de l'appréciation

business judgment test, that is whether an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest would reasonably approve the arrangement: see *Trizec*, at p. 444; *Pacifica Papers Inc. v. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069. However, while this consideration may be important, it does not constitute a useful or complete statement of what must be considered on a s. 192 application.

[140] First, the fact that the business judgment test referred to here and the business judgment rule discussed above (at para. 40) are so similarly named leads to confusion. The business judgment *rule* expresses the need for deference to the business judgment of directors as to the best interests of the corporation. The business judgment *test* under s. 192, by contrast, is aimed at determining whether the proposed arrangement is fair and reasonable, having regard to the corporation and relevant stakeholders. The two inquiries are quite different. Yet the use of the same terminology has given rise to confusion. Thus, courts have on occasion cited the business judgment test while saying that it stands for the principle that arrangements do not have to be perfect, i.e. as a deference principle: see *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] Q.J. No. 16158 (QL), 2007 QCCS 6830. To conflate the business judgment test and the business judgment rule leads to difficulties in understanding what "fair and reasonable" means and how an arrangement may satisfy this threshold.

[141] Second, in instances where affected security holders have voted on a plan of arrangement, it seems redundant to ask what an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest, would do. As will be discussed below (at para. 150), votes on arrangements are an important indicator of whether a plan is fair and reasonable.

commerciale, qui consiste à déterminer si un homme ou une femme d'affaires intelligent et honnête, membre de la catégorie ayant droit de vote en cause et agissant dans son propre intérêt, approuverait raisonnablement l'arrangement : voir *Trizec*, p. 444; *Pacifica Papers Inc. c. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069. Toutefois, bien que cette question puisse être importante, elle ne constitue pas un énoncé utile et complet des éléments à considérer pour l'examen d'une demande fondée sur l'art. 192.

[140] Premièrement, la similitude d'appellation du test de l'appréciation commerciale qui nous intéresse ici et de la règle de l'appréciation commerciale examinée précédemment (au par. 40) sème la confusion. La *règle* de l'appréciation commerciale exprime la nécessité de faire preuve de retenue à l'égard de l'appréciation par les administrateurs de ce qui sert le mieux les intérêts de la société. Le *test* de l'appréciation commerciale pour l'application de l'art. 192, quant à lui, vise à déterminer si l'arrangement proposé est équitable et raisonnable compte tenu des intérêts de la société et des parties intéressées. Ces deux analyses diffèrent passablement. Or, la similitude des termes employés pour les désigner sème la confusion. Ainsi, il est arrivé que des tribunaux citent le test de l'appréciation commerciale à l'appui du principe selon lequel il n'est pas nécessaire que les arrangements soient parfaits, c.-à-d. en tant que principe de retenue judiciaire : voir *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] J.Q. n^{o} 16158 (QL), 2007 QCCS 6830. Lorsqu'on confond le test de l'appréciation commerciale et la règle de l'appréciation commerciale, il devient plus difficile de comprendre le sens de l'expression « équitable et raisonnable » et la façon dont un arrangement peut satisfaire à cette condition.

[141] Deuxièmement, lorsque les détenteurs de valeurs mobilières dont les droits sont touchés ont voté en faveur d'un plan d'arrangement, il paraît redondant de se demander ce que ferait une femme ou un homme d'affaires intelligent et honnête, en tant que membre de la catégorie ayant droit de vote en cause et agissant dans son propre intérêt. Comme on le verra plus loin (au par. 150), les

However, the business judgment test does not provide any more information than does the outcome of a vote. Section 192 makes it clear that the reviewing judge must delve beyond whether a reasonable business person would approve of a plan to determine whether an arrangement is fair and reasonable. Insofar as the business judgment test suggests that the judge need only consider the perspective of the majority group, it is incomplete.

votes tenus au sujet d'arrangements constituent un indicateur important de leur caractère équitable et raisonnable. Toutefois, le critère de l'appréciation commerciale n'est pas plus éclairant que le résultat d'un vote. L'article 192 établit clairement que, pour se prononcer sur le caractère équitable et raisonnable de l'arrangement qui lui est soumis, le juge doit aller au-delà de la question de savoir si un homme ou une femme d'affaires raisonnable l'approuverait. Dans la mesure où le critère de l'appréciation commerciale donne à entendre qu'il suffit au juge d'adopter le point de vue du groupe majoritaire, il est incomplet.

[142] In summary, we conclude that the business judgment test is not useful in the context of a s. 192 application, and indeed may lead to confusion.

[142] En résumé, la Cour conclut que le critère de l'appréciation commerciale n'est pas utile dans le contexte de l'application de l'art. 192, et qu'il peut même semer la confusion.

[143] The framework proposed in these reasons reformulates the s. 192 test for what is fair and reasonable in a way that reflects the logic of s. 192 and the authorities. Determining what is fair and reasonable involves two inquiries: first, whether the arrangement has a valid business purpose; and second, whether it resolves the objections of those whose rights are being arranged in a fair and balanced way. In approving plans of arrangement, courts have frequently pointed to factors that answer these two questions as discussed more fully below: *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212 (H.C.); *Cinar Corp. v. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (Que. Sup. Ct.); *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789.

[143] Le cadre proposé dans les présents motifs reformule le critère d'appréciation du caractère équitable et raisonnable pour l'application de l'art. 192 en accord avec la logique de cette disposition et la jurisprudence. L'appréciation du caractère équitable et raisonnable suppose deux examens. Le premier consiste à déterminer si l'arrangement poursuit un objectif commercial légitime, et le second s'il répond d'une façon juste et équilibrée aux objections de ceux dont les droits sont visés. Les tribunaux appelés à approuver un arrangement ont souvent mentionné des facteurs qui répondaient à ces deux questions, comme cela sera expliqué plus loin : *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212 (H.C.); *Cinar Corp. c. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (C.S. Qué.); *PetroKazakhstan Inc. c. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789.

[144] We now turn to a more detailed discussion of the two prongs.

[144] Passons maintenant à un examen plus détaillé de chacun de ces deux volets.

[145] The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. In other words, courts must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation.

[145] Le volet de l'analyse du caractère équitable et raisonnable qui se rapporte à l'objectif commercial légitime reconnaît que l'arrangement doit procurer à la société un avantage qui compense l'atteinte aux droits. Autrement dit, le tribunal doit être convaincu que l'intérêt de la société justifie le fardeau imposé par l'arrangement aux détenteurs de

The proposed plan of arrangement must further the interests of the corporation as an ongoing concern. In this sense, it may be narrower than the "best interests of the corporation" test that defines the fiduciary duty of directors under s. 122 of the *CBCA* (see paras. 38-40).

valeurs mobilières. Le plan proposé doit en outre servir les intérêts de la société dans la perspective de la continuité de l'entreprise, critère qui peut avoir une portée plus réduite que le critère de ce qui est « au mieux des intérêts de la société » utilisé pour définir l'obligation fiduciaire imposée aux administrateurs par l'art. 122 de la *LCSA* (voir les par. 38-40).

[146] The valid purpose inquiry is invariably fact-specific. Thus, the nature and extent of evidence needed to satisfy this requirement will depend on the circumstances. An important factor for courts to consider when determining if the plan of arrangement serves a valid business purpose is the necessity of the arrangement to the continued operations of the corporation. Necessity is driven by the market conditions that a corporation faces, including technological, regulatory and competitive conditions. Indicia of necessity include the existence of alternatives and market reaction to the plan. The degree of necessity of the arrangement has a direct impact on the court's level of scrutiny. Austin J. in *Canadian Pacific* concluded that

> while courts are prepared to assume jurisdiction notwithstanding a lack of necessity on the part of the company, <u>the lower the degree of necessity, the higher the degree of scrutiny that should be applied</u>. [Emphasis added; p. 223.]

If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders.

[146] L'examen de l'objectif commercial légitime est invariablement lié aux faits. Par conséquent, la nature et l'étendue de la preuve requise pour répondre à ce critère variera suivant les circonstances. Un important facteur à considérer pour établir si un plan d'arrangement poursuit un objectif commercial légitime est celui de la nécessité de l'arrangement pour la poursuite des activités de la société. Cette nécessité est fonction des conditions du marché, notamment sur les plan de la technologie, de la réglementation et de la concurrence. L'existence de solutions de rechange et la réaction du marché au plan constituent des indices de la nécessité du plan. Le degré de nécessité de l'arrangement a une incidence directe sur la rigueur de l'examen. Dans *Canadian Pacific*, la juge Austin a conclu :

> [TRADUCTION] . . . bien que les tribunaux soient disposés à exercer leur compétence malgré l'absence de nécessité suffisante pour la société, <u>moins la nécessité est grande, plus l'examen doit être rigoureux</u>. [Nous soulignons; p. 223.]

Si le plan d'arrangement est nécessaire pour que la société continue d'exister, les tribunaux seront plus enclins à l'approuver en dépit de ses effets préjudiciables sur certains détenteurs de valeurs mobilières. À l'inverse, si la situation financière ou commerciale de la société ne requiert pas l'arrangement, les tribunaux se montreront plus circonspects et procéderont à un examen minutieux pour s'assurer qu'il ne sert pas uniquement les intérêts d'une partie intéressée en particulier. Par conséquent, la nécessité relative de l'arrangement peut en justifier les effets négatifs sur les intérêts des détenteurs de valeurs mobilières touchés.

[147] The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.

[147] Le second volet de l'analyse du caractère équitable et raisonnable est axé sur la question de savoir si les objections de ceux dont les droits sont visés ont été résolues de façon juste et équilibrée.

[148] An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:

> [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

[149] The question is whether the plan, viewed in this light, is fair and reasonable. In answering this question, courts have considered a variety of factors, depending on the nature of the case at hand. None of these alone is conclusive, and the relevance of particular factors varies from case to case. Nevertheless, they offer guidance.

[150] An important factor is whether a majority of security holders has voted to approve the arrangement. Where the majority is absent or slim, doubts may arise as to whether the arrangement is fair and reasonable; however, a large majority suggests the converse. Although the outcome of a vote by security holders is not determinative of whether the plan should receive the approval of the court, courts have placed considerable weight on this factor. Voting results offer a key indication of whether those affected by the plan consider it to be fair and reasonable: *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Gen. Div.).

[151] Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and

[148] Un plan d'arrangement peut susciter des objections lorsqu'il existe des tensions entre les intérêts de la société et ceux de détenteurs de valeurs mobilières ou lorsque différents groupes dont les droits sont touchés ont des intérêts opposés. Le juge doit être convaincu que l'arrangement établit un juste équilibre compte tenu des intérêts continus de la société et des circonstances de l'affaire. Pour cela, il devra souvent procéder à une pondération complexe en déterminant si des mesures d'accommodement ou de protection appropriées ont été offertes aux parties concernées. Toutefois, comme l'a indiqué le juge Forsyth dans *Trizec*, par. 36,

> [TRADUCTION] le tribunal doit prendre garde de ne pas s'attacher aux besoins particuliers d'un groupe donné et s'efforcer de traiter équitablement tous ceux qui sont touchés par la transaction compte tenu des circonstances. Le caractère équitable de l'arrangement doit s'apprécier globalement ainsi qu'à l'égard de chacune des différentes parties intéressées.

[149] Il faut se demander si le plan, considéré dans cette perspective, est équitable et raisonnable. Pour répondre à cette question, les tribunaux ont tenu compte de divers facteurs, selon la nature de l'affaire. Aucun de ces facteurs n'est déterminant à lui seul et la pertinence de chacun varie d'un cas à l'autre, mais ils fournissent des indications utiles.

[150] Le fait que la majorité des détenteurs de valeurs mobilières aient voté en faveur du plan constitue un facteur important. Le caractère équitable et raisonnable d'un plan qui ne recueille qu'une minorité ou une faible majorité des voix peut être mis en doute, tandis qu'une majorité substantielle a l'effet inverse. Bien que le résultat du vote des détenteurs de valeurs mobilières ne soit pas déterminant pour l'approbation judiciaire du plan, les tribunaux attribuent un poids considérable à ce facteur. Il s'agit d'un indice capital permettant de savoir si les parties touchées estiment que l'arrangement est équitable et raisonnable : *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Div. gén.).

[151] En l'absence de vote, les tribunaux peuvent se demander si une femme ou un homme d'affaires intelligent et honnête, en tant que membre de

acting in his or her own interest, might reasonably approve of the plan: *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Trizec*.

[152] Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific*; *Trizec*. The court may also consider the repute of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies: see *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (Ont. S.C.J.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

[153] This review of factors represents considerations that have figured in s. 192 cases to date. It is not meant to be exhaustive, but simply to provide an overview of some factors considered by courts in determining if a plan has reasonably addressed the objections and conflicts between different constituencies. Many of these factors will also indicate whether the plan serves a valid business purpose. The overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations.

[154] We arrive then at this conclusion: in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's

la catégorie en cause et agissant dans son propre intérêt, approuverait raisonnablement le plan : *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Trizec*.

[152] La proportionnalité du compromis entre les divers détenteurs de valeurs mobilières, la situation des détenteurs de valeurs mobilières avant et après l'arrangement et les effets de l'arrangement sur les droits des divers détenteurs de valeurs mobilières sont aussi des indices de son caractère équitable : voir *Canadian Pacific*; *Trizec*. Les tribunaux peuvent également tenir compte de la réputation des administrateurs et conseillers qui défendent l'arrangement et ses modalités. Ainsi, les tribunaux ont déjà tenu compte du fait qu'un plan avait été approuvé par un comité spécial d'administrateurs indépendants, de l'existence d'une opinion formulée par un spécialiste de renom sur le caractère équitable du plan et des moyens auxquels les actionnaires avaient accès pour exprimer leur dissidence et obtenir une évaluation : voir *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (C.S.J. Ont.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

[153] Les facteurs susmentionnés représentent les éléments pris en considération jusqu'à maintenant pour l'examen des demandes prévues à l'art. 192. Cette énumération n'est pas exhaustive, mais vise simplement à donner un aperçu des facteurs retenus par les tribunaux pour établir si un plan avait résolu de façon raisonnable les objections soulevées et les conflits entre parties intéressées. Beaucoup de ces facteurs pourront aussi indiquer si le plan poursuit un objectif commercial légitime. L'appréciation globale du caractère équitable et raisonnable d'un arrangement dépend des faits et peut faire intervenir différents facteurs suivant les circonstances.

[154] Cela mène donc à la conclusion suivante : pour qu'un plan d'arrangement soit déclaré équitable et raisonnable, le juge doit être convaincu qu'il poursuit un objectif commercial légitime et qu'il répond adéquatement aux objections et aux conflits entre différentes parties intéressées. Pour décider si un arrangement répond à ces critères, le juge tient compte de divers facteurs pertinents, dont la nécessité de l'arrangement pour la continuité de la société,

continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups.

[155] As has frequently been stated, there is no such thing as a perfect arrangement. What is required is a reasonable decision in light of the specific circumstances of each case, not a perfect decision: *Trizec*; *Maple Leaf Foods*. The court on a s. 192 application should refrain from substituting their views of what they consider the "best" arrangement. At the same time, the court should not surrender their duty to scrutinize the arrangement. Because s. 192 facilitates the alteration of legal rights, the Court must conduct a careful review of the proposed transactions. As Lax J. stated in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J.), at para. 153: "Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination."

(2) Application to These Appeals

[156] As discussed above (at paras. 137-38), the corporation on a s. 192 application must satisfy the court that: (1) the statutory procedures are met; (2) the application is put forward in good faith; and (3) the arrangement is fair and reasonable, in the sense that: (a) the arrangement has a valid business purpose; and (b) the objections of those whose rights are being arranged are resolved in a fair and balanced way.

[157] The first and second requirements are clearly satisfied in this case. On the third element, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate before this Court focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way.

l'approbation du plan par la majorité des actionnaires et des autres détenteurs de valeurs mobilières ayant droit de vote, le cas échéant, et la proportionnalité des effets du plan sur les groupes touchés.

[155] Comme cela a souvent été dit, il n'existe pas d'arrangement parfait. Ce qui est requis, c'est que la décision soit raisonnable au regard des circonstances particulières de l'espèce, et non qu'elle soit parfaite : *Trizec*; *Maple Leaf Foods*. Les tribunaux appelés à approuver un plan en vertu de l'art. 192 doivent s'abstenir d'y substituer leur propre conception de ce qui constituerait le « meilleur » arrangement. Mais ils ne doivent pas pour autant renoncer à s'acquitter de leur obligation d'examiner l'arrangement. Étant donné que l'art. 192 facilite la modification de droits, le tribunal doit procéder à un examen attentif des transactions proposées. Comme la juge Lax l'a déclaré dans *UPM-Kymmene Corp. c. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (C.S.J. Ont.), par. 153 : [TRADUCTION] « Bien qu'il n'y ait pas lieu de scruter les décisions du conseil d'administration à la loupe dans la perspective idéale que permet le recul, il faut tout de même les examiner. »

(2) Application aux présents pourvois

[156] Comme il a déjà été mentionné (aux par. 137-138), la société qui soumet une demande en vertu de l'art. 192 doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande est soumise de bonne foi et (3) l'arrangement est équitable et raisonnable au sens où a) il poursuit un objectif commercial légitime et b) il répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés par l'arrangement.

[157] En l'espèce, les deux premières conditions sont indiscutablement remplies et, en ce qui concerne la troisième, les détenteurs de débentures ne contestent plus que l'arrangement poursuive un objectif commercial légitime. Le débat, devant la Cour, porte donc sur la question de savoir si les objections de ceux dont les droits sont visés par l'arrangement ont été résolues de façon équitable et équilibrée.

[158] The debentureholders argue that the arrangement does not address their rights in a fair and balanced way. Their main contention is that the process adopted by the directors in negotiating and concluding the arrangement failed to consider their interests adequately, in particular the fact that the arrangement, while upholding their contractual rights, would reduce the trading value of their debentures and in some cases downgrade them to below investment grade rating.

[158] Suivant les détenteurs de débentures de Bell Canada, l'arrangement ne tient pas compte de leurs droits d'une façon équitable et équilibrée. Leur principal argument porte que le processus adopté par les administrateurs pour négocier et conclure l'arrangement n'a pas tenu suffisamment compte de leurs intérêts, plus particulièrement parce que l'arrangement, bien qu'il maintienne leurs droits contractuels, réduirait la valeur marchande de leurs débentures et, dans certains cas, leur ferait perdre leur cote de placements admissibles.

[159] The first question that arises is whether the debentureholders' economic interest in preserving the trading value of their bonds was an interest that the directors were required to consider on the s. 192 application. We earlier concluded that authority and principle suggest that s. 192 is generally concerned with legal rights, absent exceptional circumstances. We further suggested that the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not constitute such a circumstance.

[159] La première question qui se pose est de savoir si les administrateurs étaient tenus de prendre en considération les intérêts financiers des détenteurs de débentures quant au maintien de la valeur marchande de leurs titres dans le cadre de l'application de l'art. 192. La Cour a conclu précédemment qu'il ressort des principes et de la jurisprudence que l'art. 192 concerne généralement les droits, en l'absence de circonstances particulières. Elle a aussi indiqué que la diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits sont demeurés intacts ne constitue habituellement pas ce type de circonstances.

[160] Relying on Policy Statement 15.1, the trial judge in these proceedings concluded that the debentureholders were not entitled to vote on the plan of arrangement because their legal rights were not being arranged; "[t]o do so would unjustly give [them] a veto over a transaction with an aggregate common equity value of approximately $35 billion that was approved by over 97% of the shareholders" (para. 166). Nevertheless, the trial judge went on to consider the debentureholders' perspective.

[160] En s'appuyant sur l'Énoncé de politique 15.1, le juge de première instance a conclu que les détenteurs de débentures ne devaient pas se voir accorder le droit de voter sur le plan d'arrangement parce qu'il ne visait pas leurs droits : [TRADUCTION] « Leur accorder ce droit [leur] conférerait injustement un droit de veto sur une transaction d'une valeur totale d'environ 35 milliards de dollars d'actions ordinaires, approuvée par plus de 97 p. 100 des actionnaires » (par. 166). Le juge a néanmoins tenu compte du point de vue des détenteurs de débentures.

[161] We find no error in the trial judge's conclusions on this point. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192. The trial judge was thus correct in concluding

[161] Selon la Cour, le juge de première instance pouvait à bon droit conclure ainsi. Puisque la transaction proposée touchait uniquement les intérêts financiers des détenteurs de débentures, et non leurs droits, et puisqu'ils ne se trouvaient pas dans des circonstances particulières commandant la prise en compte de simples intérêts sous le régime de l'art. 192, les détenteurs de débentures

that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests in his assessment of whether the arrangement was fair and reasonable under s. 192, as he did.

ne constituaient pas une catégorie touchée pour l'application de cette disposition. Le juge de première instance était donc fondé à conclure qu'ils ne pouvaient être autorisés à opposer un veto à près de 98 p. 100 des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Même s'il n'en avait pas l'obligation, le juge de première instance avait le droit de tenir compte des intérêts financiers des détenteurs de débentures, comme il l'a fait, pour se prononcer sur le caractère équitable et raisonnable de l'arrangement en vertu de l'art. 192.

[162] The next question is whether the trial judge erred in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The trial judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. He noted that it was open to the debentureholders to negotiate protections against increased debt load or the risks of changes in corporate structure, had they wished to do so. He went on to state:

> . . . the evidence discloses that [the debentureholders'] rights were in fact considered and evaluated. The Board concluded, justly so, that the terms of the 1976, 1996 and 1997 Trust Indentures do not contain change of control provisions, that there was not a change of control of Bell Canada contemplated and that, accordingly, the Contesting Debentureholders could not reasonably expect BCE to reject a transaction that maximized shareholder value, on the basis of any negative impact [on] them.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 162, quoting (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, at para. 199)

[162] Il faut ensuite se demander si le juge de première instance a conclu à tort que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. Le juge a souligné que l'arrangement préservait les droits contractuels des détenteurs de débentures tels que ces derniers les avaient négociés. Il a indiqué que les détenteurs de débentures, s'ils l'avaient désiré, auraient pu négocier des mesures de protection contre l'accroissement de la dette ou les risques de changement dans la structure de la société. Il a ajouté :

> [TRADUCTION] . . . la preuve révèle que leurs droits [des détenteurs de débentures] ont effectivement été pris en compte et évalués. Le Conseil d'administration a conclu, à juste titre, que les actes de fiducie de 1976, 1996 et 1997 ne renfermaient aucune stipulation concernant un changement de contrôle et que, par ailleurs, aucun changement de contrôle de Bell Canada n'était envisagé, de sorte que les détenteurs de débentures ne pouvaient raisonnablement s'attendre à ce que BCE rejette une transaction qui maximisait la valeur actionnariale parce qu'elle avait des effets négatifs pour eux.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, par. 162, citant (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, par. 199)

[163] We find no error in these conclusions. The arrangement does not fundamentally alter the debentureholders' rights. The investment and the return contracted for remain intact. Fluctuation in the trading value of debentures with alteration in debt load is a well-known commercial phenomenon. The debentureholders had not contracted against this contingency. The fact that the trading value of

[163] La Cour ne décèle aucune erreur dans ces conclusions. L'arrangement ne modifie pas fondamentalement les droits des détenteurs de débentures. L'investissement et le rendement prévus par contrat demeurent inchangés. La fluctuation de la valeur marchande des débentures associée à une variation de l'endettement est un phénomène commercial bien connu. Les détenteurs de débentures

the debentures stood to diminish as a result of the arrangement involving new debt was a foreseeable risk, not an exceptional circumstance. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada: necessity was established. No superior arrangement had been put forward, and BCE had been assisted throughout by expert legal and financial advisors, suggesting that the proposed arrangement had a valid business purpose.

[164] Based on these considerations, and recognizing that there is no such thing as a perfect arrangement, the trial judge concluded that the arrangement had been shown to be fair and reasonable. We see no error in this conclusion.

[165] The Court of Appeal's contrary conclusion rested, as suggested above, on an approach that incorporated the s. 241 oppression remedy with its emphasis on reasonable expectations into the s. 192 arrangement approval process. Having found that the debentureholders' reasonable expectations (that their interests would be considered by the Board) were not met, the court went on to combine that finding with the s. 192 onus on the corporation. The result was to combine the substance of the oppression action with the onus of the s. 192 approval process. From this hybrid flowed the conclusion that the corporation had failed to discharge its burden of showing that it could not have met the alleged reasonable expectations of the debentureholders. This result could not have obtained under s. 241, which places the burden of establishing oppression on the claimant. By combining s. 241's substance with the reversed onus of s. 192, the Court of Appeal arrived at a conclusion that could not have been sustained under either provision, read on its own terms.

ne se sont pas prémunis contractuellement contre une telle éventualité. La diminution éventuelle de la valeur marchande de leurs titres par suite de l'arrangement prévoyant l'accroissement de l'endettement constituait un risque prévisible, et non des circonstances particulières. Il était clair pour le juge que, pour la continuité de la société, l'approbation d'un arrangement comportant un accroissement de l'endettement et des garanties à la charge de Bell Canada était nécessaire. La nécessité était établie. Aucun arrangement supérieur n'avait été soumis et BCE avait bénéficié, pendant tout le processus, des conseils de spécialistes du droit et de la finance, ce qui donne à croire que l'arrangement poursuivait un objectif commercial légitime.

[164] En s'appuyant sur ces considérations, et reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a conclu que le caractère équitable et raisonnable de l'arrangement avait été démontré. Cette conclusion n'est à notre avis entachée d'aucune erreur.

[165] Comme cela a déjà été précisé, l'opinion contraire de la Cour d'appel procédait d'un raisonnement qui amalgamait la demande de redressement pour abus de l'art. 241, axé sur les attentes raisonnables, et le processus d'approbation d'un arrangement établi à l'art. 192. Après avoir conclu que les attentes raisonnables des détenteurs de débentures (que le Conseil d'administration tienne compte de leurs intérêts) n'avaient pas été satisfaites, la cour a associé cette conclusion au fardeau de preuve imposé à la société par l'art. 192. Elle a ainsi combiné les éléments substantiels de la demande de redressement pour abus au fardeau de la preuve applicable dans le cadre d'une demande d'approbation sous le régime de l'art. 192. De ce croisement a découlé la conclusion que la société ne s'était pas acquittée de son obligation de démontrer qu'il n'était pas possible de répondre aux attentes raisonnables des détenteurs de débentures. L'application de l'art. 241, qui impose au plaignant l'obligation de prouver l'abus, n'aurait pas pu produire un tel résultat. En combinant les éléments substantiels de l'art. 241 au fardeau de preuve inversé prévu à l'art. 192, la Cour d'appel est parvenue à une conclusion qu'aucune de ces dispositions, isolément, n'aurait pu justifier.

VI. Conclusion

[166] We conclude that the debentureholders have failed to establish either oppression under s. 241 of the *CBCA* or that the trial judge erred in approving the arrangement under s. 192 of the *CBCA*.

[167] For these reasons, the appeals are allowed, the decision of the Court of Appeal set aside, and the trial judge's approval of the plan of arrangement is affirmed with costs throughout. The cross-appeals are dismissed with costs throughout.

Appeals allowed with costs. Cross-appeals dismissed with costs.

Solicitors for the appellants/respondents on cross-appeals BCE Inc. and Bell Canada: Davies, Ward, Phillips & Vineberg, Montréal; Ogilvy Renault, Montréal.

Solicitors for the appellant/respondent on cross-appeals 6796508 Canada Inc.: Woods & Partners, Montréal.

Solicitors for the respondents/appellants on cross-appeals Group of 1976 Debentureholders and Group of 1996 Debentureholders: Fishman, Flanz, Meland, Paquin, Montréal.

Solicitors for the respondent/appellant on cross-appeals Group of 1997 Debentureholders: McMillan, Binch, Mendelsohn, Toronto.

Solicitors for the respondent Computershare Trust Company of Canada: Miller, Thomson, Pouliot, Montréal.

Solicitor for the intervener Catalyst Asset Management Inc.: Christian S. Tacit, Kanata.

Solicitors for the intervener Matthew Stewart: Langlois, Kronström, Desjardins, Montréal.

VI. Conclusion

[166] La Cour est d'avis que les détenteurs de débentures n'ont établi ni qu'il y avait eu abus au sens de l'art. 241 de la *LCSA* ni que le juge de première instance a commis une erreur en approuvant l'arrangement sous le régime de l'art. 192 de la *LCSA*.

[167] Pour ces motifs, les pourvois sont accueillis, la décision de la Cour d'appel est annulée et l'approbation du plan d'arrangement par le juge de première instance est rétablie, avec dépens devant toutes les cours. Les pourvois incidents sont rejetés avec dépens devant toutes les cours.

Pourvois principaux accueillis avec dépens. Pourvois incidents rejetés avec dépens.

Procureurs des appelantes/intimées aux pourvois incidents BCE Inc. et Bell Canada : Davies, Ward, Phillips & Vineberg, Montréal; Ogilvy Renault, Montréal.

Procureurs de l'appelante/intimée aux pourvois incidents 6796508 Canada Inc. : Woods & Partners, Montréal.

Procureurs des intimés/appelants aux pourvois incidents un groupe de détenteurs de débentures de 1976 et un groupe de détenteurs de débentures de 1996 : Fishman, Flanz, Meland, Paquin, Montréal.

Procureurs de l'intimé/appelant aux pourvois incidents un groupe de détenteurs de débentures de 1997 : McMillan, Binch, Mendelsohn, Toronto.

Procureurs de l'intimée la Société de fiducie Computershare du Canada : Miller, Thomson, Pouliot, Montréal.

Procureur de l'intervenante Catalyst Asset Management Inc. : Christian S. Tacit, Kanata.

Procureurs de l'intervenant Matthew Stewart : Langlois, Kronström, Desjardins, Montréal.

TAB 8

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-039230-103

DATE: January 28, 2014

PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

RAMZI MAHMOUD ALHARAYERI
Plaintiff
v.
HANS PETER BLACK
DAVID TAHMASSEBI
ROB ROY
ANDRUS WILSON
Defendants
and
WI2WI CORPORATION
Mise-en-cause

JUDGMENT

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[1] The Court is seized with an action in oppression by the Plaintiff Ramzi Mahmoud Alharayeri ("**Ramzi**")[1] against the Defendants Hans Peter Black ("**Black**"), David Tahmassebi ("**Tahmassebi**"), Rob Roy ("**Roy**") and Andrus Wilson ("**Wilson**"), who were, at all relevant times, directors of the Mise-en-cause Wi2Wi Corporation ("**Wi2Wi**"). Ramzi seeks damages in the amount of $4,692,539.98 which sum represents,

[1] Both sides referred to the Plaintiff as Ramzi during the trial.

according to him, the value of his shares in Wi2Wi which he was unable to realize because of the Defendants' conduct.

BACKGROUND FACTS

[2] In 2005, Ramzi was an executive with 20 years experience in the computer business. He was at that time the Vice-President of the Original Equipment Manufacturing ("**OEM**") division of Actiontec Electronics, Inc. ("**Actiontec**"), which was involved in the manufacture of Wi-Fi modules (the "**Old Products**"). Ramzi was interested in developing a multiple functioning system-in-package for cell phones that would incorporate Wi-Fi, Bluetooth and GPS as three distinct layers in one chip (the "**New Products**"). Actiontec was reluctant to embark in this new venture, and Ramzi therefore proposed that he purchase the OEM division in a management buy-out and develop the New Products on his own.

[3] In order to proceed with the management buy-out, Ramzi required financing. In July or August 2005, he was introduced to Palos Capital ("**Palos**"), which was a Montréal-based money management firm. Palos proposed a reverse takeover using a shell company, Sargeant Bay Capital Inc. ("**Sargeant Bay**"), which already had $650,000 from investors and was looking for a transaction in which to invest those funds. The steps in the reverse takeover were that Ramzi would incorporate a company to acquire the OEM division of Actiontec, that Palos would find additional investors through Sargeant Bay, and that Sargeant Bay would then acquire Ramzi's company and issue shares to Ramzi.

[4] Ramzi proceeded to acquire the OEM division from Actiontec through a company called Wi2Wi Inc. in October 2005 for US $3 million, which was financed by Palos.

[5] Meanwhile, Palos was trying to find $5 million from investors. Ramzi, with the assistance of Palos, Richard Groome ("**Groome**") and Wilson prepared a forecast and a business plan for Wi2Wi. The forecast prepared in November 2005 showed that revenue from the Old Products, whether from existing clients or from new clients, was expected to be relatively stable at $3 to $5 million per quarter, and that revenue from the New Products was expected to start slowly in the second quarter of 2006 and to increase quickly to almost $30 million in 2007, over $75 million in 2008, and $200 million in 2009. The business plan also provided that Wi2Wi would go public in the first quarter of 2006. The search for investors did not go well, and Palos was able to find only US $3.5 million out of the $5 million that it had hoped to find.

[6] Nevertheless, the reverse takeover of Wi2Wi Inc. by Sargeant Bay proceeded in December 2005, with the resulting entity being Wi2Wi. As part of the reverse takeover, Ramzi exchanged his 4.5 million common shares of Wi2Wi Inc. for a total of 4.5 million shares of Wi2Wi: 2 million common shares, 1 million Class A Convertible Preferred Shares (the "**A Shares**") and 1.5 million Class B Convertible Preferred Shares (the "**B Shares**"). As more fully set out below, the A Shares were convertible into common

shares if certain financial targets were met for the financial year 2006, and the B Shares were convertible into common shares if certain financial targets were met in the 2007 financial year. There were also Class C Convertible Preferred Shares (the "**C Shares**") that were issued as an incentive to those involved in finding new investors for Wi2Wi. The A, B and C Shares were non-participating, non-voting, non-transferable and non-assignable.

[7] The fact that the financing was not going as well as planned brought about two consequences. First, it meant that Wi2Wi had less cash than originally planned. The money raised by Palos was largely used to finance the purchase from Actiontec. This lack of cash came to be a constant theme in the history of Wi2Wi. Through 2006, sales continued on the Old Products, although the rhythm of those sales was not as high as forecast, and work continued on the development of the New Products. The development of the New Products did not proceed as quickly as Ramzi had foreseen in the November 2005 forecast. Wilson suggested in his testimony that this was due to Ramzi's poor management, and Ramzi suggested that the delays in the development of the New Products were due to the cash difficulties under which Wi2Wi operated. It is not necessary, for the purposes of this judgment, to come to any conclusion on that issue. It is sufficient to note that the revenues from the Old Products were lower than expected (although margins were high because that part of the business appears to have been operated quite efficiently), and development of the New Products was slower than expected.

[8] The second consequence of the difficulties in finding adequate financing was that Wi2Wi was not able to go public in 2006 as planned. This made it more difficult for Wi2Wi to find financing going forward. It also made it difficult for Ramzi to sell any of his shares.

[9] In early 2007, two events occurred which planted the seeds for the present litigation. Both of these events relate to Mitec Telecom Inc. ("**Mitec**"), a publicly-traded company in the telecom field in which Palos was a significant shareholder. The first event is that, sometime late in 2006 or early in 2007, Palos came up with the idea that a merger or other transaction between Mitec and Wi2Wi might be a good fit for both companies. The second event is that Ramzi had a need for cash for personal reasons and he went to Palos in early 2007 to see if Palos might be interested in buying some of his shares in Wi2Wi. This seems to have occurred at about the same time that Palos thought that Wi2Wi and Mitec might be a good fit, and Palos therefore suggested that Mitec might be interested in buying some of Ramzi's shares.

[10] The result of these two events is that there were parallel negotiations between Mitec and Ramzi for the acquisition of Wi2Wi and for the acquisition of some of Ramzi's shares in Wi2Wi. The issue of when Ramzi disclosed to the Board of Wi2Wi that he was involved in negotiations with Mitec to sell some of his shares in Wi2Wi was contested at trial, and the discussion of that specific issue is set out below.

[11] At this stage, it is sufficient to note the following steps that took place in discussions between Mitec and Wi2Wi. In a memorandum dated March 12, 2007[2], Mitec expressed an interest in acquiring 51% of Wi2Wi with an option to purchase the remaining 49%. Mitec was estimating Wi2Wi's value at US $26 million, such that it would issue shares of Mitec worth US $13 million for the first tranche of Wi2Wi shares. The exercise price for the option to purchase the remaining 49% of Wi2Wi at the end of 2007 would be US $15 million to US $25 million in Mitec shares, depending on Wi2Wi's 2007 revenue, for a total consideration between US $28 million and US $38 million.

[12] That initial memorandum evolved into a draft letter of intent sent by Mitec to Wi2Wi on March 17, 2007. The draft letter of intent provided that Mitec would acquire 100% of the shares of Wi2Wi for a purchase price of approximately US $25 million in Mitec shares, with a further US $20 million in warrants being issued entitling the shareholders of Wi2Wi to acquire additional shares of Mitec at a nominal cost if the revenue for Wi2Wi for the first four quarters after the closing exceeded US $40 million, for a total consideration between US $25 million and US $45 million.

[13] After further discussions between the parties, that draft evolved into a letter of intent sent by Mitec to Wi2Wi on April 10, 2007 (the "**First LOI**"). The First LOI provided for an "Initial Consideration" of approximately US $25 million and an "Adjustment Consideration" equal to 90% of the gross revenue between US $25 million and US $42 million and 50% of the gross revenue between US $42 million and US $60 million, for a total consideration between US $25 million and US $50 million payable in Mitec shares. Paragraph 7 of the First LOI was entitled "Governance" and provided that Ramzi would be appointed President of Mitec's U.S. operations and Executive Vice-President of Mitec, and that the board of directors would be made up of Ramzi, the President of Mitec Dan Piergentili ("**Piergentili**"), three Mitec nominees and three Wi2Wi nominees.

[14] At the same time, Ramzi and Mitec were negotiating the sale of some of Ramzi's shares. The share purchase agreement is dated March 30, 2007 and was apparently signed on April 2, 2007 (the "**Ramzi SPA**"), and it refers to a letter of intent signed on March 23, 2007. According to Ramzi, Mitec was interested in purchasing 1 million of his common shares but he ultimately sold only 300,000 common shares. The purchase price was US $750,000, or US $2.50 per share, payable in cash, with a warrant that would entitle Ramzi to receive up to a maximum of a further US $500,000 of Mitec shares if Mitec purchased at least 90% of the outstanding Wi2Wi shares within 120 days and if the price under that transaction was higher than US $2.50 per share. If Mitec did not acquire 90% of the outstanding Wi2Wi shares within 120 days, the warrant expired.

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[2] The Board discussed a memorandum from Mitec at its March 2, 2007 meeting. It appears that this memorandum was prepared prior to that meeting and that the March 12, 2007 date was a computer generated date on a subsequent copy of the memorandum.

[15] There were two further provisions in the Ramzi SPA that are worth highlighting at this stage. First, under paragraph 5.2(a), Ramzi "shall enter into and shall cause the other shareholders of the Corporation to enter into the Wi2Wi Purchase Agreement", which was defined as an agreement whereby Mitec acquired at least 90% of the outstanding shares of Wi2Wi. Further, under paragraph 5.2(b), Ramzi granted to Mitec an option to purchase all or a portion of the balance of his shares at a price of US $3.00 per share payable in Mitec shares, in the event that the "Wi2Wi Purchase Agreement" does not close within 120 days.

[16] Through April and May 2007, Mitec and Wi2Wi proceeded with their due diligence of one another. One of the issues that came up at the Board of Wi2Wi in this context was how to deal with the A, B and C Shares in the context of the transaction with Mitec. Mitec was proposing to purchase all of the shares of Wi2Wi, so it was a question of how to divide the price amongst the shareholders of Wi2Wi. Ramzi's right to convert the A Shares was dependent on Wi2Wi's financial results for the 2006 financial year, which had ended on September 30, 2006. The audited financial statements for the 2006 financial year are dated April 16, 2007, but at the May 16, 2007 Board meeting, Black said that he had seen draft financial statements but not the final financial statements. Ramzi testified that he forwarded the final financial statements to the Board the next day. There is no record that the Board ever approved those financial statements, or that they were ever presented to the shareholders at an annual meeting. Ramzi took the position that his A Shares should be converted into common shares and should be included in the sale to Mitec pursuant to the First LOI on the same basis as the common shares. Ramzi's right to convert the B Shares was dependent on Wi2Wi's financial results for the year ending September 30, 2007. Ramzi recognized that he had no right to convert the B Shares in May 2007, and various options were under discussion.

[17] Also at the end of May 2007, Ramzi negotiated the sale to Intermec, Wi2Wi's sole remaining customer for the Old Products, of Wi2Wi's manufacturing rights to certain of the Old Products. The proceeds of the sale were US $1.3 million and the sale essentially put an end to the old business.

[18] It is on May 31, 2007 that things start to go off the rails. On that date, there was a dinner attended by the Defendants Wilson and Black and by Piergentili, without Ramzi being present. Amongst other things, they discussed the Ramzi SPA. Piergentili testified that he was surprised to learn that the Board was not aware of the details of the deal, and Wilson testified that he was shocked to learn the details. These disclosures led to a flurry of emails on June 1, which culminated in Ramzi's resignation as Chief Executive Officer of Wi2Wi. It is clear from Ramzi's testimony that he had not expected his resignation to be accepted, but it was. He tried to withdraw the resignation, but the Board refused. Mitec was advised of this development and, after some back and forth with Wi2Wi, Mitec terminated the First LOI on June 29.

[19] On June 7, 2007, the Board received a copy of the Ramzi SPA and indicated to both Ramzi and Mitec that it would not approve the transfer of the shares. As a result, the Ramzi SPA was amended and restated (the “**Amended SPA**”) to eliminate the undertaking to cause the other shareholders to sell their shares to Mitec and the option to buy the balance of Ramzi’s shares. Further, the price was reduced from US $2.50 per share to US $1.50 per share. Because Ramzi was not able to reimburse the cash he had received in consideration for the shares, the number of shares was increased from 300,000 to 500,000 so that the total purchase price remained US $750,000.

[20] On July 23, 2007, Mitec issued a second letter of intent to Wi2Wi (the “**Second LOI**”). As a result of the due diligence and the ongoing delays in the development of the New Products, Mitec reduced the purchase price to US $13.2 million in Mitec shares with additional consideration corresponding dollar to dollar to any gross revenue in excess of US $14 million, up to a maximum of US $25 million inclusive of the initial consideration. The governance clause found in the First LOI was not found in the Second LOI.

[21] The Board met to discuss the Second LOI. The Board was not happy with the price or with the disappearance of the governance clause, but did not completely close the door to Mitec.

[22] With discussions with Wi2Wi at a standstill, Mitec went back to Ramzi and on September 6, 2007 offered him US $0.50 per share for his remaining common shares and US $100 for his A and B Shares, for a total consideration of US $750,100 (the “**September 6 Offer**”). At the same time as the September 6 Offer was submitted to Ramzi, Mitec sent a copy to Wi2Wi, and the Board indicated that it would be prepared to consent to the purchase if the A and B Shares were surrendered by Mitec to Wi2Wi, and if :

> “Mitec shall concurrently offer to all existing Wi2Wi shareholders the Common Shares of Wi2Wi that it shall purchase under the Offer, on the basis which is pro rata to the then existing ownership position in Wi2Wi held by each Wi2Wi shareholder. Such offer shall remain open for a period of 10 days following closing of the Transaction.”

[23] Those conditions were acceptable to Mitec, but Ramzi rejected the September 6 Offer because the price was too low. One week later, on September 13, 2007, Mitec came back with a new offer at US $1.50 per common share plus US $100 for the A and B Shares (the “**September 13 Offer**”) which Ramzi accepted. The Board indicated that it would approve the transaction on the same conditions as it had been prepared to approve the September 6 Offer.

[24] Mitec then proceeded to a due diligence of Wi2Wi and it found that the situation was much worse than it had expected. It appeared that Wi2Wi was even at risk of missing its payroll at the end of September. In those circumstances, Mitec offered on September 27, 2007 to make a loan to Wi2Wi of up to $1 million, with a first tranche of

$250,000 advanced immediately. The loan provided for a six month term and 12% interest, with all of Wi2Wi's intellectual property given as security. As a further condition, a shareholders meeting was to be called within 48 hours of receiving the first tranche with all existing Board members resigning, such that a new Board would be elected by the majority of the shareholders and a new management restructuring team would be appointed by the new Board.

[25] The Board refused this loan offer and instead proceeded on September 28, 2007 with a private placement of convertible secured notes (the "**Private Placement**"). Pursuant to the Private Placement, each shareholder was entitled to subscribe for $1.00 of convertible secured notes of Wi2Wi (the "**Notes**") for every two common shares of Wi2Wi currently owned. The Notes had a six month term and 10% interest, and were secured on all of the assets of Wi2Wi including its intellectual property. Further, the Notes were convertible into common shares of Wi2Wi at the rate of 50,000 common shares per $1,000 principal amount of Notes, which represented a conversion price of $0.02 per common share.

[26] The Private Placement also included a negative covenant whereby Wi2Wi undertook not to enter into any merger or consolidation while any amount remained outstanding under the Notes.

[27] On October 5, 2007, Mitec terminated the September 13 Offer. The termination of the September 13 Offer appears to have been based on the results of the due diligence, because on October 9, Mitec made a new offer to Ramzi (the "**October 9 Offer**"). The new price was US $0.50 per common share with no mention of the A or B Shares. Mitec had incorporated into its offer the Board's condition about offering the common shares to the other shareholders on a pro rata basis but added that it would have the option to purchase the shares not taken up by the other shareholders.

[28] Ramzi was prepared to accept that offer. The Board considered it at their meeting on October 14, 2007, and took the position that Mitec could not acquire more than 8% of Ramzi's shares, regardless of how many shares were taken up by the other shareholders. The October 15 delay for the Private Placement passed without Ramzi or Mitec having exercised the right to subscribe for the Notes, and Mitec ultimately walked away from the October 9 Offer.

[29] It appears that Ramzi has had very little to do with Wi2Wi since October 15, 2007. He has sent emails to ask for the conversion of his A and B Shares but he did not participate in the shareholders meetings of March 28, 2008 or March 24, 2010. He testified that he had not received notice of either meeting.

[30] The latest evidence with respect to Wi2Wi is a press release dated July 9, 2012. This press release announced a reverse takeover of Wi2Wi by International Sovereign Energy Corp. ("**ISEC**") whereby it was expected that 4.481 Wi2Wi shares would be exchanged for one new ISEC share. The plan of arrangement also provided for the

cancellation of the issued and outstanding A and B Shares. The press release suggests that Wi2Wi has finally succeeded in marketing the New Products, although for the year ended December 31, 2011, Wi2Wi had total revenue of only US $4,930,000. Finally, it is interesting to note from this press release that the defendants Black and Tahmassebi were still Directors of Wi2Wi as of July 9, 2012.

[31] Finally, there was evidence that Mitec, on the other hand, had essentially ceased its operations.

THE CLAIM

[32] Ramzi alleges the following acts by the Defendants:

> "The Defendants have violated the Plaintiff's reasonable expectation to be treated fairly and the cumulative effects of their conduct have been oppressive to the Plaintiff for the following reasons:
>
> (a) The Directors refusal to finalize the conversion of the Plaintiff's Series A shares;
>
> (b) The Directors refusal to finalise the conversion of the Plaintiff's Series B shares;
>
> (c) The Directors unreasonable refusal to allow the Plaintiff's sale of 300,000 common shares in 2007;
>
> (d) The Directors frustration of Mitec Telecom Inc. ("Mitec")'s offers to purchase the Corporation's shares;
>
> (e) The Directors efforts to dilute the Plaintiff's shares in the Corporation;
>
> (f) The Directors refusals to call shareholder meetings; and
>
> (g) The Directors refusals to disclose Wi2Wi's financial information.

[33] Ramzi alleges that this conduct amounts to "oppression" under Section 241 of the Canada Business Corporation Act (the "**CBCA**")[3], which provides in part as follows:

> (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

[3] R.S.C. 1985, c. C-44.

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 243;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XIX to be made; and

(n) an order requiring the trial of any issue.

[34] Ramzi has sued the four Defendants, who were directors of Wi2Wi at the relevant time.

[35] Ramzi seeks damages in the amount of $4,692,539.98, which represents, according to him, the value of his common shares, A Shares and B Shares as of September 6, 2007. He seeks an order that he remit his share certificates to whomever the Defendants designate upon payment of that sum.

TRIAL AND PROCEDURAL ISSUES

[36] Ramzi testified at the trial, and he called as witnesses Piergentili from Mitec, Groome from Notre-Dame Capital Inc. (“**Notre-Dame**”), a shareholder of Wi2Wi, and Hubert Marleau (“**Marleau**”) from Palos.

[37] The only Defendant to testify was Wilson, and the Defendants did not call any other witnesses.

[38] There was one pre-trial issue which had an impact on the trial. Ramzi had made a motion for permission to re-amend his motion to institute proceedings on October 15, 2013, which was granted in part by my colleague Mr. Justice Schrager on October 22, 2013. In that judgment, amendments to add (1) allegations with respect to the conditions imposed by the Board on the October 9 Offer and (2) allegations that Black’s sons had acquired shares in October 2007 as *prête-noms* for Black, were not allowed by Mr. Justice Schrager. I allowed evidence to be made with respect to the October 9 Offer and evidence with respect to the shareholders of Wi2Wi is in the Court record, but those two matters are not specifically alleged as acts of oppression.

GENERAL PRINCIPLES APPLICABLE TO OPPRESSION CASES

[39] The general principles applicable to oppression cases are well established and are not contested by any of the parties. Essentially, as established by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*,[4] there is a two-pronged inquiry.

[40] The first prong of the inquiry is to establish whether the petitioner’s reasonable expectations were breached. With respect to the concept of reasonable expectations, the Court explained that stakeholders enter into relationships with and within

[4] [2008] 3 S.C.R. 560, paragraphs 56 to 68.

corporations on the basis of understandings and expectations upon which they are entitled to rely, provided that they are reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations. The Court added that fair treatment is most fundamentally what shareholders are entitled to "reasonably expect".

[41] Once a breach of reasonable expectations is established, the second prong is to consider whether the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest. The Court held that "oppression" means conduct that is coercive and abusive and suggests bad faith, that "unfair prejudice" may admit of a less culpable state of mind that nevertheless has unfair consequences, and that "unfair disregard" means ignoring an interest as being of no importance, contrary to the petitioner's reasonable expectations.

[42] With those principles in mind, I will look at Ramzi's reasonable expectations and the conduct of the Defendants in relation of each alleged act of oppression, and then consider the remedy sought by Ramzi.

ANALYSIS OF THE SPECIFIC ALLEGATIONS OF OPPRESSION

a) Failure to convert the A Shares

[43] As part of the reverse takeover of Wi2Wi Inc. by Sargeant Bay, 1 million A Shares were issued to Ramzi. The conversion right attached to the A Shares is defined as follows in paragraph 5.1(a) of Schedule A of Wi2Wi's articles of incorporation:

> "the Class A Convertible Preferred Shares will be convertible into a like number of Common Shares only in the event the Corporation achieves gross margins of $3,500,000 for its 2006 financial year, the whole as determined by the auditors of the Corporation whose determination shall be binding upon the Corporation and the holders of the Class A Convertible Preferred Shares;"

[44] Ramzi's reasonable expectation would be that his A Shares would be converted into common shares if that test is met.

[45] The articles call for a determination by the auditors as to whether the test was met. We have no evidence of a specific determination by the auditors, other than note (14)(b) to the audited financial statements for the year ended September 30, 2006, which provides as follows:

> "The Class A Convertible Preferred Shares were convertible into a like number of common shares in the event the Company achieved gross margins of $3.5 million for its 2006 financial year, pursuant to the Share Purchase Agreement between the shareholder of Wi2Wi Inc. and Wi2Wi Corporation on December 12, 2006 (the Agreement). The Agreement does not define gross margin. In the

> absence of any specific definitions or interpretations in the Agreement, management has presumed gross margin equals revenues less cost of revenues per the financial statements prepared pursuant to Canadian GAAP. Based upon that, management has concluded that the Class A Convertible Preferred Shares are currently convertible into 1.0 million common shares at the option of the holder for five years from the date the Company notifies the holder."

[46] The language included by the auditors in note (14)(b) of the 2006 audited financial statements was reproduced word for word in note (15)(b) of the 2007 audited financial statements and in note 12 of the 2008 and 2009 audited financials statements, with the only difference being that in 2007, the following sentence was added at the end of the note:

> "Subsequent to the end of fiscal 2006, a dispute arose over the conversion rights."

That sentence is not found in the 2008 and 2009 financial statements.

[47] The formula described in the notes is that gross margin equals revenues less cost of revenues. I take judicial notice of the fact that this is a fairly standard definition of gross margin. It is also consistent with the internal financial statements of Wi2Wi for the period ended June 30, 2007 produced in the record where the difference between "Income" and "Cost of Goods Sold" is labelled as "Gross Profit". Moreover, the CEO of Wi2Wi at the time of the 2007 audited financial statements was the Defendant Wilson, and "management" in 2007 used the same definition for gross margin as "management" in 2006. I will therefore accept that formula.

[48] The consolidated statement of operations included in the 2006 audited financial statements shows revenues of $12,038,000 and cost of revenues of $7,584,000, for a difference of $4,454,000 which is not labelled in the consolidated statement of operations but which corresponds to the definition which I have accepted for gross margin.

[49] Based on the foregoing, I conclude that the test as set out in paragraph 5.1(a) of the articles was met.

[50] There is a procedure in section 5.1 for the conversion of the A Shares. Essentially, the auditors determine whether Wi2Wi achieved a gross margin of $3,500,000 for its 2006 financial year, then Wi2Wi provides written notice to the holders of the A Shares of the financial results for the 2006 financial year "forthwith following the approval of the Corporation's audited financial statements for said financial year by the Board of Directors", and then the holder of the A Shares has five years from receipt of the Corporation's notice to send his notice accompanied by the share certificates representing his A Shares.

[51] This procedure was not followed. The auditors audited the financial statements but, other than referring to management's position in note (14)(b), made no specific determination of Wi2Wi's gross margins for 2006. Further, the evidence is to the effect that the Board never approved the 2006 audited financial statements and never sent notice to Ramzi of the 2006 results. Finally, Ramzi has never sent a formal notice asking for the conversion of the A Shares, although he did make frequent requests at Board meetings, in emails, and otherwise.

[52] Ramzi certainly cannot be faulted for the failure to follow the procedure. The Defendants cannot invoke their failure to approve the audited financial statements and their failure to issue a notice to Ramzi to justify their failure to convert the A Shares.

[53] Wilson gave two reasons to justify the failure to convert the A Shares.

[54] First, in his testimony and as appears from the minutes of the Board, there were some doubts expressed as to the validity of the numbers in the 2006 audited financial statements. I note, however, that the numbers in the 2006 audited financial statements have never been amended or restated, and that those exact numbers are used as the comparative numbers in the 2007 financial statements which were approved by the Board and submitted to the shareholders in early 2008 after Ramzi's resignation. Whatever doubts may have existed as to the 2006 numbers proved not to be well-founded. I therefore dismiss that argument.

[55] Wilson also suggested in his testimony that the A Shares were not converted because Wi2Wi had potential claims against Ramzi arising from his mismanagement of Wi2Wi, which claims were set out in the demand letter sent to Ramzi in August 2007. Even if Wi2Wi had claims against Ramzi (and I note that whatever claims it may have had were never pursued), those claims cannot justify a failure to convert the shares. There can be no compensation between the conversion of shares and a monetary debt. Further, the A Shares and the alleged debt have different sources: the A Shares were issued to Ramzi as a shareholder as part of the reverse takeover, and the potential claims against him relate to mismanagement as an employee. In any event, Wi2Wi would not have lost any rights by converting the A Shares. It could still have seized the common shares or refused the transfer of the common shares to a third party and therefore ensured that Ramzi had assets against which it could execute a judgment. For all of these reasons, the second argument is rejected.

[56] I therefore conclude that the A Shares should have been converted into one million common shares.

[57] The fact is, however, that they were not converted and that there have been subsequent corporate steps which have affected the shares of Wi2Wi, namely the dilution of the common shares as a result of the Private Placement in October 2007 and the subsequent reverse takeover by ISEC which apparently involved the conversion of

4.481 Wi2Wi common shares for one new ISEC common share as well as the cancellation of the A Shares.

[58] In my view, Ramzi had a second reasonable expectation in relation to the A Shares, which is that the Board would consider his rights as holder of the A Shares in any transaction involving the shares of Wi2Wi and ensure that any such transaction did not unfairly prejudice him as the holder of the A Shares. It is important to note that the A Shares (and the B Shares) were non-participating, non-voting, non-transferable and non-assignable, but they were convertible into common shares. It was reasonable for Ramzi to rely on the Board to protect his rights prior to conversion, because he could not do so himself.

[59] As set out below, the Private Placement had a hugely dilutive effect on the value and voting rights of the common shares. In those circumstances, the Board should have taken steps to ensure that the A Shares were not prejudiced. There are a variety of ways in which that could have been done, but the Board acted in complete disregard for the rights of the holders of the A Shares. It is interesting to note that the Board did take steps to protect the holders of options to purchase common shares, which included the Directors themselves, and to protect Wilson who held C Shares, but that it took no steps whatsoever to protect the holder of the A Shares.

[60] I will not discuss the transaction with ISEC, because there is no evidence as to what exactly happened and it was not pleaded as a ground of oppression.

[61] In my view, therefore, there are two related acts of oppression, namely the failure to convert the A Shares into common shares, and the failure to consider Ramzi's rights as holder of the A Shares in the context of the Private Placement in October 2007 and to ensure that he was not prejudiced by the Private Placement.

b) Failure to convert the B Shares

[62] The condition for the conversion of the B Shares is set out in paragraph 5.2(a) of Schedule A of Wi2Wi's articles of incorporation as follows :

> "the Class B Convertible Preferred Shares will be convertible into a like number of Common Shares only in the event the Corporation achieves gross margins of $11,000,000 for its 2007 financial year, the whole as determined by the auditors of the Corporation whose determination shall be binding upon the Corporation and the holders of the Class B Convertible Preferred Shares;"

[63] As with respect to the A Shares, Ramzi's reasonable expectations would be that (1) the B Shares would be converted into common shares if the condition in the articles is met; and (2) the Board would ensure that, prior to their conversion, the B Shares would not be prejudiced by any corporate transaction.

[64] Wi2Wi's audited financial statements for the 2007 financial year are dated February 25, 2008 and were submitted to the shareholders at a meeting March 28, 2008. Note 15(B) of the 2007 audited financial statements provides as follows:

> "The Class B Convertible Preferred Shares were convertible into a like number of Common Shares only in the event the Corporation achieved gross margins of $11.0 million for its 2007 financial year pursuant to the Agreement. The Agreement does not define gross margin. In the absence of any specific definitions or interpretations in the Agreement, management has presumed gross margin equals revenues less costs of revenues per the financial statements prepared pursuant to the Canadian GAAP. Based upon that, management concluded that the target was not met."

[65] The comment about the target not having been met was not reproduced in the 2008 and 2009 audited financial statements.

[66] The consolidated statement of operations for the 2007 financial year shows revenues of $454,000 and cost of revenues of $1,160,000 for a negative gross margin of $706,000. However, as appears from note 5 to the financial statements, these revenues and cost of revenues are limited to the New Products because the sale of the Old Products was classified as "discontinued operations" following the sale of that business to Intermec on May 31, 2007. As further appears from note 5, the sales of Old Products for the period from October 1, 2006 to May 31, 2007, generated revenues of $4,357,000 and had a cost of revenues of $2,014,000 for a gross margin of $2,343,000, which is not included in the gross margin in the consolidated statement of operations but rather is included in a line further down in the statement called "Net income (loss) from discontinued operations, net of income taxes (note 5)".

[67] For the purposes of paragraph 5.2(a) of the articles, the gross margin for the first 8 months of the financial year should not be excluded merely because those operations were discontinued. Therefore the gross margin for the year was $2,343,000 from the sale of Old Products less the loss of $706,000 on the sale of New Products for a combined gross margin of $1,637,000.

[68] As a result, the condition set out in paragraph 5.2(a) of the articles was not met. In those circumstances, paragraph 5.2(g) provided that "the number of Common Shares into which the Class B Convertible Preferred Shares may be converted shall be reduced on a *pro rata* basis". In other words, the number of common shares to be issued is equal to $1,637,000 divided by $11 million and multiplied by 1.5 million common shares, which results in 223,227 common shares.

[69] With respect to the 2007 financial year, the audited financial statements were approved by the Board of Directors on or about February 25 or 26, 2008, but no notice was issued to Ramzi. As a result, Ramzi did not issue the shareholder notice required by the articles. It is clear, however, that Ramzi did request the conversion of his B Shares on numerous occasions and I find that those attempts are sufficient to satisfy

the articles and that the Defendants cannot rely on their failure to send a notice to justify the failure to convert the B Shares.

[70] The complicating factor with respect to the B Shares is that the various transactions with Mitec were being negotiated and the Private Placement took place prior to the date on which the Board approved the 2007 financial statements. As a result, Ramzi did not have the right to convert the B Shares prior to these events.

[71] In those circumstances, the Board was required to consider the B Shares in the context of the negotiations with Mitec and the Private Placement and to ensure that the rights of the holder of the B Shares were not prejudiced by either the sale to Mitec or the Private Placement. This does not mean that the Board was required to call a shareholders meeting to amend the bylaws and accelerate the conversion of the B Shares into common shares prior to the sale to Mitec, as Ramzi appears to have suggested on a number of occasions. Indeed, there was an email from Stephen Kelly of Ogilvy Renault, as it then was, the corporate attorneys of Wi2Wi, on May 29, 2007, setting out three different ways in which the B Shares could be dealt with in the context of the transaction with Mitec. Any of those approaches would have been sufficient to protect Ramzi's rights as holder of the B Shares. In fact, no steps were taken to protect his rights, but none of the transactions with Mitec went forward and therefore the point is moot.

[72] However, the Private Placement in October 2007 did go forward. As set out more fully below, the conversion of the Notes had a very serious dilutive effect on the common shares and on their voting rights and value, and therefore, by ricochet, had a similar effect on the B Shares. No steps whatsoever were taken by the Board to protect the holder of the B Shares from that prejudice. As described below, the Board did take steps to protect the option holders and Wilson as holder of some of the C Shares, but did nothing with respect to the B Shares. I find that this conduct by the Board amounts to an unfair disregard for the rights of the holder of the B Shares and therefore constitutes oppression. For the purposes of the remedy, I will give effect to the fact that the B Shares would have been converted into 223,227 common shares.

c) Refusal to approve the Ramzi SPA

[73] Pursuant to the articles of Wi2Wi, "No share in the share capital of the Corporation shall be transferred nor assigned without the approval of the directors certified by a resolution of the Board of Directors."

[74] Ramzi's reasonable expectation would be that such approval would not be unreasonably withheld by the Directors or, as he put it in his plan of argument, that "the Wi2Wi Board could not unduly interfere in a possible sale of his personal shares to an outside party."

[75] The transaction which the directors failed to approve is the Ramzi SPA whereby he sold 300,000 common shares to Mitec for US $2.50 each for a total of US $750,000. The Ramzi SPA is dated March 30, 2007 and the testimony is to the effect that it was signed on April 2, 2007.

[76] The parties hotly debated when the Board was informed of this transaction. Ramzi takes the position that he informed the Board of this potential transaction at the meeting on March 22, 2007, that he emailed the Board with respect to this transaction on March 23 and 24, 2007, and that he had further discussion of the transaction at the Board level on March 25 and April 6. Wilson, the only Board member to testify, said that he had no knowledge of the transaction until his meeting with Piergentili on May 31, 2007 and that the Board did not actually see a copy of the Ramzi SPA until June 7, 2007.

[77] I do not accept Ramzi's version of the events. His discussions with Mitec must have been well advanced by March 22 because the parties signed a letter of intent on March 23. The minutes of the Board on March 22, however, do not refer specifically to a sale to Mitec and they suggest that Ramzi was being careful not to disclose that he was negotiating a sale to Mitec: "Mr Alharayeri disclosed to the board that he is in the process of looking for an outside party to purchase some of his common shares of Wi2Wi".

[78] Ramzi also pointed to an email exchange between Ramzi and the Board on March 23 and 24 where he said that he "thought of an idea" that involved adding to "the term sheet" a requirement that Mitec purchase upon signing "the term sheet" 500,000 shares from Wi2Wi and 500,000 shares from Ramzi personally "at the final agreed on price for this transaction".

[79] It is clear to me that "the term sheet" is a reference to the First LOI, a draft of which had been received the previous week and had been discussed at the Board meeting on March 22. It appears that Ramzi was looking for a way to sell some of his shares as part of the sale of Wi2Wi to Mitec as opposed to going through with the Ramzi SPA, for which a letter of intent was signed that same day. He clearly knew that the Ramzi SPA was problematic.

[80] However, when Board members objected to including a provision requiring Mitec to buy up-front some of his shares for cash when the other shareholders would be receiving Mitec shares, Ramzi backed off this suggestion and proceded instead with the Ramzi SPA.

[81] The next Board meeting was March 25, after Ramzi had signed the letter of intent for the Ramzi SPA. Again, his disclosure to the Board was very limited: "At the closure of the meeting, Mr. Alharayeri announces he will be seeking out the opportunity to sell a portion of his common shares to an outside party."

[82] He then signed the Ramzi SPA on April 2, 2007. It provides that the delivery of a Board resolution approving the transfer of the shares is a condition, but Mitec waived that condition provided that Ramzi uses his best efforts to obtain the approval within 90 days, failing which the value of the warrant (which gives him additional consideration in the event the Wi2Wi deal is done at a price higher than US $2.50 per share) is reduced by 50%.

[83] The April 6 Board minutes are somewhat ambiguous: "The board actively participated in an open discussion regarding the possible sale transaction of a portion of Mr. Alharayeri's common shares to Mitec Telecom." It is not clear if this is referring to the possibility of requiring Mitec to purchase some of Ramzi's shares up-front and for cash in the First LOI or if it is referring to the Ramzi SPA. It seems more likely that "the possible sale transaction" is a reference to the First LOI which was then under negotiation, because the Ramzi SPA had already been signed and was hardly a "possible sale transaction" and because the next sentence in the minutes is: "The board agreed to have Mr. Andy Wilson help Mr. Alharayeri in negotiations with this possible transaction and report to the board of any findings." (emphasis added) The evidence established clearly that Wilson was involved in the negotiation of the deal between Wi2Wi and Mitec and not in any dealings between Ramzi and Mitec. Moreover, Wilson testified that the Board again rejected the idea of adding the sale of Ramzi's personal shares up-front and for cash to the First LOI.

[84] On the other hand, Wilson testified that he was not aware of the sale from Ramzi to Mitec until the dinner meeting with Piergentili on May 31. That does not appear to be accurate either. The agenda for the Board meeting on May 16, 2007 includes as an agenda item "Approval of a name transfer of 300,000 shares to Mitec", and the minutes indicate that the sale was disclosed:

> "Ramzi moves to approve the name transfer and Hans wants to table it due to the exchange agreement issues. He wants to move it to later in the meeting when Amar is on the line. Ramzi says that he signed an agreement on April 2, he announce that he sold. He says that this only a name transfer the agreement is already done. Hans asked Norm how do you feel about this, they want to listen to the agreement first. Hans says that he does not have a problem with this but it makes sense to revisit later in the meeting."

The name Mitec is not mentioned in that portion of the minutes but it was previously disclosed in the agenda. The minutes do not include any discussion of the issue later in the meeting.

[85] In his testimony, Wilson attempted to attack the reliability of the May 16 minutes. It is true that the May 16 minutes are not in the same format as the earlier minutes that were filed in the Court record and that they do not appear to have been prepared by Linda Arends, who was the assistant secretary and who prepared the earlier minutes filed in the Court record. However, these are nevertheless part of Wi2Wi's corporate

records and given that no attempt has been made to correct them in the seven years since they were prepared, I am prepared to treat them as accurate.

[86] On the other hand, Ramzi alleges in his motion that the Board approved the transaction at the May 16 meeting and subsequently arbitrarily rescinded its approval of the sale. I do not accept that characterization. Nothing in the minutes suggests that the Board approved the transaction on May 16. Although Ramzi appears to have disclosed the fact of a transaction with Mitec at the May 16 meeting, he did not disclose the details, and there is no suggestion that the Board had any knowledge of the special conditions included in the Ramzi SPA until Wilson and Black had the discussion with Piergentili on May 31 and until they received a copy of the Ramzi SPA on June 7. The Board minutes of June 15, 2007 are very clear:

> "Mr. Al-Harayeri then asked the directors what their concerns were with the recent situation involving his alleged partial transfer of shares to Mitec. Mr. Steinberg responded that Mr. Al-Harayeri had not disclosed what he did to the board, had not told the board that he had agreed to an option for the sale of all and not only a portion of his shareholdings in the Corporation and that Mr. Al-Harayeri had made an undertaking to Mitec that Mr. Al-Harayeri would cause the other shareholders of the Corporation to accept a transaction with Mitec, that globally the situation is totally different from what had been presented to the board by Mr. Al-Harayeri and that, in Mr. Steinberg's view, Mr. Al-Harayeri had conducted himself in a wholly inappropriate manner."

[87] More specifically, once it had the details of the Ramzi SPA, the Board was concerned by the following specific provisions:

1) The price was US $2.50 per share in cash with a warrant for the difference between US $2.50 and the price ultimately paid to the shareholders of Wi2Wi in a transaction with Mitec, to be paid in Mitec shares;

2) The covenant by Ramzi in paragraph 5.2(a) that he enter into and cause the other shareholders of Wi2Wi to enter into a definitive sale of 90% or more of the issued and outstanding shares of Wi2Wi to Mitec; and

3) The granting in paragraph 5.2(b) by Ramzi of an exclusive and irrevocable option in favour of Mitec to purchase all or a portion of the balance of his common shares at a price of US $3.00 per share payable in Mitec shares.

[88] The Board was entitled to react negatively to these provisions, as they suggest that Ramzi was in a conflict of interest as he negotiated his sale and the larger transaction between Wi2Wi and Mitec in parallel.

[89] First, Ramzi was getting a better deal than the other shareholders in that the price of US $2.50 was being paid up-front and in cash whereas the other shareholders were getting Mitec shares in payment at a later date. Moreover, even though the price

of US $2.50 per share was lower than the price in the First LOI (which was almost US $3.00 per share assuming the conversion of the A, B and C Shares and more than US $4.00 per share based on the then issued common shares), it was clear to all parties by June 17 that the Wi2Wi/Mitec deal was not going to be done for US $25 million. The price in the Second LOI, which was dated July 23, 2007, was approximately US $1.50 per share assuming the conversion of the A, B and C Shares or US $2.25 per share based on the then issued common shares.

[90] Of greater concern was the clause whereby the CEO of the corporation “shall enter into and shall cause the other shareholders of the Corporation to enter into” the deal with Mitec. This raises serious conflict issues as to whether Ramzi will be acting in the best interests of the shareholders when he negotiates and recommends acceptance of a deal with Mitec.

[91] Finally, the option to purchase all of his shares at a price of US $3.00 per share in the event that the deal with Wi2Wi did not close was also problematic because of the size of Ramzi’s shareholding. The Board had concerns about a creeping takeover of Wi2Wi by Mitec in which the control premium would go exclusively to Ramzi rather than having the same price paid to all of the shareholders.

[92] In my view, the Board did not act unreasonably in refusing to approve the transfer of shares pursuant to the Ramzi SPA.

[93] Subsequent to the Board’s refusal, the deal was renegotiated to eliminate the aspects which were problematic, and the Amended SPA was executed by Ramzi and Mitec and was approved by the Board on July 6, 2007. The changes from the Ramzi SPA to the Amended SPA are as follows :

1) The price of the shares was reduced from US $2.50 to US $1.50, and the number of shares sold was increased from 300,000 to 500,000 such that Ramzi would not be required to reimburse any portion of the purchase price;

2) Ramzi’s undertaking to cause other shareholders to enter into the deal to sell Wi2Wi to Mitec was deleted; and

3) Mitec’s option to purchase all of Ramzi’s shares if the deal between Wi2Wi and Mitec did not go forward was also deleted.

[94] The origin of the price reduction is not altogether clear. Ramzi and Piergentili suggested that the Board imposed the price decrease on Mitec, but that appears unlikely because it would not be in the Board’s interest to lower the valuation of Wi2Wi. Further, the Second LOI by Mitec for all of the shares of Wi2Wi in July substantially reduced the price offered. As a result, I am of the view that the price was not something which was imposed by the Board but it appears to have been Mitec’s decision both because its valuation of Wi2Wi was decreasing and because the Amended SPA was

not as favourable a deal for Mitec. As for the elimination of the other two provisions, the Board appears to have acted reasonably.

[95] In my view there was no oppression relating to the Ramzi SPA.

d) Frustration of Mitec's offers to purchase Wi2Wi's shares

[96] Leaving aside the memorandum in February or March 2007 and the draft of the First LOI dated March 17, 2007, there were five formal offers from Mitec to Wi2Wi or to Ramzi, none of which resulted in a completed transaction:

- The First LOI dated April 10, 2007,
- The Second LOI dated July 23, 2007,
- The September 6 Offer,
- The September 13 Offer, and
- The October 9 Offer.

[97] With respect to the offers for all of Wi2Wi (the First and Second LOI), Ramzi's reasonable expectation would be that the Board would act reasonably in considering any such offer and in attempting to negotiate a deal if it was in the best interests of the corporation. With respect to the offers for Ramzi's shares (the September 6, September 13 and October 6 Offers), Ramzi's reasonable expectation is that the Board would not unreasonably withhold its approval.

[98] I will examine the circumstances surrounding the failure of each offer, in order to see whether there is anything contrary to his reasonable expectations.

[99] The First LOI was sent to by Mitec to Wi2Wi on April 10, 2007. It was accepted by Wi2Wi and the parties began to work on their due diligence. The First LOI was terminated by Mitec on June 29, 2007, citing Ramzi's resignation as a material adverse change in the business and direction of Wi2Wi. The evidence also discloses that Mitec was concerned about the delays in the development of the New Products and had doubts as to the value of Wi2Wi expressed in the First LOI. There is no basis on which the Board can be held responsible for the termination of the First LOI.

[100] The Second LOI from Mitec to Wi2Wi is dated July 23, 2007. Under the Second LOI, the "Initial Consideration" was dropped from US $25 million to US $13.2 million, and the "Adjustment Consideration" was dropped from 90% of gross revenue between US $25 million and US $42 million plus 50% of gross revenue between US $42 million and US $60 million, to 100% of gross revenue between US $14 million and US $25 million. These very significant adjustments in the price appear to have been triggered

by the due diligence that Mitec carried out at Wi2Wi, and in particular the delays in the launch of the New Products. Further, the Second LOI did not include the governance provisions found in the First LOI, such that the Second LOI was more of a takeover by Mitec than a merger of equals. For these reasons, the Board did not consider the Second LOI to be acceptable, although the Board remained open to doing a deal with Mitec.

Given the deference that the Court is required to show to the Board's business judgment, I see no basis on which to conclude that the Board's refusal of the Second LOI was unreasonable.

[101] Mitec then changed its focus to the balance of Ramzi's shares. In the September 6 Offer, Mitec offered to purchase the balance of Ramzi's shares for US $0.50 per common share (for a total of US $750,000) and US $100 for the A and B Shares. The Board was concerned that this offer would result in a creeping takeover of Wi2Wi by Mitec, and so it imposed certain conditions on Mitec, the most important of which were that the A and B Shares would be surrendered by Mitec to Wi2Wi for cancellation and that the common shares acquired by Mitec would be offered to all existing Wi2Wi shareholders on a basis which was pro rata to the then existing ownership position in Wi2Wi held by each Wi2Wi shareholder. Both of these conditions were acceptable to Mitec, but Ramzi declined the September 6 Offer because he did not consider the price to be high enough. There is therefore no oppression by the Board in the failure of this offer.

[102] Mitec then made the September 13 Offer at US $1.50 per share for the common shares (US $2,250,000 total) and US $100 for the A and B Shares. This offer was acceptable to Ramzi, and the Board was prepared to approve it on the same conditions as the September 6 Offer. In the course of its due diligence in relation to this offer, Mitec discovered the extent of Wi2Wi's financial problems. As a result, Mitec made the loan offer to Wi2Wi on September 27 which was refused and Wi2Wi instead proceeded with the Private Placement on September 28, 2007. Mitec terminated the September 13 Offer on October 5.

[103] I am satisfied that Mitec terminated the September 13 Offer on October 5 because it had concluded that the price which it had offered Ramzi was too high given the financial state of Wi2Wi. This conclusion flows from the fact that Mitec came back on October 9 with a further offer at US $0.50 per share. I do not believe that Mitec's termination of the September 13 Offer was in any way due to the conditions imposed by the Board or to the Private Placement. I therefore conclude that there was no oppression in the failure of the September 13 Offer.

[104] The final offer made by Mitec to Ramzi was the October 9 Offer. The new price was US $0.50 per common share with no mention of the A or B Shares. Mitec had incorporated into its offer the Board's condition dating back to September 6 about offering the common shares to the other shareholders on a pro rata basis, but it added

an important change – it provided that it was purchasing "a minimum of 8% or up to 100%" of Ramzi's common shares, and added:

> Upon signing of this agreement Mitec shall offer on a pro rate basis to the outstanding Wi2Wi share holders the opportunity to purchase the Vendors shares at the same price. This offer will be extended for 10 days at which point Mitec will have the option to purchase those shares that remain outstanding. (Emphasis added)

[105] Mitec's calculation appears to have been that the other shareholders would be unlikely to pick up Ramzi's shares because (1) they had just participated in the Private Placement to preserve their existing shares, and (2) they would have to participate in the Private Placement again with respect to the new shares to preserve their value.

[106] Ramzi was prepared to accept that offer. The Board considered it at their meeting on October 14, 2007. The Board was concerned with the possibility of a creeping takeover by Mitec if Mitec had the right to purchase the shares not taken up by other shareholders. Ultimately, the Board took the position that it would not allow Mitec to acquire more than 8% of Ramzi's shares, regardless of the position taken by the other shareholders. The October 15 delay for the Private Placement passed without Ramzi or Mitec having exercised the right to subscribe for the Notes and Mitec walked away from the October 9 Offer.

[107] The October 9 Offer was made after the Private Placement, and must have been made with the intention by Mitec that it would subscribe for the Notes under the Private Placement. I therefore conclude that the failure of October 9 Offer was not related to the Private Placement. Rather, the final straw for Mitec appears to have been the Board's decision that it would not allow Mitec to buy more than 8% of Ramzi's shares regardless of how many other shareholders agreed to participate in the transaction. Mitec walked away from the deal shortly thereafter.

[108] The issue therefore is whether the Board acted reasonably in limiting Mitec's right to acquire Ramzi's shares. Mitec had already acquired 500,000 common shares, which represented 8.8% of the issued and outstanding common shares. The remaining 1,500,000 common shares held by Ramzi (ignoring the A and B Shares) represented a further 26.3%. Considering that Mitec's allies, including in particular Palos, owned some shares and had influence with respect to other shares, the Board was concerned that the Ramzi shares would give Mitec effective control without Mitec ever paying a control premium to the other shareholders.

[109] In my view, this was a legitimate concern for the Board. I therefore conclude that the Board did not act unreasonably in relation to the failure of the October 9 Offer. I also note that, as set out above, Ramzi did not plead the failure of the October 9 Offer as a ground of oppression.

e) The dilution of Ramzi's shares as a result of the Private Placement

[110] The Private Placement provided that each shareholder was entitled to subscribe for $1.00 of Notes for every two common shares of Wi2Wi then owned. The Notes were convertible into common shares of Wi2Wi at the rate of 50,000 common shares per $1,000 principal amount of Notes, which means that the conversion price was $0.02 per common share.

[111] If every shareholder participated in the Private Placement, Wi2Wi would issue approximately $2,900,000 in Notes which would be convertible into approximately 145 million common shares. In other words, Wi2Wi's capital would increase by $2,900,000 but the number of common shares would increase from 5,807,760 to over 150,000,000.

[112] The effect of the Private Placement on any shareholder who did not participate would be devastating. If, for example, every shareholder except Ramzi participated in the Private Placement, Wi2Wi would issue approximately $2,150,000 in Notes which would be convertible into approximately 107 million common shares. Ramzi's percentage shareholding (looking only at the common shares and ignoring the A and B Shares) was 25.8% before the Private Placement and would drop to 1.3% if he was the only shareholder who did not participate. The value of his shares would also drop – he had an offer at U.S. $0.50 before the Private Placement's dilutive effect, but the Private Placement was at $0.02 and the Board speculated in October 2007 that the next round of financing after the Private Placement would be at $0.05 per common share, which in fact it was in May 2008.

[113] This extreme dilutive effect was intentional. As Wilson explained in his testimony, Wi2Wi was in danger of missing the next payroll and it was imperative that every shareholder participate in the Private Placement.

[114] In fact, the Private Placement accomplished its goal. The 2008 and 2009 audited financial statements disclose that Wi2Wi issued $1,922,000 in Notes and that all of those Notes were converted into common shares, which means that 96,100,000 common shares were issued. The effect on Ramzi, who did not participate, was that his shareholding dropped from 25.8% of the common shares to 1.5%.

[115] The issue is whether this breached Ramzi's reasonable expectations and whether the Defendants' conduct constituted oppression.

[116] In terms of Ramzi's reasonable expectations, he cannot be said to have had the expectation that he would never be diluted. The Business Plan dated November 2005 provided for the issuance of 2 million common shares and the intention from the outset was to take Wi2Wi public, which would necessarily result in dilution of Ramzi's ownership position. At best, he can be said to have had the reasonable expectation that he would not be unfairly diluted. Ramzi states in his plan of argument that he had

the reasonable expectation that "he would not be excessively diluted and that his shares would not be rendered valueless in a rights offering."

[117] In terms of when the issuance of shares constitutes oppression, Ramzi relies in particular on two decisions of the Québec courts, namely *Re Sabex Internationale Ltée*[5] and *Segal c. Blatt*[6]. In my view, these cases are not particularly helpful in resolving the present matter.

[118] In *Sabex*, the Court granted the petitioners an injunction to prevent a share offering to the shareholders at a reduced price. The Court found that the corporation was intended to be held 50/50 but that the majority had acquired control through "des manoeuvres habiles qui ne respectaient pas l'esprit de l'entente originale" (paragraph 47). Further, the Court was not satisfied that there was a proper purpose for the share offering and found instead that the majority was seeking to take advantage of the very difficult financial situation of the petitioners to increase its control position.

[119] In *Segal*, the Court ordered the corporation to purchase the petitioner's shares which had been diluted as the result of a share offering. However, the Court concluded that the dilutive share offering was carried out "without his knowledge and, indeed, behind his back" (paragraph 38).

[120] The author Markus Koehnen[7] provides very useful guidance. He states a number of guiding principles, which I would summarize as follows:

- The motive behind the share issue is of great importance. A share issuance motivated by an improper purpose is oppressive. However, a share issue may be oppressive even where the purpose was proper. The Courts will examine the balance between corporate benefit and individual harm.

- Extending the offering to all shareholders reduces the likelihood of oppression, but is not determinative. The share issue will be oppressive where the decision to issue shares is motivated by the knowledge that the applicant cannot accept the invitation to participate.

- Where the proponents of the share issuance benefit by obtaining increased control of the corporation, Courts will view the transaction with much greater suspicion.

- Issuing shares in the face of another dispute with the applicant creates an inference of oppression that requires strong evidence of a legitimate corporate purpose to overcome.

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[5] [1979] J.Q. no 367 (S.C.).
[6] 2007 QCCS 1488, affirmed except on issue of share valuation: 2008 QCCA 1094.
[7] *Oppression and Related Remedies* (2004), pages 137 to 145.

- Share offerings at a discount to book value, without a proper assessment of value or for otherwise inadequate consideration, are also oppressive.

[121] The various factors cut both ways in this case.

[122] The key factors in favour of the validity of the Private Placement are the purpose of the Private Placement and the fact that it was offered on the same terms to all of the shareholders (other than the holders of the A, B and C Shares, as discussed above).

[123] In terms of the purpose, the testimony of Wilson, confirmed by the testimony of Piergentili and Marleau, made it clear that Wi2Wi was in desperate financial circumstances in September 2007 and was at risk of missing payroll and closing its doors. This is further confirmed by the Mitec loan offer on September 27, and the Board minutes on September 28 (“quickly running out of cash”, “critical that the payroll be met”, “cash crunch”, “brink of a zero-cash position”, “ensure that the Corporation could pursue its operations”, “emergency financing”, “current critical financial situation”).

[124] There is no evidence of any improper purpose, such as the dilution of Ramzi or any other shareholder. The Board knew of Ramzi’s difficult financial circumstances and need for cash earlier in 2007 and it is fair to assume that the Board would have assumed that Ramzi was still in difficult financial circumstances in October.

[125] However, the assumption under which all of the parties operated in October was that Mitec would buy Ramzi’s common shares and would participate in the Private Placement. This is reflected in Ramzi’s reaction to the Private Placement:

> Email of September 29, 2007 to Ogilvy Renault:
>
> “I want to subscribe myself but as you know I signed a LOI to sell my shares. Do you have subscriptions forms or paper work to fill/forward to Mitec since they are buying my shares.”
>
> Email of October 1, 2007 to Ogilvy Renault:
>
> “Mitec … want to execute on the LOI in place and finalize the purchase but will need from you in writing an email that will allow for an extension till the 15th so we can finish the paper work and allow them to participate in this round with the shares they will purchase.”

[126] It is also reflected in the Board minutes of October 14, 2007:

> “The directors then discussed whether Mitec’s strategy was not to purchase shares, with the view of then purchasing additional convertible secured notes…”

[127] There is no evidence that the Board issued the Private Placement in the belief that Ramzi’s shares would not participate and would therefore be diluted. In my view, the purpose of the Private Placement was a proper one.

[128] The Private Placement by its terms was open to all shareholders and it was received by Mitec and by Ramzi. It was drafted in a discriminatory way – "significant shareholders that have recently been involved in negotiations concerning the Corporation" were given only 3 days to respond while "all other shareholders" had an additional two weeks. Mitec objected to the shorter delay and Wi2Wi eliminated it, with the result that all shareholders were treated equally.

[129] However, there are elements that bring the Private Placement into question, particularly the benefits to the Defendants and the very low conversion price.

[130] The Private Placement did benefit the Defendants personally to varying degrees. The Board accelerated the conversion of Wilson's 100,000 C Shares (but not the C Shares held by others) to allow him to participate in the Private Placement and issued to him 100,000 common shares despite the doubts expressed by the auditors in February 2007 as to whether the test for conversion had been met. Note (15)(b) to the 2007 audited financial statements provides:

> "Per management, the actual amount of debt and equity raised prior to June 30, 2006 was $3.5 million or 69.8% of the goal, and therefore, the pro rated number of [the 300,000] Class C Convertible Preferred Shares convertible into common shares is 209,400."

[131] The Board also adopted a new stock option plan in October 2007 to ensure that option holders (mostly employees but also the Defendants as directors) were not affected by the Private Placement. A greater number of new options were granted at US $0.05 to replace the original options which were granted at $1.25 to take into account the dilution of the shares.

[132] Finally, the Defendants Black and Wilson participated in the Private Placement and thereby benefited from the dilution of the shareholders who did not participate, including Ramzi.

[133] On the other hand, the Defendant Roy sold most of his shares on October 1, 2007, prior to the Private Placement, and he did not participate in the Private Placement with the balance of his shares, so he was diluted. He sold his shares to Alexander Richard Black and Hans Arthur Black, who are said to be "associates" of Black (as that term is defined in s. 2 of the CBCA) and who participated in the Private Placement with the result that as of February 1, 2008, Black and his "associates" held 59.06% of the issued common shares of Wi2Wi.[8]

[134] The Defendant Tahmassebi was not a shareholder.

[8] That figure is somewhat misleading because not all Notes had been converted into common shares as of that date. If all of the conversion rights had been exercised, Black and his "associates" would have held 24.6% of the issued common shares.

[135] The bigger issue is the conversion price of $0.02 per common share. Koehnen suggest that "share offerings at a discount to book value, without a proper assessment of value or for otherwise inadequate consideration are also oppressive." (*supra*, p. 143)

[136] I note at the outset that neither party presented any expert evidence on the value of Wi2Wi's common shares or the adequacy of the $0.02 conversion price.

[137] Based on the audited financial statements of Wi2Wi for the year ended September 30, 2007, the book value of the common shares was negative and therefore the $0.02 conversion price was not at a discount to book value.

[138] However, there is other evidence in the file that suggests a higher value. The common shares were issued at $0.75 and $1.25. Ramzi sold some of his common shares to Mitec in July 2007 for US $1.50. The evidence closest in time to the Private Placement is the October 9 Offer, which provided a price of US $0.50. This offer was made by Mitec after it had conducted its due diligence and it was accepted by Ramzi, and in my view, it represents the best evidence of the value of the common shares in October 2007. It is also interesting to note that the value of US $0.50 is somewhat confirmed by Black's comment at the October 23, 2007 Board meeting that "any further round of financing would be expected at 5 cents" and by the fact that the next shares issued by Wi2Wi in May 2008 were at US $0.05.[9]

[139] On the other hand, the desperate financial circumstances in which Wi2Wi found itself suggest that the common shares had no value unless funds were raised through the Private Placement.

[140] Wilson acknowledged that the conversion price was low, but argued that the low conversion price was necessary to ensure the participation of the shareholders. Groome also commented that the conversion price was low and suggested that it was too low, but he did not go any further and there is no evidence that anyone objected to the conversion price at the time of the Private Placement.

[141] If I accept that the shares were worth US $0.50, is that sufficient to find that a Private Placement with a conversion price of $0.02 was oppressive? I do not believe so. I am persuaded that Wi2Wi urgently required the cash, that all of the shareholders were invited to participate in the Private Placement and were given an equal opportunity to participate, and that, in the exercise of its business judgment, the Board chose a low conversion price as a means to elicit a higher rate of participation. I dismiss this ground.

[9] The weighted average of 5,807,760 shares at US $0.50 and 96,100,000 shares at $0.02 is $0.049 or 4.9 cents.

f) The refusals to call shareholder meetings

[142] Ramzi's reasonable expectation was that the directors would call shareholder meetings, at least as often as prescribed under the CBCA.

[143] Section 133 of the CBCA requires an initial annual meeting of the shareholders not later than eighteen months after the corporation comes into existence, and subsequent meetings not later than fifteen months after holding the last preceding annual meeting and no later than six months after the end of the corporation's preceding financial year.

[144] The evidence indicates that shareholder meetings took place on March 28, 2008 and March 24, 2010, but that there were no shareholder meetings in 2007 notwithstanding numerous requests from Ramzi and at least one request from Notre-Dame, writing on its own behalf and "on behalf of a group of significant shareholders."

[145] I cannot, however, conclude that this failure to call a shareholder meeting was oppressive. Ramzi, as the holder of more than 5% of the issued shares of Wi2Wi, had the right under s. 143(1) of the CBCA to formally requisition the directors to call a meeting of shareholders. If the directors failed to call a meeting within 21 days after receiving the requisition, Ramzi had the right under s. 143(4) to call the meeting. Ramzi did not exercise this right.

[146] I do not see how the failure to call a shareholder meeting can be oppressive in circumstances where the shareholder has the right to call a meeting and does not exercise that right.

[147] This ground is dismissed.

g) Refusal to disclose Wi2Wi's financial information

[148] Ramzi's reasonable expectation was that the Board would provide at least the financial information required by the CBCA.

[149] The CBCA imposes an obligation on the directors to place financial statements before the shareholders at every annual meeting (s. 155(1)) and to send a copy of the financial statements to the shareholders at least 21 days before the meeting (s. 159(1)). A shareholder also has the right to examine the financial statements of the corporation at its registered office on request (s. 157(1)).

[150] The company did not fully comply with those obligations. There is no evidence that the 2006 financial statements were ever approved by the Board or placed before the shareholders. The 2007 financial statements were approved by the Board and placed before the shareholders on March 28, 2008, which was within the six month

delay after year-end. The 2008 financial statements were approved by the Board and placed before the shareholders with the 2009 financial statements on March 24, 2010, which was within the six month delay after year-end for the 2009 financial statements but was one year late for the 2008 financial statements.

[151] I am not, however, convinced that the failure to issue financial statements is oppressive in these particular circumstances, where there is no evidence of a complaint at the time and no evidence of any request to consult financial information. Moreover, even if the financial information was not provided to Ramzi, it appears that Mitec was always provided adequate financial information for its due diligence such that the failure to provide financial information to Ramzi did not prejudice the potential transactions with Mitec.

[152] This ground is dismissed.

h) Conclusion on oppression

[153] As a result, I conclude that Ramzi has proven oppression in relation to the failure to convert the A and the B Shares and the failure to ensure that Ramzi's rights as the holder of the A and B Shares were not prejudiced by the Private Placement.

REMEDY

[154] The Court has a very broad discretion to fashion an appropriate remedy. The list of remedies in s. 241(3) of the CBCA is long and does not limit that discretion.

[155] Ramzi has asked the Court to condemn the four Defendants, who were directors of Wi2Wi throughout the relevant period, to pay him $4,692,539.98 in damages, which is the equivalent in Canadian dollars of US $1.50 per share for his common shares (1,500,000) plus the common shares into which he says his A Shares (1,000,000) plus his B Shares (470,056.47) should have been converted. He also asks for interest and the additional indemnity from September 6, 2007, even though the action was not instituted until May 14, 2010 and was served on or about July 6, 2010. Finally, he asks that he be ordered to remit the shares to whomever the Defendants designate.

[156] This proposed remedy raises a number of issues:

a) Did the oppressive conduct cause the damage claimed?

b) Is the damage properly evaluated?

c) Is the damage claimed against the proper parties?

d) What is the appropriate way to deal with the residual value of the shares?

e) From what date should interest and the additional indemnity be awarded?

a) Causation

[157] Because of the failure to convert the A Shares into common shares, Ramzi had A Shares rather than common shares at the time of the September 6, September 13 and October 9 Offers and at the time of the Private Placement. The B shares were not convertible until February or March 2008.

[158] The September 6 and September 13 Offers were US $0.50 and US $1.50 respectively per common share and US $100 for all of the A and B Shares. The October 9 Offer was US $0.50 for the common shares with no offer for the A and B shares. None of those deals closed.

[159] The Private Placement was offered to all holders of common shares. It did not include any offer or any other provisions for the holders of A or B Shares. As a result, the A and B Shares remained convertible into 1,223,227 common shares, but the value and voting power of those common shares dropped dramatically as a result of the dilution pursuant to the Private Placement. There was nothing that the holder of the A and B Shares could do to avoid that loss.

[160] In my view, it is not a defence to argue that the dilution would have occurred even if the A and B Shares had been converted into common shares, because Ramzi would not have exercised his rights under the Private Placement. That is speculative in nature. Mitec might have been more interested in Ramzi's shares and might have pursued them more aggressively if he had more of them. Ramzi might have called the shareholder's meeting if he was in a better position to control the outcome of the meeting. As Gascon, J., as he then was, stated in *Segal*, *supra*, paragraph 39:

> "Respondents' contention that Mr. Segal would have refused to invest further even if called upon to do so is certainly not an excuse to ignore his rights as a shareholder."

[161] Moreover, there were other ways to deal with the A and B Shares in the Private Placement other than immediate conversion, such as making them convertible into a greater number of common shares (which was essentially the approach taken with respect to the options). That was not dependent on Ramzi's participation in the Private Placement and would have avoided the loss that he suffered.

[162] As a result, I conclude that the causal link between the oppression and the loss on the A and B Shares has been established.

b) Valuation of the loss

[163] Ramzi claims that the value of the common shares before the Private Placement was US $1.50 based on the September 13 Offer. That is clearly not an appropriate measure – Mitec terminated that offer following the due diligence in which it learned of Wi2Wi's precarious financial position. In my view, the best indication of value is the October 9 Offer's price of US $0.50 per common share. Using the conversion rate on September 6, 2007 (the only exchange rate in the record), this is equal to $0.53.

[164] Applying that value to the 1,223,227 common shares into which Ramzi's A and B Shares were convertible, the total loss was $648,310.

c) Proper defendants

[165] Ramzi has chosen to sue Black, Tahmassebi, Roy and Wilson, who were directors of Wi2Wi throughout the relevant period. Wi2Wi is a mise-en-cause, but no conclusion is sought against the corporation.

[166] The issue of when it is appropriate to order that the directors personally pay damages was canvassed at length by the Ontario Court of Appeal in *Budd v. Gentra Inc.*[10], where Doherty J.A. stated the test as follows :

> "[46] ... A director or officer may be personally liable for a monetary order under [s. 241 of the C.B.C.A.] if that director or officer is implicated in the conduct said to constitute the oppression and if in all of the circumstances, rectification of the harm done by the oppressive conduct is appropriately made by an order requiring the director or officer to personally compensate the aggrieved parties.
>
> [47] In deciding whether an oppression action claiming a monetary order reveals a reasonable cause of action against directors or officers personally, the court must decide:
>
> * Are there acts pleaded against specific directors or officers which, taken in the context of the entirety of the pleadings, could provide the basis for finding that the corporation acted oppressively within the meaning of s. 241 of the C.B.C.A.?
>
> * Is there a reasonable basis in the pleadings on which a court could decide that the oppression alleged could be properly rectified by a monetary order against a director or officer personally?
>
> [48] The first requirement seems self-evident. No person should have to defend a lawsuit absent allegations which identify the conduct of that person said to render him or her liable to the plaintiff. This statement of claim utterly fails to deal with the director defendants or management defendants on an individual basis.

[10] [1998] O.J. No. 3109.

> Rather, they are treated as a single entity, each indistinguishable from the other, and all serving as the cat's paw of the controlling shareholders. Nowhere does the appellant allege that any named director or officer did or failed to do any specified act or participated in any identified way in any of the decisions or manoeuvres which the appellant relies on in support of his claim. The claim does no more than identify the individuals as directors or officers of Royal Trustco at some unspecified time. There is no attempt to connect any individual director or officer to the alleged corporate oppression.
>
> …
>
> [52] Even if the appellant had alleged specific acts against specific directors or officers, I would still hold that the claim as framed does not reveal a reasonable cause of action against them personally. As indicated above, the remedial reach of s. 241 is long, but it is not unlimited. Any order made must "rectify the matter complained of" by the parties seeking the remedy. To maintain an action for a monetary order against a director or officer personally, a plaintiff must plead facts which would justify that kind of order. The plaintiff must allege a basis upon which it would be "fit" to order rectification of the oppression by requiring the directors or officers to reach into their own pockets to compensate aggrieved persons. The case law provides examples of various situations in which personal orders are appropriate. These include cases in which it is alleged that the directors or officers personally benefitted from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely held corporations where a director or officer has virtually total control over the corporation provide another example of a situation in which a director or officer may be held personally liable to rectify corporate oppression."

[167] In my view, each of the Defendants was involved in the oppressive conduct, although it is Black and Wilson who play the lead roles in the discussions at the Board level. Moreover, although all of the Defendants benefitted from the changes to the stock option plan, it is the Defendants Black and Wilson who participated in the Private Placement and benefitted from the dilution of Ramzi's A and B Shares. Wilson also benefitted from the conversion of his C Shares into the full number of common shares notwithstanding issues as to whether the test had been met. In the circumstances, I consider that it is "fit" to order the Defendants Black and Wilson personally to pay the damages to Ramzi.

d) Residual value of the shares

[168] Ramzi cannot keep the shares and their value.

[169] There are two ways to deal with the A and B Shares – either I deduct their value after the Private Placement from their value before the Private Placement to calculate the damages, or I order Ramzi to return them.

[170] The best indication of the value of the common shares after the Private Placement is $0.05 per share, based on Black's comment at the October 23, 2007 Board meeting and the subsequent issuance of shares in May 2008 at US $0.05. As pointed out above, the figures of US $0.50 and $0.05 are consistent.

[171] However, Ramzi never had the ability to obtain that value because his A and B Shares were never converted into common shares. Moreover, and although I do not have complete evidence on the subject, it appears that the reverse takeover of Wi2Wi by ISEC, if it indeed happened, may have resulted in the exchange of Wi2Wi common shares for ISEC shares and the cancellation of the A and B Shares.

[172] As a result, I do not consider it appropriate to reduce the damages awarded to Ramzi by the value of the A and B Shares because that value is too uncertain. Instead, I will order Ramzi to remit the share certificates for the A and B Shares to the Defendants Black and Wilson or to whomever they designate.

e) Interest

[173] Ramzi asks for interest and the additional indemnity from September 6, 2007, even though the action was not instituted until May 14, 2010 and was served on or about July 6, 2010. I was not given any explanation for the almost three year delay in the institution of the action.

[174] In the circumstances, I will order that interest and the additional indemnity be calculated only from the date of service of the action.

FOR THESE REASONS, THE COURT;

GRANTS in part the Plaintiff's motion;

ORDERS the Defendants Black and Wilson solidarily to pay to the Plaintiff the sum of $648,310 with interest and the additional indemnity from the date of service of the action;

ORDERS the Plaintiff, upon payment of the amount set out above, to remit the share certificates for the A and B Shares to the Defendants Black and Wilson or to whomever they designate;

WITH COSTS against the Defendants Black and Wilson.

STEPHEN W. HAMILTON, J.S.C.

Me Éric Cadi
Me Emma Lambert
for the Plaintiff

Me Éric Lefebvre
Me Chrystal Ashby
for the Defendants

Date of hearing: November 20, 21, 22, 25, 26, 27, 29, 2013

TAB 9

Unofficial English Translation

Black c. Alharayeri **2015 QCCA 1350**

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-024260-143
(500-11-039230-103)

DATE: August 19, 2015

CORAM: THE HONOURABLE YVES-MARIE MORISSETTE, J.C.A.
JACQUES DUFRESNE, J.C.A.
CLAUDE C. GAGNON, J.C.A.

HANS PETER BLACK
and
ANDRUS WILSON
APPELLANTS / INCIDENTAL RESPONDENTS – Defendants
v.

RAMZI MAHMOUD ALHARAYERI
RESPONDENT / INCIDENTAL APPELLANT – Plaintiff

JUDGMENT

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[1] The appellants and the respondent appeal from a judgment of the Superior Court, District of Montreal (the Honourable Mr. Justice Stephen W. Hamilton), rendered on January 28, 2014, which ordered them solidarily to pay to the respondent compensation of $648,310 with interest and the additional indemnity. The respondent cross-appeals, asking that the amount of the order be set at $1,932,698.66;

[2] For the attached reasons of Morissette, J.A., with which Dufresne and Gagnon, JJ.A., agree, **THE COURT**:

[3] **DISMISSES** the main appeal with costs against the appellants/incidental respondents;

[4] **DISMISSES** the cross-appeal with costs against the respondent/incidental appellant.

YVES-MARIE MORISSETTE, J.C.A.

JACQUES DUFRESNE, J.C.A.

CLAUDE C. GAGNON, J.C.A.

Mtre Eric Christian Lefebvre
Mtre Chrystal Ashby
Norton Rose Fulbright Canada
For the appellants/incidental respondents

Mtre Douglas Mitchell
Mtre Emma Lambert
Irving Mitchell Kalichman
For the respondent/incidental appellant

Date of hearing: May 27, 2015

REASONS OF MORISSETTE, J.A.

[5] In a proceeding under section 241 of the *Canada Business Corporations Act*[1] ("*CBCA*"), the Superior Court, District of Montreal (the Honourable Mr. Justice Stephen W. Hamilton), ordered the appellants solidarily to pay the respondent compensation of $648,310 with interest and the additional indemnity.[2] They appeal from the judgment. As for the respondent, he cross-appeals, asking that the amount of the order be set at $1,932,698.66.

- I -

[6] The period most relevant to the dispute is the year 2007. The respondent (identified as "Ramzi" in the trial judgment) had been a shareholder of the impleaded party Wi2Wi Corporation (the "impleaded party" or "Wi2Wi") since its creation in 2005.[3] He was also President and Chief Executive Officer, a position from which he resigned on June 1, 2007. The appellants Wilson and Black were shareholders of the impleaded party and had been members of its Board of Directors since July 2005 and May 2006, respectively. After the respondent resigned, Wilson became the impleaded party's acting President and Chief Executive Officer. In addition, the appellant Black was Chairman of the impleaded party's Audit Committee, which consisted of two members of the Board of Directors, in this case the two appellants.

[7] The circumstances that gave rise to the dispute and on which the trial judge based his ruling can be summarized here briefly. For a better understanding of the issues raised by the appeal, I shall provide various details of the circumstances in my discussion of each issue in the reasons that follow.

[8] The respondent is an experienced executive in the electronics and computer hardware industry. From 2005 to June 2007, he was the directing mind of the impleaded party, which had been created to develop and market a new product (a microchip card) based on a design by the respondent. Early in 2007, the respondent, who was seeking cash for himself personally, began talks with Mitec Telecom Inc. ("Mitec"), a telecommunications company that was interested in acquiring his shares of the

1 R.S.C. (1985), ch. C-44.
2 2014 QCCS 180.
3 Wi2Wi was created as the result of a reverse takeover by Capital Sargeant Bay Inc., a corporation constituted in July 2004 of which the respondent was a shareholder. In December 2005, Capital Sargeant Bay Inc. changed its name and became Wi2Wi in a transaction described by the trial judge at paragraph 6 of his reasons. As a result of the transaction, the respondent held in the share capital of the impleaded party's two million common shares, one million Class A preferred shares, and one million and a half Class B preferred shares. His holdings will be discussed later in these reasons.

impleaded party. Negotiations began, during which Mitec made several offers from April 10 until October 14, 2007, to purchase blocks of or all of the common shares held by the respondent.

[9] From mid-April until mid-October 2007, all of Mitec's offers, with one exception,[4] failed to come to fruition, either because the parties could not agree on the terms of a firm agreement or because the impleaded party's Board of Directors prevented such agreement. It must be noted that, under a provision of the impleaded party's articles, "[n]o share in the share capital of the Corporation shall be transferred nor (*sic*) assigned without the approval of the directors certified by a resolution of the Board of Directors". Among the other points raised against the defendants at trial, the respondent accused them of having oppressively prevented the transfer of his common shares to Mitec.

[10] Moreover, apart from his common shares, the respondent also held Class A preferred shares and Class B preferred shares in the impleaded party, all of which shares were convertible into common shares on certain terms. At trial, the respondent alleged, *inter alia*, that the defendants had failed to make such conversions even though, according to him, the conditions to do so had been met and he was entitled to receive common shares in exchange for his preferred shares. He also alleged that they had considerably diluted the relative weight of the common shares that he was entitled to receive by carrying out a private placement approved by the impleaded party's Board of Directors at a meeting held on September 28, 2007.

- II-

[11] First, I shall reproduce the most relevant excerpts from section 241 of the *CBCA*. They read as follows:

241. (1) A complainant may apply to a court for an order under this section.	**241. (1)** Tout plaignant peut demander au tribunal de rendre les ordonnances visées au présent article.
(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates (*a*) any act or omission of the corporation or any of its affiliates effects a result, (*b*) the business or affairs of the	**(2)** Le tribunal saisi d'une demande visée au paragraphe (1) peut, par ordonnance, redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur

[4] On July, 3 2007, the impleaded party's Board of Directors approved the sale of 500,000 of the 2,000,000 common shares then owned by the respondent at the price of $1.50 a share.

corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

a) soit en raison de son comportement;

b) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;

c) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(*a*) an order restraining the conduct complained of;

(*b*) an order appointing a receiver or receiver-manager;

(*c*) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(*d*) an order directing an issue or exchange of securities;

(*e*) an order appointing directors in place of or in addition to all or any of the directors then in office;

(*f*) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(*g*) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;

(3) Le tribunal peut, en donnant suite aux demandes visées au présent article, rendre les ordonnances provisoires ou définitives qu'il estime pertinentes pour, notamment :

a) empêcher le comportement contesté;

b) nommer un séquestre ou un séquestre-gérant;

c) réglementer les affaires internes de la société en modifiant les statuts ou les règlements administratifs ou en établissant ou en modifiant une convention unanime des actionnaires;

d) prescrire l'émission ou l'échange de valeurs mobilières;

e) faire des nominations au conseil d'administration, soit pour remplacer tous les administrateurs en fonctions ou certains d'entre eux, soit pour en augmenter le nombre;

f) enjoindre à la société, sous réserve du paragraphe (6), ou à toute autre personne, d'acheter des valeurs mobilières d'un détenteur;

g) enjoindre à la société, sous réserve du paragraphe (6), ou à toute autre personne, de rembourser aux (*h*) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(*i*) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;

(*j*) an order compensating an aggrieved person;

(*k*) an order directing rectification of the registers or other records of a corporation under section 243;

(*l*) an order liquidating and dissolving the corporation;

(*m*) an order directing an investigation under Part XIX to be made; and

(*n*) an order requiring the trial of any issue.

détenteurs une partie des fonds qu'ils ont versés pour leurs valeurs mobilières;

h) modifier les clauses d'une opération ou d'un contrat auxquels la société est partie ou de les résilier, avec indemnisation de la société ou des autres parties;

i) enjoindre à la société de lui fournir, ainsi qu'à tout intéressé, dans le délai prescrit, ses états financiers en la forme exigée à l'article 155, ou de rendre compte en telle autre forme qu'il peut fixer;

j) indemniser les personnes qui ont subi un préjudice;

k) prescrire la rectification des registres ou autres livres de la société, conformément à l'article 243;

l) prononcer la liquidation et la dissolution de la société;

m) prescrire la tenue d'une enquête conformément à la partie XIX;

n) soumettre en justice toute question litigieuse.

[12] Commenting on this provision of the Act in *BCE Inc. v. 1976 Debentureholders*[5] ("*BCE*"), the Supreme Court of Canada highlighted several general considerations that I believe should be reiterated here. Although I will not reproduce the citations in the excerpt, I shall cite side by side the French and English versions of the judgment to dispel any ambiguity that could result from the use of the words "fair" and "*équité*" in the passage in question:[6]

[58] First, oppression is an equitable remedy. It seeks to ensure fairness – what is "just and equitable". It gives a

[58] Premièrement, la demande de redressement pour abus est un recours en equity. Elle vise à rétablir la justice –

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5 [2008] 3 S.C.R. 560, 2008 CSC 69.

6 This unanimous judgment by the Court was rendered in English: *ibid.*, at 572. The nuance conveyed by the English word "fair" evokes a broader power than that connoted by the words "equity" and "*équité*" used side by side in the French translation.

court broad, equitable jurisdiction to enforce not just what is legal but what is fair…. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities….

ce qui est « juste et équitable ». Elle confère au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité…. Par conséquent, les tribunaux saisis d'une demande de redressement pour abus doivent tenir compte de la réalité commerciale, et pas seulement de considérations strictement juridiques….

[59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

[59] Deuxièmement, comme beaucoup de recours en equity, le sort d'une demande de redressement pour abus dépend des faits en cause. On détermine ce qui est juste et équitable selon les [page 591] attentes raisonnables des parties intéressées en tenant compte du contexte et des rapports en jeu. Un comportement abusif dans une situation donnée ne sera pas nécessairement abusif dans une situation différente.

[13] Another leading case on the scope of this provision is worthy of note, namely, the judgment of the Court of Appeal of Ontario in *Budd v. Gentra*.[7] Doherty, J.A., on behalf of a unanimous Court, wrote:

> [47] In deciding whether an oppression action claiming a monetary order reveals a reasonable cause of action against directors or officers personally, the court must decide:
>
> > Are there acts pleaded against specific directors or officers which, taken in the context of the entirety of the pleadings, could provide the basis for finding that the corporation acted oppressively within the meaning of s. 241 of the C.B.C.A.?
> >
> > Is there a reasonable basis in the pleadings on which a court could decide that the oppression alleged could be properly rectified by a monetary order against a director or officer personally?
>
> [48] The first requirement seems self-evident. No person should have to defend a lawsuit absent allegations which identify the conduct of that person said

[7] [1998] O.J. No. 3109 (Ont. C.A.).

> to render him or her liable to the plaintiff. This statement of claim utterly fails to deal with the director defendants or management defendants on an individual basis. Rather, they are treated as a single entity, each indistinguishable from the other, and all serving as the cat's paw of the controlling shareholders. Nowhere does the appellant allege that any named director or officer did or failed to do any specified act or participated in any identified way in any of the decisions or manoeuvres which the appellant relies on in support of his claim. The claim does no more than identify the individuals as directors or officers of Royal Trustco at some unspecified time. There is no attempt to connect any individual director or officer to the alleged corporate oppression.
>
> …
>
> [52] …To maintain an action for a monetary order against a director or officer personally, a plaintiff must plead facts which would justify that kind of order. The plaintiff must allege a basis upon which it would be "fit" to order rectification of the oppression by requiring the directors or officers to reach into their own pockets to compensate aggrieved persons. The case law provides examples of various situations in which personal orders are appropriate. These include cases in which it is alleged that the directors or officers personally benefitted from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely held corporations where a director or officer has virtually total control over the corporation provide another example of a situation in which a director or officer may be held personally liable to rectify corporate oppression.

The same passages appear at paragraph [166] of the judgment *a quo*, immediately before certain conclusions of fact that the appellants challenge in their appeal.

[14] *Budd v. Gentra* set out several useful guideposts for analyzing the oppression remedy under section 241 of the *CBCA*. This is particularly true in the case of a hypothetical personal order against the directors of a corporation. Relying on this judgment, which reviewed the case law then in existence, one author provides the following description of situations that lend themselves to this hypothesis:[8]

> 14.1.1.1. Where directors obtain a personal benefit financial benefit from their conduct.
>
> 14.1.1.2. Where directors have increased their control of the corporation by the oppressive conduct.
>
> 14.1.1.3. Where directors have breached a personal duty they as directors.

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8 Markus Koehnen, *Oppression and Related Remedies* (Toronto: Carswell, 2004) at 201 (citations omitted). The trial judge borrows an analysis from this author at paragraph [120] of his reasons.

14.1.1.4. Where directors have misused a corporate power.

14.1.1.5. Where a remedy against the corporation would prejudice other security holders.

[15] I would like to cite one last principle. Gascon, J.A., as he then was, recently wrote in a unanimous decision that an appellate court hearing a dispute based on section 241 of the *CBCA* should interfere sparingly and show deference, given the discretionary nature of the power conferred by this provision:[9]

> [36] As a result, appellate courts owe a high degree of deference to judgments rendered on oppression remedies. They should interfere sparingly with the exercise of that discretion, that is, merely in circumstances where it is established that it was exercised in an abusive, unreasonable or non judicial manner.[10] The Court should avoid substituting its opinion for that of the trial judge. It should intervene only when faced with errors of law or decisions rendered on the basis of erroneous principles or irrelevant considerations, or where the judgment is so clearly wrong as to amount to an injustice. On questions of fact, the standard of review of palpable and overriding error must be strictly applied.

- III -

[16] At this stage, it appears appropriate to summarize the debate at trial.

[17] The respondent raised seven distinct arguments in Superior Court, which he had set out in the first version of his motion to institute proceedings. He worded them as follows:

> 15. The Defendant Directors have violated the Plaintiff's reasonable expectation to be treated fairly and the cumulative effects of their conduct has been oppressive to the Plaintiff for the following reasons:
>
> (a) The Directors refusal to finalize the conversion of the Plaintiff's Series A shares;
>
> (b) The Directors refusal to finalise [sic] the conversion of the Plaintiff's Series B shares;
>
> (c) The Directors unreasonable refusal to allow the

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9 *Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136 (citations and footnotes omitted).

10 *Spitzer v. Magny*, 2012 QCCA 2059, at para. [3]; *Sanimal v. Produits de viande Levinoff ltée,* 2005 QCCA 265, at paras. [29]–[31].

Plaintiff's sale of 300,000 common shares in 2007;

(d) The Directors frustration of Mitec Telecom Inc. ("**Mitec**")'s offers to purchase the Corporation's shares;

(e) The Directors efforts to dilute the Plaintiff's shares in the Corporation;

(f) The Directors refusal to call shareholder meetings; and

(g) The Directors refusal to disclose Wi2Wi's financial information.

These arguments reappear in identical form in each of the subsequent amended versions of the motion to institute proceedings.

[18] Although the judgment *a quo* allowed the respondent's remedy, it disregarded most of the arguments referred to directly above. It ruled in the respondent's favour on the first and second arguments; in relation to the fifth, which it disregarded, it briefly reviewed the rights that the respondent enjoyed as a result of his Class A and Class B preferred shares. On this specific point, the judge faulted the appellants for not having taken any measures to preserve the rights in question when, in September 2007, the impleaded party's Board of Directors (including, of course, the appellants) resolved to refinance it by means of a private placement in which only the impleaded party's shareholders were invited to take part. The details of the analysis are as follows.

[19] First, the judge reiterated the general principles that should guide the court when it applies section 241 of the *CBCA*. In particular, he referred to the two-pronged inquiry that the Supreme Court set out in these terms in *BCE*:[11]

> 56 In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.

Having adopted this formula, the judge proceeded to analyze the circumstances of the matter from each of these standpoints.

[11] *Supra* note 5.

[20] In accordance with the articles of the impleaded party in effect at the relevant time, the respondent's Class A preferred shares were governed by the terms and conditions set forth in article 5.1:

> 5. <u>CONVERSION RIGHTS</u>
>
> 5.1 The holders of the Class A Convertible Preferred Shares may, at their option, by written notice (the "**Class A Shareholder Notice**") as hereinafter provided, convert all, but not less than all, of their Class A Convertible Preferred Shares into Common Shares of the Corporation upon the following terms and conditions:
>
> (a) the Class A Convertible Preferred Shares will be convertible into a like number of Common Shares only in the event the Corporation achieves gross margins of $3,500,000 for its 2006 financial year, the whole as determined by the auditors of the Corporation whose determination shall be binding upon the Corporation and the holders of the Class A Convertible Preferred Shares;

As for his Class B preferred shares, they were subject to the following rules:

> 5.2 The holders of the Class B Convertible Preferred Shares may, at their option, by written notice (the "**Class B Shareholder Notice**") as hereinafter provided, convert all, but not less than all, of their Class B Convertible Preferred Shares into Common Shares of the Corporation upon the following terms and conditions:
>
> (a) Class B Convertible Preferred Shares will be convertible into a like number of Common Shares only in the event the Corporation achieves gross margins of $11,000,000 for its 2007 financial year, the whole as determined by the auditors of the Corporation whose determination shall be binding upon the Corporation and the holders of the Class B Convertible Preferred Shares;
>
> …
>
> (g) in the event that the Corporation's sales and/or gross margin targets set forth in paragraph 5.2(a) above are not met, then the number of Common Shares into

> which the Class B Convertible Preferred Shares may be converted shall be reduced on a *pro rata* basis, the number of Common Shares issuable to be determined by the auditor of the Corporation and to be provided for in the Corporation's Class B Notice which shall be binding on the holders of the Class B Convertible Preferred Shares.

[21] Concerning the Class A shares, the judge concluded that the respondent could legitimately expect that they be replaced by common shares in accordance with the formula provided because the objective set out in clause 5.1 (a) had been achieved for the fiscal year ended September 30, 2006. The appellant Wilson testified that the board members had doubts about the validity of the 2006 financial statements and that the board had never approved them. But, as the judge pointed out, the same note that specified in the 2006 financial statements that the Class A shares were henceforth convertible into one million common shares also appeared in the financial statements for 2007, 2008 and 2009. And the figures in the 2006 financial statements also appeared for comparison purposes in the 2007 financial statements, which were approved by the Board of Directors and submitted "as is" to the shareholders.

[22] The judge also rejected the argument that in 2007 the impleaded party had reasons to expect that it would claim compensation from the respondent: this potential claim could not justify the alleged compensation when the respondent insisted in 2007 that his preferred shares be converted into common shares.

[23] As for the Class B shares, the judge was aware that the financial objective set by clause 5.2 (a) was not reached during the reference period; according to the 2007 financial statements, available February 25, 2008, the real gross earnings were $1,637,000 and therefore far below the stipulated target of $11 million. But clause 5.2 (g) also provides that, in such an event, "the number of Common Shares into which the Class B Convertible Preferred Shares may be converted shall be reduced on a *pro rata* basis". It follows that, for the 1.5 million class B shares held by the respondent, conversion on a *pro rata* basis entitled him to 223,227 common shares.

[24] The judge's conclusions after applying the test referred to at paragraph [19], above, are found in the following passages of his reasons:

> [44] Ramzi's reasonable expectation would be that his A Shares would be converted into common shares if [the test of clause 5.1 (a)] is met.
>
> …
>
> [58] In my view, Ramzi had a second reasonable expectation in relation to the A Shares, which is that the Board would consider his rights as holder of the A

Shares in any transaction involving the shares of Wi2Wi and ensure that any such transaction did not unfairly prejudice him as the holder of the A Shares.

…

[63] As with respect to the A Shares, Ramzi's reasonable expectations would be that (1) the B Shares would be converted into common shares if the condition in the articles is met; and (2) the Board would ensure that, prior to their conversion, the B Shares would not be prejudiced by any corporate transaction.

The judge concluded that these reasonable expectations were breached in a manner that unfairly prejudiced the respondent.

[25] As I have already stated, the judge then rejected the respondent's arguments concerning what he considered the directors' oppressive refusal to approve the various offers made by Mitec to purchase his shares of the impleaded party. These arguments are no longer in dispute and they need not be considered further.

[26] Then, continuing his analysis, the judge rejected the respondent's fifth argument as formulated ("The Directors efforts to dilute the Plaintiff's shares in the Corporation"). Given that this aspect of the file is related to the fate of the Class A and Class B shares, it deserves clarification. The judge emphasized that the impleaded party's financial position in 2007 showed why, on September 28 of that year, the Board of Directors used a radical measure to provide a rapid and substantial injection of capital into the business. The means chosen was a private placement: any holder of common shares was given the opportunity to make an investment in consideration for a note that would involve conversion of each $1,000 so advanced into 50,000 common shares of the impleaded party (in other words, the shares so acquired would be purchased for $0.02 each). As the judge explained, this strategy made it possible to resolve the impleaded party's serious liquidity problem[12] because it rapidly provided $1,922,000 of new money, but it also involved the issuance of 96,100,000 more common shares. The respondent, who was short of funds at the time and could not take part in the private placement, saw his share of the impleaded party's common share capital fall from 25.8% to 1.5%, hence the dilution of his share capital referred to in his application for oppression remedy. At paragraphs [115] to [141] of his reasons, the judge explained why, in his view, the private placement was a business decision that was justified in the circumstances. This was a finding of fact that the respondent wisely did not question in his cross-appeal.

[27] Lastly, the judge used just a few paragraphs to rule on the respondent's final two arguments concerning the refusal to call a shareholders' meeting in 2007 and the failure

[12] In this regard, the judge quoted the minutes of a meeting of the impleaded party's Board of Directors, held on September 28, 2007, during which the situation was referred to in the following terms: "quickly running out of cash", "critical that the payroll be met", "cash crunch", "brink of a zero-cash position", "ensure that the Corporation could pursue its operations", "emergency financing" and "current critical financial situation".

to approve the audited financial statements for 2006. Although the evidence shows some irregularities of this type, the judge believed that the situations were in no way oppressive and that they alone did not justify the respondent's bringing an action.

[28] As can be seen, the judgment is finely shaded, especially the distinct handling of the respondent's first, second, and fifth arguments.

- IV -

[29] The main appeal raises four questions. Before setting them out, I believe it advisable to cite a short excerpt from the appellants' factum to place the discussion properly in context:

> 3. In his ruling, the first instance judge found that the treatment of the Plaintiff's preferential shares amounted to oppression. As such, he granted in part the action against the Appellants … and ordered them solidarily to pay to Plaintiff a sum of $648,310 with interest and the additional indemnity from the date of service.…
>
> 5. Although they do not agree with the characterization of the events that transpired as oppression, the Appellants do not specifically challenge the first judge's findings in this regard, but rather that nothing warranted their personal condemnation to a monetary award.

[30] The first two questions raised by the appellants concern their personal liability: (i) Did the trial judge err by concluding at paragraph [167] of his reasons that the appellants' "lead roles in the discussions at the Board level" justified that they be held personally liable as directors of the impleaded party? (ii) Did the trial judge violate the *audi alteram partem* rule in concluding that the appellants had obtained a personal benefit from the failure to convert the respondent's preferred shares by relying on facts that had not been alleged and arguments that had not been raised?

[31] The two other questions concern the assessment of the prejudice: (iii) Did the trial judge err by not taking into account the dilution caused by the private placement when he assessed the existence of a causal connection between the failure to convert the respondent's preferred shares into common shares on the one hand and the monetary loss alleged by the respondent on the other? And (iv) Did the trial judge err in his determination of the value of the common shares that would have been substituted for the respondent's preferred shares, and did he err by failing to estimate the residuary value of the preferred shares?

[32] In this part of the appeal, the appellants argue that the file as heard at first instance did not demonstrate that they had personally committed oppressive or wrongful acts toward the respondent. They argue that the allegations in the action were general and covered only the impleaded party's Board of Directors or the defendants

collectively, or in other words the two appellants and the defendants Roy and Tahmassebi, who were both exonerated at trial. Thus, was the trial judge mistaken when he attributed the actions referred to at paragraph [167] of his reasons to the appellants? The paragraph reads as follows:

> [167] In my view, each of the Defendants was involved in the oppressive conduct, although it is Black and Wilson who play the lead roles in the discussions at the Board level. Moreover, although all of the Defendants benefitted from the changes to the stock option plan, it is the Defendants Black and Wilson who participated in the Private Placement and benefitted from the dilution of Ramzi's A and B Shares. Wilson also benefitted from the conversion of his C Shares into the full number of common shares notwithstanding issues as to whether the test had been met. In the circumstances, I consider that it is "fit" to order the Defendants Black and Wilson personally to pay the damages to Ramzi.

[33] Two central ideas emerge from this passage: first, the appellants were the main instigators of the decisions that prejudiced the respondent, and second, they both obtained a personal benefit from the private placement and the dilution of the respondent's shares.

(i) The role played by the appellants

[34] Concerning the first idea, namely the lead roles played by the appellants, they challenge the basis of it. In their view, the mere fact that, according to the minutes of the Board of Directors' meetings, they were allegedly more actively involved than the other board members in discussions likely to affect the respondent's interests did not justify their being held personally liable for the board's unanimous decisions. They argue that to endorse such reasoning would hinder the frank and open discussions that should be encouraged within a board of directors. On the contrary, the *raison d'être* of such deliberations is to "salute rather than shun directors willing to forcefully voice their concerns with regard to the management of the corporation".

[35] In response to this argument, the respondent cited *Wood Estate v. Arius3D Corp.*,[13] a judgment of the Ontario Superior Court of Justice in which the plaintiff claimed compensation under section 241 of the *CBCA* from a company, four of its board members, and one of its officers (its chief financial officer). After analyzing the circumstances of the matter, D. M. Brown, J., allowed the action and individualized the order against the officer and two of the directors in their capacity as "key decision-makers"[14] who caused the oppression suffered by the plaintiff.

[36] In my view, to the extent that an issue of principle can be identified in this case, the respondent's argument must be upheld.

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[13] [2014] O.J. No. 2620 (Ont. C.S.J..).
[14] *Ibid.* at para. [135].

[37] First, the possibility of a personal order against one or more directors seems well recognized. The author Markus Koehnen wrote on this matter:[15]

> Directors and officers can be held personally liable for corporate oppression. Their liability in this regard does not depend on the breach of a specific statutory duty or common law tort but is substantially broader. Personal liability for directors and officers does not implicate corporate veil principles but involves the proper interpretation of the oppression remedy. Although the oppression remedy creates a broader personal basis of personal liability for directors than either the common law or specific provisions of statutory liability, not all oppression claims justify orders against directors. The plaintiff must make specific allegations against directors to found a claim against them; otherwise directors' liability would be engaged each time the oppression remedy was invoked.

JurisClasseur Québec reflects these observations.[16] The authors of the fascicle entitled "*Redressement en cas d'abus ou d'iniquité*", commented:[17]

> [TRANSLATION]
>
> An oppression remedy may directly concern the directors of a corporation if they were involved in the inequitable treatment of the plaintiff. … Generally speaking, it is necessary to prove that they committed oppressive or unfair acts justifying a monetary penalty to compensate for the loss. According to the case law, such payment should be ordered when the board members have derived a personal benefit from the alleged act or when they have increased their control over the business.

[38] Moreover, the appellants' argument is accepted, it would be more difficult if not impossible to individualize the directors' liability so as to distinguish those whose actions have been oppressive (within the meaning of subsection 241(2) of the *CBCA*) from those whose actions have not. When the directors are not all equally compromised by their actions, it would risk creating a form of immunity benefiting directors at fault. Such an outcome appears to be incompatible with the broad discretionary power conferred on the Court under the *CBCA* ("to enforce not just what is legal but what is fair", as the Supreme Court wrote) as well as with the remedial purpose of the remedy governed by section 241 of the *CBCA*.

[39] Once these details are spelled out, this aspect of the appeal in a sense dissolves into a series of questions involving the weighing of evidence; to resolve them, it was open to the trial judge to consider the Corporation's documents filed into evidence –

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15 *Supra*, note 8, at 200.

16 Raymonde Crête and Philippe D'Anjou, "*Redressement en cas d'abus ou d'iniquité*", in *JurisClasseur Québec*, *Droit des sociétés*, fascicle 14 (Montreal: LexisNexis, 2013) at 14.

17 *Ibid.* at 19.

minutes of meetings and the register of the impleaded party's securities, for example – to determine to which of the directors the oppressive or inequitable conduct could lawfully be imputed.

[40] Several salient facts from the file provide ample support for the judge's conclusion. They are as follows.

[41] In May 2007, the appellant Black was Chairman of the impleaded party's Audit Committee, whose only members were the appellant Wilson and himself. This was when the 2006 financial statements were prepared, from which it could only be concluded that, in accordance with the corporation's articles, the respondent's Class A preferred shares were henceforth convertible into common shares.

[42] From June 2007 to February 2008, the appellant Wilson held the position of Acting Chairman and Chief Executive Officer of the impleaded party.

[43] The agenda of the meeting of the Board of Directors held on May 16, 2007, contains a passage on the "Approval of the conversion of Class A shares to common shares". It appears from the minutes of this meeting that:

> [The respondent] moves to approve the conversion of the Class A to the directors. [The appellant Black] says they have seen draft financials, but not seen the final. I (*sic*) will send the hard copies of the financials to the board. Board approval of the conversion of Class A shares will be considered after review of final financials.

[44] The following passages are from the minutes of the meeting of the Board of Directors held on the following June 15:

> Dr. Black then commented that he continued to have serious issues as to whether Mr. Al-Harayeri should receive common shares of the Corporation on conversion of the Class A shares given his recent conduct and the directors discussed this at length.

And later:

> Mr. Wilson suggested that the board continue to review all facts surrounding Mr. Al-Harayeri's conduct in the current circumstances and decided whether they should proceed with the conversion of the Class A shares into common shares.

[45] According to the same source, at the meeting of the Board of Directors of July 17, the advisability of converting the respondent's preferred shares into common shares was again the subject of discussion by one of the appellants. The minutes state:

> Dr. Black indicated that Mr. Al-Harayeri had not been forthcoming with the other directors and there was doubt whether the Corporation should, as a matter of course, agree to a conversion of the Class A Shares held by Mr. Al-Harayeri and the directors then discussed this at further length.

[46] As the trial judge affirmed, the financial statements for 2006 were never adopted by the Board of Directors, but the reference in them to the possibility of converting Class A shares was repeated in the financial statements of subsequent years and the figures in the 2006 financial statements were used in the 2007 financial statements.

[47] We now come to the impact of the private placement on the respondent's holdings (the advisability of the financing transaction for the impleaded party is not challenged here, as attention should instead be focussed on the role played by the appellants and the personal benefit they obtained from the initiative). The following elements should be pointed out:

— As of July 24, 2007, the appellant Black was given the task of proposing for the impleaded party a means of financing other than a merger with Mitec.

— On September 13, at a meeting of the Board of Directors, the appellant Wilson took a position on the impleaded party's financial situation. The minutes read as follows:

> Mr. Wilson then describes that the Corporation has been slow to pay certain suppliers, given the cash crunch and the Corporation may be accordingly sustaining such damage to its reputation. Mr. Wilson then indicates that the Corporation would need some type of emergency financing before the proposed transaction between Mitec and Mr. Al-Harayeri is completed and the directors then discussed this at length. It is thereafter agreed that financing should be pursued aggressively by the Corporation and the directors agree to follow up on different contacts with a view to implementing this on an accelerated timeframe.

— The minutes of the meeting of September 28 contain the following, *inter alia*:

> Mr. Steinberg [Chairman of the impleaded party] then advised the directors that discussions had been held with Mr. Wilson and Dr. Black, and that they would seek financing of the Corporation immediately so as to ensure that the Corporation could pursue its operations, provided however that the board agreed on financing terms and next steps. Mr. Steinberg then referred to a draft term sheet prepared by Mr. Wilson but indicated that it was up to the board to discuss it before taking a decision.
>
> Mr. Steinberg then indicated that he felt it was critical at this juncture to hear from all directors on the current situation.

> Dr. Rob Roy indicated that he agreed with the views expressed by Dr. Black and Mr. Steinberg; he added that he was happy that Dr. Black, Mr. Steinberg and Mr. Wilson were taking necessary steps to ensure funding of the Corporation in the current context and he felt that this was overall the right approach to take.
>
> David Tahmassebi indicated that he concurred with the overview provided by Mr. Steinberg and Dr. Black; he indicated though that he had some questions as to how the other shareholders of the Corporation would participate in the financing.
>
> The directors then discussed the manner in which other shareholders would participate, the timing of the offering for the purposes of such participation, dilution issues and the overall effect of the proposed financing.

— Lastly, the appellant Wilson stated during his testimony:

> [T]he Ramzi issue had disappeared because he was no longer a shareholder in a position to block and be a big influence on all of the stuff that the company was doing, and the premise that we should be accepting, a creeping takeover, because the justification was good for shareholders because it got rid of the Ramzi issue, and the Ramzi issue had just taken care of itself, didn't hold water anymore.

[48] The trial judge therefore had all the evidence required to conclude that the appellants had indeed played the role that he attributed to them at paragraph [167] of his reasons; from this standpoint, his judgment contains no errors justifying its reversal.

(ii) The *audi alteram partem* rule and the benefit obtained by the appellants

[49] The first two situations identified by the author Koehnen, referred to above at paragraph [14], are clearly what the judge had in mind when he drafted the second and third sentences of paragraph [167] of his reasons, quoted above at paragraph [32]. The appellants challenged this determination on two distinct grounds. It apparently took them by surprise, in that the respondent had never alleged that they had benefited from the outcome of the decision of September 28, 2007, and that it was "completely unsupported by the evidence adduced at trial".

[50] On the first point, the appellants argued that the allegations in the application were of a general nature and would have covered only the impleaded party's Board of Directors or the defendants collectively, namely the two appellants and the defendants Roy and Tahmassebi, who were both exonerated at trial.

[51] A consideration of this ground requires first referring to the relevant allegations of the motion to institute proceedings. The motion, filed in May 2010 and then amended four times, alleged the following in its last version of November 2013:

…

B. THE DEFENDANTS' OPPRESSIVE CONDUCT

13.1 From December 2005 to his resignation in June 2007, Plaintiff was the heart and soul of Wi2Wi as well as a significant minority shareholder;

13.2 Developing Wi2Wi into a great company was his project and ambition: he devoted night and day to the Corporation;

13.3 Having created and successfully headed the OEM Division of Actiontec since 1997, he understood Wi2Wi's clients' needs as well as the direction in which the market was heading with regards to wireless technology;

13.4 Wi2Wi could not grow without the Plaintiff's experience, know-how and expertise…;

13.5 The success of Wi2Wi thus relied entirely on Plaintiff's shoulders;

13.6 In fact, Plaintiff successfully managed Wi2Wi and was able to grow its revenue to over $12,000,000 CAD in its first year of operation as well as exceed his Series A shares' gross margin target set forth in the Share Purchase Agreement, the whole as more fully described herein below in Section C of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.7 In doing so, Plaintiff was able to negotiate, in early 2007, the merger of Wi2Wi with Mitec Telecom Inc. ("Mitec") for a very large premium and at very advantageous conditions;

13.8 Indeed, Mitec submitted a Letter of Intent to Wi2Wi's Board, offering approximately $60 million USD for the acquisition of all of Wi2Wi's outstanding common and preferred shares, bringing the Investors' initial investment from $3 million USD to just under $30 million USD in less than two (2) years, the whole as more fully described herein below in Section F of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.9 Both companies complemented each other's business and the merger was to create synergies as well as permit Wi2Wi to grow better and faster;

13.10 Moreover, by exceeding the financial objectives which were set out in the Share Purchase Agreement, Plaintiff became entitles to convert his 1,000,000 Series A shares into 1,000,000 common shares bringing his stake in Wi2Wi to 3,000,000 common shares out of 6.7 million outstanding shares, the whole as appears from Exhibit P-4;

13.11 However, instead of working in the best interest of Wi2Wi and its shareholders, the Defendants:

(a) refused to finalize the conversion of the Plaintiff's Series A shares;

(b) tried to minimize the Plaintiff's return on the merger by requiring Mitec to disregard Plaintiff's Series A and B shares from the purchase price;

(c) Frustrated the merger of Wi2Wi with Mitec, thereby preventing its investors to (*sic*) cash in on their initial investment;

the whole as more fully described herein below in Sections C and F of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.12 As a result, Mitec withdrew its offer but since it was still interested in merging with Wi2Wi, it extended a new offer to the Board and submitted a second Letter of Intent, the whole as more fully described herein below in Section F of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.13 The Defendant again frustrated this second offer in their pursuit to minimize the Plaintiff's return and by demanding that Mitec first negotiate a separate deal with the Plaintiff and by trying to force the Plaintiff to accept a lower price for his shares and to surrender his Series A and B shares;

13.14 As a result, this second offer also fell through, the whole as more fully described herein below in Section F of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.15 Instead of working in the best interest of Wi2Wi and its shareholders, the Defendants continued their oppressive conduct and acted in their own personal interest:

(a) first, they put a stop to all discussions with Mitec;

(b) then, they needlessly diluted Wi2Wi's equity, refused for a long time to call a shareholder meeting to disclose Wi2Wi's financial statements to the Plaintiff, the whole as more fully described herein below in Sections G, H and I of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.16 By diluting Wi2Wi's equity, the Defendants ensured their position on the Board by barring any shareholder, and more particularly the Plaintiff, from ever being able to replace them on the said Board and to eventually conclude a transaction with Mitec for the benefit of both Wi2Wi and its shareholders, the whole as more fully described herein below in Sections G and H of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.17 Indeed, when finally a shareholder meeting was called in March 2008, Plaintiff's stake in Wi2Wi had been diluted to the point where he could no longer fairly exercise his rights as a shareholder since he now barely owned 1% of the shares of Wi2Wi, the whole as more fully described herein below in Sections G and H of the Plaintiff's Second Re-Amended Motion to institute proceedings;

14. Given the above, the Defendants have acted in a manner that is oppressive, prejudicial, and that unfairly disregards the interests of the Plaintiff as a minority shareholder, contrary to the provisions of s. 241 of the *Canada Business Corporations Act*;

15. The Defendants have violated the Plaintiff's reasonable expectation to be treated fairly and the cumulative effects of

their conduct has been oppressive to the Plaintiff for the following reasons:

(a) The Directors refusal to finalize the conversion of the Plaintiff's Series A shares;

(b) The Directors refusal to finalize the conversion of the Plaintiff's Series B shares;

(c) The Directors unreasonable refusal to allow the Plaintiff's sale of 300,000 common shares in 2007;

(d) The Directors frustration of Mitec Telecom Inc. ("**Mitec**")'s offers to purchase the Corporation's shares;

(e) The Directors efforts to dilute the Plaintiff's shares in the Corporation;

(f) The Directors refusal to call shareholder meetings; and

(g) The Directors refusal to disclose Wi2Wi's financial information.

C. THE DEFENDANTS' FAILURE TO CONVERT THE PLAINTIFF'S SHARES SERIES A SHARES

16. The Plaintiff was entitled to convert his 1 million Series A shares into an equivalent number of common shares upon Wi2Wi achievement of certain gross margins in fiscal year 2006, the whole as appears from Exhibit P-4;

17. Under the Plaintiff's successful management, these margins were achieved by Wi2Wi in 2006, the whole as appears from the unsigned Consolidated 2006 Financial statements of… Wi2Wi, as well as the signed Consolidated 2006 Financial Statements of Wi2Wi, communicated herewith respectively as **Exhibit P-5** and **Exhibit P-5A**;

18. In early 2007, the Board approved the Plaintiff's conversion option, thereby entitling him to an additional 1 million common chares, for a total of 3 million out of 6.7 million issued shares, making the Plaintiff an over 40% shareholder

of the Corporation;

19. These additional common shares, although approved by the Board, were never provided to the Plaintiff, despite the fact that the Board had signed the Consolidated 2006 Financial Statements of the Corporation (Exhibit P-5A) since April 2007 which recognized Plaintiff's right to convert his 1 million Series A shares into a like number of common shares and Plaintiff's repeated requests to obtain them, the whole as appears from note 14(b) of the signed consolidated 2006 Financial Statements of the Corporation (Exhibit P-5A) and the Plaintiff's written requests communicated herewith as **Exhibit P-6**;

19.1 The right to the conversion of the Plaintiff's Series A shares into common shares was reiterated in the Board's 2010 Notice of Annual and Special Meeting of Shareholders under item "Share Capitalization", as well as in Note 10 of the Consolidated Financial Statements for the years ended September 30, 2008 and 2009, the whole as appears from the 2010 Notice of Annual and Special Meeting of Shareholders of Wi2Wi communicated herewith as **Exhibit P-22** and the Consolidated Financial Statements for the years ended September 30, 2008 and 2009 of Wi2Wi communicated herewith as **Exhibit P-23**;

19.2 This conduct by the Defendants is oppressive towards the Plaintiff;

D. THE DEFENDANTS' FAILURE TO CONVERT THE PLAINTIFF'S SHARES SERIES B SHARES

20. The Plaintiff was entitled to convert part of his 1.5 million Series B shares on a prorated basis as per the Share Purchase Agreement and Wi2Wi's By-Laws as amended in December 2005 and subject to the Corporation's audited 2007 financial statements, the whole as appears from Exhibits P-3 and P-4;

21. The Defendants unjustifiably refused to provide audited financial statements for the 2007 year or convert the Plaintiff's Series B shares as per the Share Purchase Agreement, thereby denying the Plaintiff an important and substantial percentage of the common shares of the

Corporation;

21.1 As of June 1st, 2007, date of Plaintiff's resignation as CEO of Wi2Wi, Plaintiff should have been allowed to convert his 1.5 million Series B shares into 470,056.47 common shares:

> 1.5 million Series B shares X (3,447,080.77 ÷ 11,000,000) = 470,056.47 shares

The whole as appears from the Corporation's Balance Sheet and Profit & Loss Statement dated August 14, 2007, communicated *en liasse* herewith as **Exhibit P-27**;

21.2 This conduct by the Defendants is oppressive towards the Plaintiff;

…

G. <u>THE DEFENDANTS' EFFORTS TO DILUTE THE PLAINTIFF'S SHARES IN THE CORPORATION</u>

42. Without calling a shareholder meeting, on September 28, 2007, Wi2Wi issued a share offering to all shareholders, purporting to give them the opportunity to invest $1.00 CAD for every 2 common shares owned, the whole as appears from…Wi2Wi's share offering communicated herewith as **Exhibit P-18**;

43. The Directors knew the Plaintiff had insufficient capital to participate in the share offering;

44. The share offering was issued deliberately by the Directors to dilute the Plaintiff's shareholdings;

45. The board readjusted the shares of the Directors and employees who did not participate monetarily in this share offering but elected not to adjust the Plaintiff's shares, and refused to address the conversion of his Series A and B shares;

46. This conduct by the Defendants is egregiously oppressive towards the Plaintiff;

…

[52] It can be seen that paragraph 13.15 of the motion refers explicitly to the appellants' personal interest: "…the Defendants continued their oppressive conduct and acted in their own personal interest". This allegation appeared in the first amended version of the motion in November 2010 and in all subsequent versions. Moreover, in their defence of January 25, 2011, the appellants themselves raised this matter at paragraph [122]: "[t]he business decisions at issue were i) made by the Defendants in good faith, ii) not motivated by self-interest…". In the joint declaration of the full file, dated December 10, 2012, the same terms are found under the heading "POSITION OF THE PARTIES … DEFENDANTS / RESPONDENTS", as well as in the amended defence of November 13, 2013. The defence of January 25, 2011, elicited a response from the respondent, dated April 25, 2012, in which he alleged *inter alia*: "[t]he Defendants' acts and considerations were never in the interest of Wi2Wi and its shareholders, there (sic) main preoccupation being there (sic) self interest in Wi2Wi…", and "[t]he Defendants acted to the detriment of Wi2Wi and its shareholder in focusing mainly on their personal financial gains". In such conditions, it may be difficult to argue that the matter of the appellants' personal interest (or the advantage they derived) came as a surprise to them. The parties had indeed disputed this matter, which is not surprising in any way because, as we have seen, the law seems clear on this point: the personal advantage of directors accused of oppression under section 241 of the *CBCA* is a recognized component of the analysis.[18]

[53] The appellants, however, cited *Budd v. Gentra*[19] and made the following criticism: "[t]he Plaintiff's own Motion to institute proceedings barely contains any allegation of specific acts by Black, Roy, Tahmassebi, or Wilson". I can easily see that this judgment states an important principle – indeed, this is the reasonI cited an excerpt from it at the beginning of these reasons. But the application of this principle depends on the circumstances of each case. It is immediately apparent that the facts of *Budd v. Gentra* do not ground an analogy with those that gave rise to the this appeal. At the start of his reasons, Doherty, J.A., clearly pointed out what rendered the claim based on section 241 of the *CBCA* deficient in that case:

> [2] Farley J. struck certain parts of the appellant's statement of claim. His order terminated the appellant's action against 30 individuals described as directors of Gentra Inc. (formerly Royal Trustco Limited) and collectively referred to in the statement of claim as the "defendant directors"; 9 individuals described as officers of Gentra Inc. and collectively referred to in the claim as "management defendants"; and Ernst & Young the former auditors of Gentra. The order did not affect the action against the other defendants, Gentra Inc. and several corporate defendants referred to collectively in the claim as the "controlling shareholder defendants." The appellant appealed the order of Farley J. but subsequently

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18 *Supra* at paras. [13] and [14].
19 *Supra* note 7.

> abandoned his appeal against Ernst & Young. The appeal as argued involves only the claims against the director defendants and the management defendants.
>
> …
>
> [4] I think the claim as framed fails to reveal a reasonable cause of action against the director defendants or management defendants personally and I would affirm the order of Farley J.

In the appeal file, the application concerned four directors and made the allegations against them that are reproduced at paragraph [51], above. In the matter that gave rise to *Budd v. Gentra*, the claim targeted thirty directors, nine officers, five portfolio companies, an accounting firm, and Gentra as defendants, without distinction and without specifying what would justify the individual liability of one or more of the directors or officers identified by name. It was, in short, a different situation altogether – a difference of kind, not of degree.

[54] Given the explicit reference in the motion to institute proceedings to the appellants' personal interest, the allegations against them, and the state of the law and case law to which I referred in the preceding paragraph, it cannot be concluded here that the respondent deviated from the *audi alteram partem* rule. I would even say that to argue the opposite would be audacious. The appellants had sufficient means – whether through a motion for particulars, an examination on discovery or otherwise – to garner the details of what, moreover, presented all the characteristics of an application was easily consistent with the generic terms of subsection 241(2) of the *CBCA.* At the end of his analysis, the judge rejected several of the respondent's arguments but accepted others, in whole or in part, in terms that set forth in a detailed manner how the appellants' actions were oppressive or unfair. The appellants could not expect more from a remedy under section 241 of the *CBCA*. In short, the right to be heard does not give entitlement to an accessory right to be informed of the claims of which one is the target in terms rigorously identical to those of the eventual judgment that will allow the same claims.

[55] But it is not sufficient to allege something; evidence must be adduced. The appellants go further, however, arguing that the judge's conclusion concerning their *personal* interests and benefits was "completely unsupported by the evidence adduced at trial". What is one to make of this statement?

[56] It is true that the appellants are not the only investors who have benefited from the private placement, but in ascribing liability to them the judge does not base his conclusion on their mere participation in the financing transaction, which was, moreover, legitimate. There is much more. They alone played an active role, not only by setting up the private placement but also by refusing to convert the respondent's preferred shares, when there was no parallel measure to protect his legitimate expectations. This set of background circumstances makes the direct or indirect personal benefit obtained by the

appellants a convincing factor justifying the personal order against them under section 241 of the *CBCA*.

[57] Moreover, the benefit in question cannot be seen as limited to the value of the common shares acquired as a result of the private placement. While it is plausible that the impleaded party's financial position in the fall of 2007 and thereafter was precarious and therefore the realization of a tangible cash profit in the near future was a rather hypothetical if not illusory possibility, a personal benefit does not necessarily take the form of an economic or cash gain. It may be inferred from several decisions reviewed on such matters that the benefit obtained by a director may also consist of something other, such as increased control over the share capital of the corporation and the conduct of its business.[20] The respondent raised this matter at paragraphs 13.6 and 13.7 of his motion to institute proceedings, quoted at paragraph [51] above, and the evidence shows that the private placement enabled the appellants –albeit especially the appellant Black – to consolidate their control over the impleaded party.

[58] Returning now to the evidence, we see many business links that the appellants maintained with various persons, investment firms, and management companies.

[59] Concerning the appellant Black, we may refer to the securities register of the impleaded party,[21] while keeping two pieces of information in mind: this appellant exercised control over various corporations (Hedge Hog, Conserve Fund, The Q Settlement, and Savosa Trading Ltd.) and was an associate (within the meaning of subsection 2(1) of the *CBCA*) of his two sons, Alexander Richard Black and Hans Arthur Black. In this regard, an excerpt from the proxy circular sent on February 26, 2008, with the notice of the impleaded party's annual shareholders meeting contained the following details:

> To the knowledge of the directors and officers of the Corporation, the only persons who, as at February 1, 2008, beneficially owned or exercised control or

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[20] See: *Budd v. Gentra*, *supra* note 7 at paras. [44] and [45]; *Downtown Eatery*, [2001] O.J. No. 1879 (Ont. C.A.), at para. [62]: ("Grad and Grosman, in terminating the operations of Best Beaver and leaving it without assets to respond to a possible judgment, should have retained a reserve to meet the very contingency that resulted. In failing to do so, the benefit to Grad and Grosman, as the shareholders and sole controlling owners of this small, closely held company, is clear.").

[21] On this matter, the trial judge noted the following at paragraph [38] of his reasons: "There was one pre-trial issue which had an impact on the trial. Ramzi had made a motion for permission to re-amend his motion to institute proceedings on October 15, 2013, which was granted in part by my colleague Mr. Justice Schrager on October 22, 2013. In that judgment, amendments to add (1) allegations with respect to the conditions imposed by the Board on the October 9 Offer and (2) allegations that Black's sons had acquired shares in October 2007 as *prête-noms* for Black, were not allowed by Mr. Justice Schrager. I allowed evidence to be made with respect to the October 9 Offer and evidence with respect to the shareholders of Wi2Wi is in the Court record, but those two matters are not specifically alleged as acts of oppression." The information that follows in the body of the text is corroborated at 30, 31, 56, 104, 105 and 114 of exhibit P-31A according to its page numbering (the "Securities Register" of the impleaded party).

> direction over shares carrying more than 10% of the voting rights attached to the Common Shares of the Corporation were Ramzi Al-Harayeri, who held 1,500,000 Common Shares, representing 12.26% of the issued Common Shares, Alexander Richard Black who held 1,462,500 Common Shares, representing 11.96% of the issued Common Shares, Hans Arthur Black who held 1,462,500 Common Shares, representing 11.96% of the issued Common Shares and Hans Peter Black who through Hedge Hog and Conserve Fund, The Q Settlement and Savosa Trading Ltd. exercised control or direction over 4,300,000 Common Shares, representing 35.15% of the issued Common Shares.
>
> …
>
> Dr. Black beneficially owns and/or controls 3,900,000 Common Shares through Hedge Hog and Conserve Fund, and 160,000 Common Shares through the Q Settlement and 240,000 Common Shares through Savosa Trading Ltd., a total of 4,300,000 Common Shares, representing 35.15% of the issued voting shares of the Corporation. Hans Peter Black is an Associate (as defined under the *Canada Business Corporations Act*) of Alexander Richard Black who holds 1,462,000 Common Shares, representing 11.96% of the issued Common Shares and Hans Arthur Black who holds 1,462,500 Common Shares, representing 11,96% of the issued Common Shares of the Corporation.

It is therefore possible to deduce from the evidence that, as of June 20, 2008, the date of the conversion of the bonds purchased by Savosa Trading Ltd. at the time of the private placement, this corporation controlled by the appellant Black held 35,270,125 common shares of the impleaded party, of which 35,030,125 were issued in the private placement. As for The Q Settlement, taking part in the private placement enabled it to acquire 6,500,000 common shares of the impleaded party. Lastly, Hedge Hog obtained 10,000,000 common shares by the same means.

[60] As for the appellant Wilson, he benefited personally from the private placement when the bonds subscribed on that occasion were converted in July 2008 into 666,675 common shares of the impleaded party.[22] After the private placement and the conversion of the bonds on July 30, 2008, the appellant Wilson, through YTW Growth Capital Limited Partnership and YTW Growth Capital Management Corporation, owned or controlled 11,093,342 common shares of the impleaded party.[23] Moreover, the proxy circular quoted in the preceding paragraph specifies:

> Mr. Wilson personally owns 26,667 Common Shares and beneficially owns and/or controls 326,667 Common Shares through YTW Growth Capital Limited Partnership and 100,000 Common Shares through YTW Growth Capital Management Corporation, of which Mr. Wilson is President.

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22 *Ibid.*, Securities Register, at 123.
23 *Ibid*. at 126-7.

Through YTW Growth Capital Management Corporation, the appellant Wilson held Class C preferred shares, which were also convertible into common shares. The trial judge wrote on this matter:

> The Private Placement did benefit the Defendants personally to varying degrees. The Board accelerated the conversion of Wilson's 100,000 C Shares (but not the C Shares held by others) to allow him to participate in the Private Placement and issued to him 100,000 common shares despite the doubts expressed by the auditors in February 2007 as to whether the test for conversion had been met.

The two other holders of Class C shares, Mazzen Haddad and Rick Groome, did not benefit from such accelerated conversion.

[61] From the foregoing, it can only be concluded that the appellants were mistaken when they faulted the judge for ruling against them without adequate evidence. On the contrary, there was a preponderance of evidence in the file to serve as the basis for the conclusions set forth at paragraph [167] of the trial judge's reasons.

(iii) The cause of the financial prejudice alleged by the respondent

[62] In this respect, the appellants fault the judge for ruling in the respondent's favour in the absence of any evidence of a causal connection between the loss of the value of his shareholdings and the appellants' behaviour, which the judge had previously deemed oppressive. They refer more specifically to paragraph [160] of the reasons filed in Superior Court. It is useful here to quote this passage but also to place it in context along with other short excerpts from the judgment:

> [61] In my view, therefore, there are two related acts of oppression, namely the failure to convert the A Shares into common shares, and the failure to consider Ramzi's rights as holder of the A Shares in the context of the Private Placement in October 2007 and to ensure that he was not prejudiced by the Private Placement.
>
> …
>
> [72] …the Private Placement in October 2007 did go forward. As set out more fully below, the conversion of the Notes had a very serious dilutive effect on the common shares and on their voting rights and value, and therefore, by ricochet, had a similar effect on the B Shares. No steps whatsoever were taken by the Board to protect the holder of the B Shares from that prejudice. As described below, the Board did take steps to protect the option holders and Wilson as holder of some of the C Shares, but did nothing with respect to the B Shares. I find that this conduct by the Board amounts to an unfair disregard for the rights of the holder of the B Shares and therefore constitutes oppression. For the

> purposes of the remedy, I will give effect to the fact that the B Shares would have been converted into 223,227 common shares.
>
> …
>
> [159] The Private Placement was offered to all holders of common shares. It did not include any offer or any other provisions for the holders of A or B Shares. As a result, the A and B Shares remained convertible into 1,223,227 common shares, but the value and voting power of those common shares dropped dramatically as a result of the dilution pursuant to the Private Placement. There was nothing that the holder of the A and B Shares could do to avoid that loss.
>
> [160] In my view, it is not a defence to argue that the dilution would have occurred even if the A and B Shares had been converted into common shares, because Ramzi would not have exercised his rights under the Private Placement. That is speculative in nature. Mitec might have been more interested in Ramzi's shares and might have pursued them more aggressively if he had more of them. Ramzi might have called the shareholder's meeting if he was in a better position to control the outcome of the meeting.…
>
> [161] Moreover, there were other ways to deal with the A and B Shares in the Private Placement other than immediate conversion, such as making them convertible into a greater number of common shares (which was essentially the approach taken with respect to the options). That was not dependent on Ramzi's participation in the Private Placement and would have avoided the loss that he suffered.
>
> [162] As a result, I conclude that the causal link between the oppression and the loss on the A and B Shares has been established.

[63] Presented schematically, the judge's reasoning consisted of the following: (i) the refusal to allow the conversion of the Class A preferred shares, combined with the failure at the time of the private placement to take any measures to protect the Class A and Class B preferred shares, constituted oppression; (ii) the direct consequence of the oppression took two forms: the loss of value of the respondent's shares (at a time when he was in active negotiations with a potential purchaser) and the dramatic reduction of their relative weight in the impleaded party's voting capital. The elements of fault, causation and damage were therefore present, and the prejudice remained to be assessed.

[64] Regarding the causal connection, it should be reiterated that this is a question of fact, in respect of which a palpable (plainly seen) and overriding (fatal to the reasoning process it underpins) error must be shown in appeal. As Gascon, J.A., as he then was, stated in the unanimous reasons he wrote on behalf of the Court in *Laval (Ville de)*

(Service de protection des citoyens, département de police et centre d'appels d'urgence 911) v. Ducharme:[24]

[TRANSLATION]

> [72] … the case law equates the establishment of a causal connection to a purely factual matter. As the doctrine emphasizes, when the appeal questions the judge's decision on the causal connection, the Court's attitude is generally to deem the problem to be a mere matter of fact left to the sovereign assessment of the first judge, which limits the power to interfere on appeal to only those cases involving a palpable and overriding error.

[65] Can a fault of this type be detected in the judge's analysis? In my view, this question must be answered in the negative.

[66] The appellants argue that, in any case, the respondent could not have taken part in the private placement because he was short of funds in late September and early October 2007. This assertion, which the judge described as speculative, ignored the fact that the respondent would have had funds at his disposal if he had been able to convert his Class A preferred shares into common shares and, subject to the Board's approval, sell them to the highest bidder. Moreover, the assertion disregards a plausible aspect of the story: if the respondent had had a larger block of common shares, the transaction with Mitec would have had a greater chance of taking place. It is impossible to know what the actual state of affairs would have been if the Class A shares had been converted in a timely fashion, namely several months before September 2007. But the respondent probably could have consolidated his situation and his holdings would have escaped the massive devaluation and marginalization caused by the private placement.

[67] At paragraph [161] of his reasons, *supra*, the judge refers to "the approach taken with respect to the options". There can be no doubt that the members of the Board of Directors were fully aware of the inevitable dilutive effect that the private placement would have on the shareholders' equity before the placement. The options granted to the impleaded party's employees and directors would also be affected. The minutes of the board meeting held on September 28, 2007, contain the following passage:

> The directors then discussed their concern regarding the options and how to best address the fact that, due to significant dilution of the proposed financing, new options would need to be issued to employees. The directors concurred that they could not penalize the employees. Mr. Steinberg indicated that this was a complex issue and asked Mr. Tahmassebi, as Chair of the Human Resources Committee of the Corporation, to make a recommendation on this matter. The directors agreed that any decision with respect to the options would be deferred until such time as such a recommendation was presented to the directors.

[24] 2012 QCCA 2122.

Less than a month later, on October 23, the directors returned to this matter. The minutes state:

> Dr. Black explained that the major change was that everyone has options at $1.25, the round of note financing was done at 2 cents, and that any further round of financing would be expected at 5 cents. He then noted that the largest optionholder was the key scientist and it was important that the board move quickly to ensure retention through new option grants. Mr. Tahmassebi then explained in detail the process which led to the proposed option plan, including noting that the plan follows the standard of Silicon Valley, the shares will be grandfathered to the start date of each employee, and there will be monthly vesting over the remaining three years. Mr. Tahmassebi then noted that the key employees were [XX], to whom 2% has been allocated, and [YY] to whom they adjusted 1% to 1.5%. … The directors then agreed they would approve the new plan, provided however they would consider any comments of [a board member who had expressed reservations] received before Thursday, October 25, 2007.

It appears from the file that these changes were made as stated. Twenty employees of the impleaded party and seven board members benefited from them.

[68] Section 241 of the *CBCA* gives a judge broad discretion to decide an application made under it. It cannot be argued in this case that the judge made a palpable and overriding error by using the evidence adduced at trial to draw the conclusions reproduced at paragraph [62] above, including those set out at paragraph [160] of his reasons.

(iv) The value of the common and preferred shares held by the respondent

[69] In the alternative, the appellants fault the trial judge for erring in his assessment of the pecuniary damages suffered by the respondent, first by attributing an excessive value to the common shares that the respondent could have obtained from the conversion of his preferred shares, and second by not taking into account the effective residual value of the same preferred shares for compensation purposes.

[70] It is appropriate to begin by quoting the passages of the judgment where the judge discussed this matter, not including the footnotes:

> [136] I note at the outset that neither party presented any expert evidence on the value of Wi2Wi's common shares or the adequacy of the $0.02 conversion price.
>
> [137] Based on the audited financial statements of Wi2Wi for the year ended September 30, 2007, the book value of the common shares was negative and therefore the $0.02 conversion price was not at a discount to book value.

[138] However, there is other evidence in the file that suggests a higher value. The common shares were issued at $0.75 and $1.25. Ramzi sold some of his common shares to Mitec in July 2007 for US $1.50. The evidence closest in time to the Private Placement is the October 9 Offer, which provided a price of US $0.50. This offer was made by Mitec after it had conducted its due diligence and it was accepted by Ramzi, and in my view, it represents the best evidence of the value of the common shares in October 2007. It is also interesting to note that the value of US $0.50 is somewhat confirmed by Black's comment at the October 23, 2007 Board meeting that "any further round of financing would be expected at 5 cents" and by the fact that the next shares issued by Wi2Wi in May 2008 were at US $0.05.

…

[163] Ramzi claims that the value of the common shares before the Private Placement was US $1.50 based on the September 13 Offer. That is clearly not an appropriate measure – Mitec terminated that offer following the due diligence in which it learned of Wi2Wi's precarious financial position. In my view, the best indication of value is the October 9 Offer's price of US $0.50 per common share. Using the conversion rate on September 6, 2007 (the only exchange rate in the record), this is equal to $0.53.

[164] Applying that value to the 1,223,227 common shares into which Ramzi's A and B Shares were convertible, the total loss was $648,310.

…

[168] Ramzi cannot keep the shares and their value.

[169] There are two ways to deal with the A and B Shares – either I deduct their value after the Private Placement from their value before the Private Placement to calculate the damages, or I order Ramzi to return them.

[170] The best indication of the value of the common shares after the Private Placement is $0.05 per share, based on Black's comment at the October 23, 2007 Board meeting and the subsequent issuance of shares in May 2008 at US $0.05. As pointed out above, the figures of US $0.50 and $0.05 are consistent.

[171] However, Ramzi never had the ability to obtain that value because his A and B Shares were never converted into common shares. Moreover, and although I do not have complete evidence on the subject, it appears that the reverse takeover of Wi2Wi by ISEC, if it indeed happened, may have resulted in the exchange of Wi2Wi common shares for ISEC shares and the cancellation of the A and B Shares.

> [172] As a result, I do not consider it appropriate to reduce the damages awarded to Ramzi by the value of the A and B Shares because that value is too uncertain. Instead, I will order Ramzi to remit the share certificates for the A and B Shares to the Defendants Black and Wilson or to whomever they designate.

[71] In addition, the appellants argue that it was also necessary to take into account the judge's comments at paragraphs [91], [92] and [108] of his reasons, in which he stated that it reasonable for the appellants and the other members of the Board of Directors to have refused to authorize the sale of the respondent's shares to Mitec:[25] "…the Board was concerned that the Ramzi shares would give Mitec effective control without Mitec ever paying a control premium to the other shareholders." Given the impleaded party's share capital structure, it is understandable that the Board, to use the judge's words, "had concerns about a creeping takeover of Wi2Wi by Mitec".

[72] A few figures are also relevant to analyze the appellants' arguments on this point. Before the private placement, the impleaded party's share capital consisted of 5,807,760[26] common shares. Of that number, the respondent held 2,000,000, or 34.4% of the total. This proportion fell to 25.8% early in July 2007, when the Board of Directors approved the transfer of 500,000 of his shares, or 8.6% of the total, to Mitec. The other shareholders, who collectively formed the majority, held 3,807,760 actions, or 65.6% of the total. If, before the private placement, the respondent had been able to convert his Class A preferred shares into common shares, the number of common shares of the impleaded party would have increased to 6,807,760, of which 3,000,000, or 44% of the total, would have belonged to the respondent. The possibility of a creeping takeover was therefore not illusory because Mitec potentially had other supporters among the shareholders. In this sense, it can also be supposed, although this is conjecture, that the majority shareholders were concerned about being deprived of their control.

[73] Lastly, it should be noted that the private placement that took place from September 28 to October 15, 2007, had the potential to mobilize from the impleaded party's shareholders about $2,900,000 of capital, with a conversion rate of 50,000 common shares for each $1,000. As a result of this transaction, therefore, the impleaded party's number of common shares could increase from 5,807,760 to more than 150,000,000. In fact, the transaction generated $1,922,000, which resulted in an increase of 96,100,000 common shares in the impleaded party's share capital. From 34.4% of the total of the common shares that the respondent held in June 2007, his holdings fell to 1.47% after July (and could have eventually risen to 2.1% if he had been able to add to the 500,000 common shares that he still had after the sale to Mitec of a block of 1,000,000 common shares converted under clause 5.1 of the impleaded party's

[25] Only the sale already referred to in note 4 received board approval.
[26] This figure is cited by the trial judge at paragraph [111] of his reasons.

articles and a block of 223,227 shares converted under clause 5.2 of the same articles[27]).

[74] That is the context in which the judge had to make a ruling.

[75] The assessment of the pecuniary damages is above all a matter of fact; in this case, it raised no prior or incidental questions of law. As the judge noted at paragraph [136] of his reasons, the record contained no expert evidence on the value of the impleaded party's common shares or on the fairness of the price of the common shares issued in the private placement ($0.02). The judge therefore had to rely on documentary and non-expert evidence. Having concluded that oppressive behaviour took place – which was found, as stated in paragraph 5 of the appellants' factum, reproduced at paragraph [29] above – the judge was obliged to rule on the quantum of damages. That did not rule out the possibility of his setting it at zero. Even so, in the presence of uncertainty, which could not fail to be the case in a dispute such as this one, the case law expects the judge to do his best on the basis of the evidence adduced. Only recently in *Vidéotron, s.e.n.c. v. Bell ExpressVu, l.p.*,[28] a unanimous panel of the Court made the following comments on this matter:

> [TRANSLATION]
>
> [86] The difficulties or the challenge presented by the valuation exercise does not justify setting aside the ideal to be achieved, namely full restitution. As Jean-Louis Baudouin wrote [TRANSLATION] "[t]he courts are aware of the fact that mathematical precision is difficult to achieve. Their objective, therefore, is to reach just and reasonable compensation in light of all the circumstances, according to well-accepted standards set out in case law concerning calculation methods."
>
> [87] In *Provigo Distribution inc. v. Supermarché A.R.G. inc., Société du Parc des îles v. Renaud* and *Banque de Montréal v. TMI-Éducation.com inc.*, this Court stated or described, as follows, the process of determining just and reasonable compensation in all the circumstances:
>
> > Excerpt from *Provigo Distribution inc.*

27 These clauses are reproduced, *supra*, at para [20]. One can add here that if the respondent had sold 500,000 shares to Mitec but had added 1,223,227 converted common shares to the 1,500,000 shares that he already owned, his holdings would have represented 38.7% of the 7,030,987 common shares of the impleaded party.

28 2015 QCCA 422 (references omitted). The following sources are those reproduced in the text of the citation: Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 8e édition, vol. 1, Éditions Yvon Blais, at 458, *Provigo Distribution*, [1998] R.J.Q. 47, 84 (C.A.), *Société du Parc des îles*, J.E. 2004-778, AZ-50227210 (C.A.) and *Banque de Montréal*, 2014 QCCA 1431.

Several largely unforeseeable or unquantifiable factors made assessing the prejudice an extremely complicated task. This Court faces additional difficulties in its assessment of the damage because its consideration is limited to the evidence on the record. This no doubt explains the lack of strict mathematical rigour in its calculations, as the Court is forced to rely on a certain amount of approximation and estimation, as well as its own discretion. It is the role of judges to perform such tasks, however

Excerpt from *Société du Parc des îles*

[26] In so doing, the judge awarded damages and interest as was proper in the circumstances. Having concluded that the appellants breached their obligations in several ways, breaches that in all likelihood were prejudicial to the business operated by the respondent, he had to look in the evidence for a probable demonstration of the amount of the financial prejudice suffered by the respondent….

Excerpt from *Banque de Montréal*

[103] Even if the expert reports are practically useless and despite the difficulty of the task, the trial court had to determine compensation, even resorting to approximation where necessary. ….

[88] In short, when fault is established and it is the cause of damages, the judge must [TRANSLATION] "look in the evidence for a probable demonstration of the amount of the financial prejudice suffered". Thus, [TRANSLATION] "[u]ncertainty regarding the damage in itself must be distinguished from uncertainty caused by the difficulty of precisely measuring the damage because of the nature of the legal dispute, the realities of the proceedings, or the complexity of the facts ".

[89] Deference is owed to assessments of damages, such that this Court will interfere only in the case of an error of law or a palpable and overriding error by the trial judge.…

[76] According to the judge's findings, which the appellants have not shown were marked by an error justifying that they be overturned on appeal, the oppression that the respondent suffered took two forms. The judge's conclusion on this point is clear:

[153] … I conclude that Ramzi has proven oppression in relation to the failure to convert the A and the B Shares and the failure to ensure that Ramzi's rights as the holder of the A and B Shares were not prejudiced by the Private Placement.

The decisive paragraphs on the monetary value of which the respondent was deprived as a result of these two actions by the appellants present the judge's reasoning in these terms:

> [137] Based on the audited financial statements of Wi2Wi for the year ended September 30, 2007, the book value of the common shares was negative and therefore the $0.02 conversion price was not at a discount to book value.
>
> [138] However, there is other evidence in the file that suggests a higher value. The common shares were issued at $0.75 and $1.25. Ramzi sold some of his common shares to Mitec in July 2007 for US $1.50. The evidence closest in time to the Private Placement is the October 9 Offer, which provided a price of US $0.50. This offer was made by Mitec after it had conducted its due diligence and it was accepted by Ramzi, and in my view, it represents the best evidence of the value of the common shares in October 2007. It is also interesting to note that the value of US $0.50 is somewhat confirmed by Black's comment at the October 23, 2007 Board meeting that "any further round of financing would be expected at 5 cents" and by the fact that the next shares issued by Wi2Wi in May 2008 were at US $0.05.
>
> [Emphasis added]

Later he adds:

> [163] Ramzi claims that the value of the common shares before the Private Placement was US $1.50 based on the September 13 Offer. That is clearly not an appropriate measure – Mitec terminated that offer following the due diligence in which it learned of Wi2Wi's precarious financial position. In my view, the best indication of value is the October 9 Offer's price of US $0.50 per common share. Using the conversion rate on September 6, 2007 (the only exchange rate in the record), this is equal to $0.53.

This assessment is rational and is supported by the evidence. As we have seen, the appellants, like the other members of the Board of Directors, expected radical dilution of the security. In the wake of the private placement, they took vigorous measures to rehabilitate the options offered to the impleaded party's employees and members of the Board of Directors, but no action to preserve the respondent's rights arising from the Class A and B preferred shares. In all likelihood, the respondent could have divested himself of his common shares derived from the Class A and B preferred shares. He would have done so at the mutually negotiated price identified by the judge, if the conversion of the Class A shares had been carried out with diligence. It might also be thoughtthat he would have done so at the same price if the Class B shares had been subject to a protective measure to mitigate the dilution of their value. With the adjustment of the foreign exchange rate referred to by the judge at paragraph [163] of his reasons, the total is $648,310.

[77] In short, the judge relied on plausible evidence, namely Mitec's offer of October 9, 2007. Contrary to what the appellants argue, the purpose of the price set in this way was not to have the appellants pay instead of Mitec because of the failed offer of

October 9, 2007. It was used solely to determine what the respondent's shares were in all likelihood worth, with no regard for the appellants' oppressive behaviour, which undermined such value.

[78] This last ground raised by the appellants is therefore without basis, as is their argument based on the residual value of the respondent's preferred shares, an argument that the trial judge completely rebutted at paragraphs [168] to [172] of his reasons.

- V -

[79] As I stated at the beginning of these reasons, the cross-appeal concerns only the value attributed by the trial judge to the 1,223,227 common shares, which in the normal course of events would have been substituted for the respondent's preferred shares. The judge set the value at $0.53 a share, and the incidental appellant argued that he should have set it at US $1.50. Paragraphs [137], [138] and [163] of the judgment *a quo* are the relevant passages and they have already been reproduced, *supra*, at paragraph [76].

[80] The value of US $1.50 is that which appeared in the offer sent by Mitec and to the incidental appellant on September 13, 2007. This offer provided for payment of US $1.50 for each common share and an overall amount of US $100 for the Class A and B preferred shares, with the total coming to $2,250,100. This offer was subject to the following conditions, however:

> Any transaction would also be subject to Mitec's updated due diligence review of Wi2Wi's financial condition, business and prospects and Mitec being satisfied therewith, as well as the satisfaction of any other approvals and conditions stated below.
>
> ...
>
> The purchase price per Common Share shall be payable $0.75 in cash and, at the discretion of Mitec, $0.75 in Mitec Common Shares, subject to regulatory and stock exchange approval.

It thus can be seen that it was a conditional offer, not a firm offer, and that the terms of payment, which were left to Mitec's discretion, enabled it to pay with its own common shares rather than with cash.

[81] The value of $0.53 is what Mitec offered on October 9, after it completed its due diligence of the impleaded party's situation. It is known that this situation was very precarious and that it had led to the approval of the private placement by the impleaded party's Board of Director several days earlier.

[82] In substance, the incidental appellant argues that the judge could not disregard the rate of US $1.50 because the offer of September 13, which came two weeks after the private placement, was the result of previous negotiations by mutual agreement before the massive dilution or devaluation that began on September 28. Certainly Mitec took a dim view of the private placement; indeed, it said as much to counsel for the impleaded party through its own counsel, in a letter dated September 30.

[83] Even so, on October 9, after learning of the private placement, Mitec made its last proposal to the incidental appellant. The proposal was communicated simultaneously to the impleaded party's Board of Directors. The offer concerned "the 1,500,000 common shares in the capital stock of the Corporation held by the Vendor [the incidental appellant]". The price offered was US $0.50 "for a minimum of 8% or up to 100% of the vendors (*sic*) common shares". Daniel Piergentili, the President of Mitec called during the trial by the incidental appellant, testified about the outcome in the following terms:

> A. Afterwards, the next step was talking with the Wi2Wi board. We again tried to see if a deal could be worked out to purchase Ramzi's shares, this time at a price of fifty cents (.50). The Wi2Wi board initially put a stipulation on that we had to… if… if we were to strike a deal with Ramzi, we had to offer the same deal to all Wi2Wi shareholders.
>
> So, to try to explain that is…(inaudible) say he had a million (1,000,000) shares. We struck a deal with…at a certain price. All Wi2Wi shareholders had a…had the right to purchase those shares at fifty cents (.50), based on the number of shares they had.
>
> Q. Okay.
>
> A. So, on a pro rata basis, we could all buy a…a certain amount.
>
> Q. And after that?.
>
> A. So, after that, then there was a… along with that, there was an additional stipulation that Mitec could only buy eight percent (8%). So, if no one else… even if no one else participated, all we could ever buy was eight percent (8%).

After these discussions, on October 21, Daniel Piergentili communicated by e-mail with the respondent and announced to him tersely: "No I am done with these guys as far as I am concerned the deal is over."

[84] The incidental appellant attributes to the figure proposed on September 13 a scope that it does not have. This offer was conditional on Mitec's due diligence of the

impleaded party's situation. There can be no doubt that the results of this verification were very disappointing, justifying a 66% decrease in the offer, lowering it from US $1.50 to US $0.50. In addition, because of the situation, the private placement became an absolute necessity in order to inject cash into the impleaded party. If the private placement had truly been the decisive factor in the decrease, it would have been expected that Mitec, in its offer of October 9, would have proposed a price of US $0.05, or even US $0.02, for the incidental appellant's 1,500,000 common shares. And in fact the prejudice would have occurred because of the actions of the incidental respondents, because the sale price offered for the incidental appellant's common shares would have gone from US $750,000 to US $75,000, or even to US $30,000. But that is not what happened. The transaction failed for other reasons: the requirements (legitimate, as the judge noted) of the impleaded party's Board of Directors concerning control over the company, requirements that would have left Mitec in a very minority position within the impleaded party's shareholders, are the reason for what occurred.

[85] In these conditions, the trial judge could conclude as he did –at paragraph [138] of his reasons, for example – and assess the prejudice at $0.53 a share. The ground raised by the incidental appellant therefore has no basis in fact, which renders superfluous a review of the case law he cited.

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[86] For these reasons, I would dismiss the main appeal and the cross-appeal, with costs against the defaulting parties in both cases.

YVES-MARIE MORISSETTE, J.C.A.

TAB 10

CITATION: Paul v. 1433295 Ontario Limited, 2013 ONSC 7002
COURT FILE NO.: CV-08-15586CM
DATE: 20131213

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Doreen G. Downs Paul and Russell G. V. Paul Plaintiffs	William V. Sasso and Jacqueline A. Horvat, for the Plaintiffs
– and –	
1433295 Ontario Limited and Parmjit Singh Bahia Defendants	Dante D. Gatti, for the Defendants
	HEARD: February 19, 20, 21, 22, 25, 26, 27, 28, March 1, May 22, 23, 24 and 27, 2013

REASONS FOR JUDGMENT

NOLAN J.:

INTRODUCTION

[1] The plaintiffs, the minority shareholders of the defendant corporation, are seeking two main remedies against the corporation and the majority shareholder pursuant to the *Ontario Business Corporations Act*, R. S. O. 1990, c. B 16, as amended ("*OBCA*"); the first head of relief is found in s. 185, the dissent and appraisal provision; the second is found in s. 248, the oppression remedy. They are also seeking an order for pre-judgment interest.

[2] There is no issue between the plaintiffs and defendants that the plaintiffs are entitled to the first remedy. They disagree, however, on the value to be assigned to the property, a hotel, and thus the proper value to be assigned to the shares of the corporation.

[3] With respect to the second remedy, the majority shareholder denies that he engaged in any oppressive conduct towards the plaintiffs and, thus asserts that they are not entitled to any relief with respect to that claim.

BACKGROUND

[4] In about 1998, the defendant, Parmjit Singh Bahia ("Mr. Bahia"), a business man and a resident of the United Kingdom who now owns a number of hotels in England and the United States wanted to look at acquiring a hotel in Canada. This was his first venture into the hotel business. As part of his search, he explored a number of trade newspapers. In one of them, the Western Investor, he came across the name of one of the plaintiffs, Russell G.V. Paul ("Mr. Paul"), a real estate agent/broker who specializes in hotel sales and acquisitions. Mr. Bahia contacted Mr. Paul for the purpose of engaging his services to purchase at least one Canadian hotel. And thus began an unhappy relationship that culminated more than thirteen years later in the trial before me.

[5] After looking at numerous hotels across Canada in the company of Mr. Paul, Mr. Bahia decided to acquire the almost 100-year-old Prince Arthur Hotel ("the Hotel"), in Thunder Bay, Ontario, for $3,000,000 on February 23, 2001. Mr. Paul and Mr. Paul's wife, Doreen G. Downs Paul ("Mrs. Downs Paul"), the other plaintiff, proposed to Mr. Bahia that they would like to acquire an ownership interest in the Hotel. This could be accomplished by Mr. Paul foregoing his $100,000 commission on the sale of the Hotel with that amount being contributed to the purchase price. In return, Mr. Paul and Mrs. Downs Paul would each receive a 10 per cent interest in the shares of the defendant corporation, 1433295 Ontario Limited ("the Corporation"), which was incorporated in September 2000 for the sole purpose of acquiring, holding ownership of and managing the Hotel.

[6] The total $100,000 contribution of the plaintiffs was by way of a shareholder loan. The balance of the purchase price of the Hotel was by way of a shareholder loan to the Corporation from Mr. Bahia in the amount of $1,300,000 and a loan to the Corporation by the Business Development Bank of Canada ("BDC"), in the amount of $1,600,000. Mr. Bahia received 80 per cent of the shares of the Corporation. Mr. Bahia and Mrs. Downs Paul were the Directors of the Corporation.

[7] Although Mr. Bahia's financial contribution to the acquisition of the Hotel was 13 to 1 in relation to the contribution of the Pauls, he agreed to the 80/20 split of the shares because Mrs. Downs Paul was going to be involved in the management of the Hotel, allowing Mr. Bahia to focus on his other business ventures in the United Kingdom where he lived and elsewhere. Even though Mrs. Downs Paul's experience in managing the day to day operations of a hotel was little to non-existent and there was no agreement between the parties as to what her exact duties would be and whether she would be paid for those duties, that was the arrangement the parties put in place.

[8] Not surprisingly, this management arrangement did not last long. Mrs. Downs Paul was ousted as the manager by Mr. Bahia and both the plaintiffs were banished from the Hotel by Mr. Bahia following a phone call to him from Mr. Paul who complained to him about the manner in which the Hotel was being managed by his wife.

[9] Although the lawyer who acted for all the parties on the incorporation of the Corporation prepared a draft Shareholder's Agreement which he provided to the Pauls and Mr. Bahia, the agreement was never signed. Mr. Bahia was not even sure he reviewed it. Thus, when there was a falling out between majority shareholder, Mr. Bahia, and the minority shareholders, the Pauls, there was little guidance for any of them or for the court years later, regarding any contemporaneous evidence of their reasonable expectations as between them when they entered into their fateful arrangement. This left the provisions of the *OBCA*, on which they each relied at trial to justify their respective complaints and actions and their mutual arrangements with BDC.

[10] The contributions by the Pauls and Mr. Bahia were secured by way of shareholder loans to the Corporation. The Pauls' loan was secured by a demand promissory note dated February 21, 2001, as well as by way of a charge in their favour registered against the Hotel. The conditions of the BDC loan, however, prevented the payment of any interest or repayment of the loan to any of the shareholders while any indebtedness to the BDC was outstanding. As of the time of the trial, the Corporation remained indebted to BDC.

[11] In spite of the falling out between the parties, annual shareholder meetings were held and there was an attempt on the part of Mr. Bahia to act in accordance with his legal obligations as a director of the Corporation. In June 2001, he removed Mrs. Doreen Paul as a director at a meeting of the shareholders. The Pauls continued to receive copies of the minutes of the annual shareholder meetings at which they attended or sent proxies and never made any formal complaints about the actions of the Corporation with a few exceptions. In addition, each year from 2003 up to and including 2012 with the exception of 2006 and 2007, the Pauls each received a cheque from the Corporation for interest on their shareholder loans. Although the agreement with BDC, which all the shareholders were required to enter into, specifically prohibited any payment of interest to the shareholders or any repayment of any shareholder loans while there was any indebtedness to BDC and the Pauls were well aware of this provisions, they accepted the interest payments without complaint.

[12] There was little direct communication between Mr. Bahia and the Pauls. There was some evidence that from time to time they had discussions about Mr. Bahia buying them out but nothing was finalized.

[13] From Mr. Bahia's standpoint, he found he was in an impossible situation with respect to the ongoing operation of the Hotel and the need for ongoing renovations of and repairs to the almost century old hotel. A stalemate between the plaintiffs and Mr. Bahia continued until December 2006 when Mr. Bahia sent a formal letter to the Pauls requesting they invest more funds in the Hotel for renovations. That request was refused. Prior to sending that letter, Mr. Bahia had learned from an accountant that the *OBCA* contained a

provision that would permit a corporation to take back shares of minority shareholders for fair value.

[14] On January 5, 2007, Mr. Bahia gave written notice to the Pauls of a special meeting of shareholders called for February 5, 2007. The notice of the meeting included a proposed memorandum which advised that the Corporation needed $700,000 for renovations to the Hotel. That memorandum further advised that Mr. Bahia, the sole director and majority shareholder, would not advance any further funds without the Pauls contributing a proportionate amount. The proposed resolution called for a reduction in the number of common shares on a 40-1 basis. The effect of this resolution when passed would have been that Mr. Bahia's shares would be reduced from 80 to 2 and the 10 common shares held by each of the Pauls would be reduced to one quarter of one common share. Scrip certificates would be issued for the fractional shares. That meeting did not proceed and the parties entered into negotiations to attempt to agree on a price the Pauls considered to be fair value for their shares. No agreement was reached.

[15] On March 4, 2008, Mr. Bahia sent another notice of a shareholder meeting to be held on March 19, 2008, at which time the original resolution sought in February 2007 would be brought forward to exchange the Pauls' shares for scrip shares that would need to be exchanged for shares before year end. The Pauls disagreed with the resolution and exercised their rights to dissent and appraisal by way of written notice on April 24, 2008. This was followed on April 25, 2008, by correspondence from Mr. Bahia in which he offered to purchase their shares at what he determined was fair market value of the assets of the Corporation, that being $6,120 per share as of March 18, 2008.

[16] The Pauls complained at trial about the failure of Mr. Bahia as the sole director of the Corporation to include in either of the notices of the February 2007 or March 2008 shareholder meetings any notice to them of their dissent and appraisal rights pursuant to s. 185 of the *OBCA*. According to them, it was not until the special meeting of March 19, 2008 that the Corporation's counsel advised them of that right when they objected to the adoption of the resolution. While the inclusion of such a notice might be common practice, I was not referred to any part of s. 185 which required such notice.

[17] Following March 18, 2008, what I will refer to in this judgment as Valuation Day, there were a number of valuations of the Hotel prepared by various experts who testified at trial. Had a proper valuation been completed prior to Valuation Day, in preparation for Mr. Bahia's offer of $6,120 per share, this trial might well have been unnecessary.

[18] In any event, the parties agree that the relevant date for valuation of the Hotel is March 18, 2008. Other than that date, the parties agreed on little else. The Pauls commenced this action on August 14, 2008. They were granted leave on August 10, 2011, to amend their statement of claim which they did on September 1, 2011, to add allegations related to actions of Mr. Bahia that the Pauls allege both devalued their interest in the Hotel and provided inappropriate benefits to himself in violation of the agreement with BDC, oppressive conduct in violation of s. 248 of the *OBCA*.

ISSUES

[19] The main issues to be determined are:

1) What is the value to be assigned to the shares held by the Pauls on March 18, 2008, in accordance with s. 185 of the *OBCA*, based on the value of the Hotel as of that date and determining what, if any, amounts should be deducted from or added to that value to arrive at a proper share value;

2) Did the actions of Mr. Bahia, the majority shareholder, amount to oppressive conduct towards the minority shareholders, thus engaging s. 248 of the *OBCA*, the oppression remedy?

3) If that question is answered in the affirmative, what is the proper remedy?

4) Are the plaintiffs entitled to pre-judgment interest and, if so, in what amount and from what date?

[20] At the conclusion of his submissions at the end of trial, counsel for the defendants raised an additional issue. He sought leave to amend the pleadings by adding a final line to the statement of defence to include the defence of laches, claiming that the plaintiffs had delayed in bringing their action against the defendant. Thus, the claim is time-barred by reason of the equitable doctrine of laches, asserting that there was some evidence at trial to support that defence. Not surprisingly, counsel for the plaintiffs opposed the request for the amendment. I offered counsel seven days within which to make written submissions on the issue and should I receive submissions, I would arrange a further attendance. No further material was received from either counsel. I will deal with that issue in a summary way in the Analysis portion of this judgment.

THE EVIDENCE

[21] In all, there were twelve witnesses called by the parties and numerous volumes of documents entered as exhibits including numerous financial statements which were reviewed by almost all of the witnesses, both on direct and cross-examination. The first exhibit filed by the defendants on consent was a document produced by the Sauder School of Business, Real Estate Division of the University of British Columbia entitled Hotel Valuation CPD104 Professional Development Course. I mention it here only because this document was referred to throughout the trial by the defendants' counsel both in direct examination and cross-examination of almost all of the witnesses called by both sides and held up as "the Bible" of appraisers of hotels as the proper and only way of assigning value to a hotel. Indeed, one of the expert witnesses, Monique Rosszell, was credited as a contributor to the course materials. While some of the material was of assistance in understanding the sometimes complex procedures that make up the world of appraisals, particularly of specialized property such as hotels, the exhibit was not

determinative of any conclusions I reached in coming to the ultimate share value. Given the prominent disclaimer on the first page of the document, I would have been in obvious error had I done so:

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[22] The plaintiffs called two witnesses. The first was Mr. Ben Lansink, a qualified real estate appraiser who testified as an expert as to the value of the Hotel. In addition to presenting his own report, he was later recalled on consent to present a further report he referred to as a technical review of the reports of the other experts called on behalf of the defendants. The other witness was the plaintiff, Russell Paul. In addition to testifying as to the circumstances under which he and his wife entered into this business venture with Mr. Bahia with respect to the Hotel, he prepared and presented his own report as to the value of the Prince Arthur Hotel. Not surprisingly, Mr. Paul's value was the highest of all the valuations presented at $8 million.

[23] The defendants called ten witnesses. The first was Monique Rosszell, a principal of HVS Global Hospitality Services, also a qualified appraiser, who prepared an appraisal of the Hotel.

[24] The next witness was Brian Keith Stanford of PKF Consulting, a company which provides appraisal services to a number of business sectors including hotels. Mr. Stanford, unlike Mr. Lansink and Ms. Rosszell, was not a qualified appraiser but he had prepared the report after an extensive review of the property itself and the financial records. The appraisal report was signed off by a certified appraiser, Stephen Raymer, also associated with PKF who also testified.

[25] The defendants also called as an expert Donna Marie Bain Smith, a chartered accountant and chartered business valuator as well as being qualified as an investigative and forensic

accountant. She was retained by the defendants to provide a share valuation. She completed her first report on June 29, 2011. She prepared a second report January 29, 2013, after receiving the HVS report.

[26] David Kubinec, a public accountant with BDO in Thunder Bay, was called by the defendants to testify as the Corporation's accountant.

[27] The defendants also called Mrs. Downs Paul and Jeffrey Crowe of BDBC (formerly BDC), the manager of the Branch Centre in Windsor as witnesses. Although Mr. Crowe had no direct involvement with the BDC arrangement with the parties to this action, he testified as to the conditions under which BDC lent money to corporations, including the standard provisions in the contracts. He testified that BDC's standard loan documents do not prohibit the accrual of interest, just the payment of it.

[28] Mrs. Downs Paul's evidence confirmed other evidence that had been presented: she had been in a management/oversight role at the Hotel until she was discharged and she and Mr. Paul were removed from the Hotel by the police; she had paid herself a management fee of $10,000 by way of cheque written by herself; Mr. Bahia at first had reduced her portion of the shareholder loan by $10,000 as a result; she had complained and her portion of the shareholder loan was raised to $50,000; she was emotionally distraught and devastated when she was removed as a director by Mr. Bahia. While giving evidence, Mrs. Paul gave the court unsolicited information about alleged "bad behaviour" on the part of Mr. Bahia at the Hotel, no doubt in retaliation for allegations made against her and Mr. Paul, also for "bad behaviour". To be clear, none of the allegations made by either the plaintiffs or Mr. Bahia had much relevance to the issues to be determined by me.

[29] Mr. Bahia testified on his own behalf and as the Director of the Corporation.

ANALYSIS

Summary of the Nature of the Remedies Sought

[30] Pursuant to the dissent and appraisal remedy, s. 185 of the *OBCA* (see Schedule A attached), the plaintiffs have a statutory right to be paid fair value for their shares as of the day prior to the meeting of the corporation which would result in a fundamental change in the structure of the corporation that would create a fundamental change to their rights as shareholders.

[31] This right of dissent and appraisal is meant to result in a relatively quick process for the resolution of the value of the shares. Within seven days of the receipt of the notice of dissent from the dissenting shareholders and a request to be paid fair value for their shares, the corporation is to make an offer for the dissenting shareholder shares in an amount that directors of the corporation consider to be fair value. That offer is to be accompanied by a statement setting out how the fair value was determined.

[32] If the corporation fails to make an offer or the dissenting shareholders fail to accept the offer, the corporation can apply to the court within a specified period of time for the court to fix a fair value for the shares. If the corporation fails to apply to the court, as in this case, then the dissenting shareholders have a right to apply to the court to have the value of the shares fixed. From the time the dissenting shareholders give notice of their desire to be paid out the fair value of their shares, they cease to have any rights as a shareholder.

[33] With respect to the oppression remedy provided for in s. 248 of the *OBCA* (see Schedule B attached), the court, should it find on the evidence that there has been oppressive behaviour on the part of the majority shareholders towards the minority shareholders, may provide a remedy that the court considers fair, just and equitable. When determining whether conduct complained of is oppressive, unfairly prejudicial or unfairly disregards the interests of any shareholder, the court must consider the acts complained of within the context of the reasonable expectations of the shareholders. The court can then allow for any equitable adjustments to be made to any amounts owing to the minority shareholders. It is clear in the relevant case law that both remedies can be sought together. Section 185(4) provides that the dissent and appraisal remedy can be sought "in addition to any other right a shareholder may have", in this case, the oppression remedy found in s. 248.

[34] With respect to the claim for pre-judgment interest, the plaintiffs are seeking interest on the amount determined to be fair market value for the shares as of Valuation Day in accordance with s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as well as s. 185(27) of the *OBCA*. With respect to pre-judgment interest in relation to the oppression claim, the plaintiffs are seeking it on any amount of damages back to the first act of oppression they assert, that is the day Mrs. Downs Paul was removed as a Director of the Corporation in June 2001.

Preliminary Issue: Amendment to the Statement of Defence

[35] As referred to earlier in this judgment, at the conclusion of his final submissions, counsel for the defendants sought leave to amend the defence to include the defence of laches. He argued that there would be no prejudice to the plaintiffs by allowing the amendment since laches is just "the equities version of the *Limitations Act*". He argued that the allegations of oppression by Mr. Bahia go back to 2001. Since the Pauls did not complain before this proceeding was commenced in 2008 and further amended in 2011 to set out in more detail the allegations of oppression, they are prohibited by the doctrine of laches from maintaining the oppression claim. Having raised this issue at the end of the trial, I will deal with it as a preliminary issue and begin by a brief review of the doctrine itself and the effect of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, ("the Act"), on the doctrine.

[36] Halsbury's Laws of Canada - Limitation of Actions VI. EQUITABLE DOCTRINES, 2. Laches and Acquiescence contains a helpful summary.

> HLM-50 What constitutes laches**.** If a proceeding is not subject to a limitation period, or if the limitation period has not expired after a

> lengthy period, the equitable doctrine of laches may apply as a defence to the claim. Laches permits a defendant to avoid an equitable (although not a legal) claim made against him or her if he or she can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either:
>
> 1. acquiesced in the defendant's conduct; or
>
> 2. caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.[1]
>
> A remedy is not normally available when the defendant is guilty of wrongdoing.[2]
>
> Acquiescence. In the context of laches, acquiescence is established if, after the deprivation of his or her rights and in the full knowledge of their existence, the plaintiff delays. It is not enough that the plaintiff knows of the facts that support a claim in equity; he or she must also know that the facts give rise to that claim.[3]
>
> Delay alone is not sufficient to invoke the doctrine. The issue of delay alone is dealt with by the appropriate statutory limitation period. Delay accompanied by what has occurred during the delay and the effects on the parties will determine whether the doctrine is to be applied.[4]

[37] While the defendants referred me to *Cutajar v. Fresca*, [2009] O.J. No. 5126 to support the claim that laches applies, there is far more support in the case law for the position that the *Limitations Act*, 2002 applies to oppression remedy claims. In *Cutajar*, Master Muir held at para. 73 that "there is no limitation period applicable to oppression remedy claims under section 248 of the *OBCA*." Master Muir came to this conclusion after a review of several cases: *Southerland v. Birks,* [2003] O.J. No. 2885 (C.A.), *Waxman v. Waxman* (2004), 186 O.A.C. 201, *Paragon Development Corp. v. Sonka Properties Inc.* (2009), 96 O.R. (3d) 574, and *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*, [2006] O.J. No. 27 (C.A.).

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[1] *M. (K.) v. M. (H.)*, [1992] S.C.J. No. 85, [1992] 3 S.C.R. 6 (S.C.C.); *Wewaykum Indian Band v. Canada*, [2002] S.C.J. No. 79, [2002] 4 S.C.R. 245 (S.C.C.); *K. (K.) v. G. (K.W.)*, [2008] O.J. No. 2436, 56 C.C.L.T. (3d) 165 (Ont. C.A.); *McCallum v. Canada (Attorney General)*, [2010] S.J. No. 112, [2010] 2 C.N.L.R. 191 (Sask. Q.B.); *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] M.J. No. 219, 2010 MBCA 71 (Man. C.A.).

[2] *Ambrozic v. Burcevski*, [2008] A.J. No. 552, 53 R.F.L. (6th) 242 (Alta. C.A.).

[3] *M. (K.) v. M. (H.)*, [1992] S.C.J. No. 85, [1992] 3 S.C.R. 6 (S.C.C.); *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] M.J. No. 219, 2010 MBCA 71 (Man. C.A.).

[4] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] M.J. No. 219, 2010 MBCA 71 (Man. C.A.).

[38] This view of the law was expressly rejected in *Fracassi v. Cascioli*, 2011 ONSC 178, in which Justice Pepall held that *Paragon* and *Ford* do not apply under the new *Act*. At paras. 271 and 272, Justice Pepall noted that the new *Act* is meant to be comprehensive, and went on to find that it applies to oppression remedy claims:

> 271 The Court of Appeal addressed the new *Limitations Act, 2002* in *Joseph v. Paramount Canada's Wonderland, supra*. The Court stated that section 16 of the statute sets out a list of claims to which no limitation period applies. For other claims, the new Act establishes a basic two year limitation period and a maximum limitation period of fifteen years. The Court held that as section 4 of the new Act mandates a two year limitation period unless the Act provides otherwise, a court must look in the Act for the authority to depart from the application of the two year limitation period. As the Court noted, the wording of section 4 compels the conclusion that the new Act is intended to be comprehensive.
>
> 272 There is nothing in the *Limitations Act, 2002* that suggests that breach of a fiduciary duty or a claim for oppression escapes the statute's two year parameter. Reliance therefore cannot properly be placed on the limitation conclusion in *Paragon Development Corp. v. Sonka Properties Inc.* The *Ford Motor Co.* case was decided under the old limitation statute and in any event, it would appear that the oppression in that case continued until the commencement of the action. Accordingly, given the Court of Appeal's strict interpretation of the *Limitations Act, 2002* as reflected in *Joseph v. Paramount Canada's Wonderland*, I conclude that a two year limitation period applies to the remaining causes of action in this case....

[39] In *Reinhart v. VIXS Systems Inc.*, 2011 ONSC 5349, Justice Roberts also distinguished the older cases, and held at paras. 8-9 that the *Limitations Act*, 2002, applies to oppression remedy claims:

> 8 I prefer and adopt the analysis and conclusion of Madam Justice S. Pepall in the recent decision, *Fracassi v. Cascioli*, that the limitation period begins two years after the day on which the claim for oppression was discovered.
>
> 9 As a result, I conclude that a two-year limitation period applies to the plaintiff's oppression claim.

[40] The *Act* itself, as found in *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, is meant to have broad applicability. A reading of the applicability section of the *Act* itself supports this position:

> **2.** (1) This Act applies to claims pursued in court proceedings other than,
>
> (a) proceedings to which the *Real Property Limitations Act* applies;
>
> (b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court;
>
> (c) proceedings under the *Judicial Review Procedure Act*;
>
> (d) proceedings to which the *Provincial Offences Act* applies;
>
> (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*; and
>
> (f) proceedings based on equitable claims by aboriginal peoples against the Crown. 2002, c. 24, Sched. B, s. 2 (1).

I am satisfied that the new *Act* applies to oppression remedy claims.

[41] In *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, La Forest J. outlined the test for the doctrine of laches:

> 98 Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether [page78] the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

[42] *M. (K.)* does not explicitly preclude laches from being used when a claim is subject to the *Limitations Act, 2002*, but does explain that the doctrine of laches was developed because, historically, limitations legislation did not apply to equitable claims:

> 96 Historically, statutes of limitation did not apply to equitable claims, and as such courts of equity developed their own limitation defences. Limitation by analogy was one of these, but the more important development was the defence of laches. While laches must be considered here as in any delayed equitable claim, in my view it does not afford the respondent redress.

[43] This explanation provides support to the findings in the other cases cited above, that laches will not apply when an action is subject to and within a statutory limitation period.

[44] Unlike legislation in other provinces, as well as the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, the *Limitations Act, 2002,* does not explicitly state that equitable remedies are still available despite the existence of the limitations legislation. This could be interpreted as an implication by the legislature that, where limitations legislation is applicable to claims in equity, equitable remedies are not to be used.

[45] The oppression remedy is subject to the *Limitations Act, 2002*. As such, a claim falling within the limitation period should not be subject to laches given the case law and legislative observations outlined above. While there is some case law to the contrary, this proposition does seem to follow the most recent case law as well as the purpose of the doctrine of laches as outlined by the Supreme Court of Canada. The defendants did not plead the *Limitation Act*. The request by the defendants to amend the statement of defence to include laches is refused.

ISSUE 1: SHARE VALUATION

Introduction

[46] The most vigorously contested aspect of the trial was the fair value to be assigned to the ten shares owned by each of the plaintiffs on Valuation Day pursuant to s. 185 of the *OBCA*.

[47] The *OBCA* and the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 provide for a dissenting shareholder's right to receive fair value for shares:

> *Business Corporations Act* (Ontario):
>
> **185(4)** In addition to any other right the shareholder may have, but subject to subsection (30), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents becomes effective, to be paid by the corporation the fair value of the shares held by the shareholder in respect of which the shareholder dissents, determined as of the close of business on the day before the resolution was adopted. R.S.O. 1990, c. B.16, s. 185 (4)
>
> *Canada Business Corporations Act*:
>
> **190(3)** In addition to any other right the shareholder may have, but subject to subsection (26), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents or an order made under subsection 192(4) becomes effective, to be paid by the corporation the fair value of the shares in respect of which the shareholder dissents, determined as of the close of business on the day before the resolution was adopted or the order was made.

The sections are virtually identical. The only guidance that is offered with respect to the value of shares is that the shareholder must be paid “fair value”. Accordingly, one must turn to the case law for guidance on how “fair value” is determined.

[48] The seminal case on “fair value” is *Brant Investments Ltd. et al. and KeepRite Inc. et al.* (1987), 60 O.R. (2d) 737 (H.C.), aff’d (1991), 3 O.R. (3d) 289 (C.A.). Anderson J. wrote about the meaning of “fair value” and the proper approach for the court in making such a determination in relation to the dissent and appraisal remedy at paras. 109-111 in the trial decision,

> For a phrase deceptively simple in terms, "fair value" has occasioned a great deal of judicial and editorial comment. I have concluded that there should be no premium for forcible taking. I have concluded that no element of value relative to synergistic benefits of the impugned transaction should be allowed. My reasons for these conclusions have been given. The conclusions, I hope, make it possible for me to approach the problems inherent in determining "fair value" by a route less tortuous than has been found necessary in some of the cases.
>
> I start from the premise that the appraisal remedy is a statutory right, granted to minority shareholders, to oblige the corporation to purchase the shares of those minority shareholders who dissent from some basic change imposed by the majority. The right as I view it is to recover the value of the investment so that the proceeds may be utilized elsewhere. In such circumstances I see no reason why market value is not "fair value". Market value (in some comment called "fair value", in some "intrinsic value") is defined as the highest price available in an open and unrestricted market between informed, prudent parties acting at arm's length and under no compulsion to act, expressed in terms of money or money's-worth. In my view, on the facts of this case, "market value" will constitute "fair value" within the meaning of that term as used in s. 184(3). It is on that basis that I propose to determine the award to the dissenting shareholders.
>
> In this context it is necessary to keep in mind the distinction between "market value" as thus defined and the "market value approach" to valuation referred to in the judgment of Greenberg J. in Domglas, supra. The latter has reference to use of the quoted price or prices on the stock market. Such prices reflect actual transactions of purchase and sale. "Market value" as defined above is a notional or hypothetical concept; an opinion arrived at by evidence, assumptions, calculations and judgment, in the absence of an actual transaction. The distinction is important for the disposition of this case.

[49] In *Brant*, three expert witnesses gave valuations on shares in KeepRite. There was a wide discrepancy between their valuations: Campbell: \$9 per share; Louden: \$22 per share;

and Wise: $28 per share. Anderson J.'s analysis immediately favoured Campbell's valuation because Campbell had the benefit of speaking with management of KeepRite at the time that the dissent occurred. The other appraisers prepared their valuations much later and without the benefit of speaking with management regarding the state of affairs of the company.

[50] Anderson J. then went on to note the differences between the valuations to determine the basis of the discrepancies. The two major discrepancies that accounted for most of the differences were the probable debt level, probable rate of interest to be paid and the capitalization rate. He then discussed which analysis he preferred within those two areas of discrepancy. For example, there was a discrepancy in probable interest rates between Campbell and Louden by roughly 3 per cent. Campbell expected a 13-14 per cent interest rate and Louden expected 11 per cent. Anderson J. found that Campbell's analysis was more realistic because interest rates at the time had been fluctuating and Louden's estimate was based on the expectation that they would level off. Anderson J. believed that there was still significant uncertainty in interest rates and accepted Campbell's number.

[51] This analysis favours the following method of completing a valuation:

1. Assess the experts themselves. Do the circumstances lead to one being more credible?
2. Find out why there are discrepancies between the valuations. Which inputs led to the greatest discrepancies?
3. Analyze and select the preferred inputs.

Anderson J. found that redoing the valuation is impractical. Thus, it may be that the valuation reached is the one that is closer to the valuation of the expert who had the most favourable inputs.

[52] The challenges for the court in determining fair value on Valuation Day were also articulated by the court in *Nixon v. Trace*, 2012 BCCA 48, 315 B.C.A.C. 261, in which the court referred to an earlier Court of Appeal for British Columbia decision, *Re Cyprus Anvil Mining Corp and Dickson* (1987), 33 D.L.R. (4th) 641 (B.C.C.A.), which states:

> ... the problem of finding fair value of stock is a special problem in every particular instance. It defies being reduced to a set of rules for selecting a method of valuation, or to a formula or equation which will produce an answer with the illusion of mathematical certainty. Each case must be examined on its own facts, and each presents its own difficulties. Factors which may be critically important in one case may be meaningless in another. Calculations which may be accurate guides for one stock may be entirely flawed when applied to another stock.
>
> The one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to

> exercise the best judgment that can be brought to bear on all the evidence and all the factors. I emphasize: it is a question of judgment. No apology need be offered for that. Parliament has decreed that fair value be determined by the courts and not by a formula that can be stated in the legislation.
>
> ...
>
> In summary, it is my opinion that no method of determining value which might provide guidance should be rejected. Each formula that might prove useful should be worked out, using evidence, mathematics, assessment, judgment or whatever is required. But when all that has been done, the judge is still left only with a mixture of raw material and processed material on which he must exercise his judgment to determine fair value. [At 652.]

[53] Both of these cases confirm that valuation is not an exact science, and it will be up to the court to determine how to weigh competing valuations. In *Brant*, Anderson J. ultimately assigned a share value of $13. He did not engage in an in-depth analysis of why he arrived at this exact value, but that he generally favoured Campbell's reasoning over the others. His only criticism of Campbell, thus why he went to $13 instead of accepting $9, was because he found that Campbell put too much emphasis on a temporary crisis experienced by KeepRite, thus driving Campbell's valuation down.

[54] At paragraph 130, Anderson J. described the method he used to arrive at the $13 valuation:

> The third [possible method] is to arrive at my own valuation upon my view of the evidence as a whole and without resort to any sophisticated method. Fully conscious of its frailties and the criticisms to which they will give rise, I have selected it as the least of the available evils.

This is in line with the reasoning in *Nixon* where the court found that valuation is an imperfect science and it is ultimately up to the trial judge who has a wide degree of discretion in choosing the appropriate method in order to reach a valuation.

[55] The court was presented with three different opinions of value of the Hotel as of Valuation Day prepared by experts qualified to give such opinions. Every valuation used either an income approach or combined income and market comparison approach. As referred to earlier in this judgment, Mr. Paul prepared his own valuation of the Hotel even though he is not a qualified appraiser. In my view, it was presumptuous of him to take that approach to providing the court with evidence required to determine a proper share valuation. His report was not helpful and the presentation of his "opinions" resulted in a considerable waste of court time, both in terms of direct and cross-examinations. While Mr. Paul is an experienced real estate broker who has considerable knowledge about the buying and selling of hotels, his views as an interested party are of no value to

the court. The fact that he assigned the highest value to the Hotel was not surprising, given his interest in the outcome.

[56] Mr. Paul's presentation of a report had another unfortunate result. His own expert, Mr. Lansink, made reference to various aspects of Mr. Paul's "findings" in his technical report prepared to respond to the defendants' experts' reports to rebut their opinions. In doing so, it brought Mr. Lansink's objectivity into serious question.

[57] With respect to the expert reports themselves, I will review each of them briefly in turn.

Lansink Report

[58] Mr. Lansink was asked by Mrs. Downs Paul on December 12, 2011 to provide a report regarding the value of the Hotel for the purposes of this litigation. Mr. Lansink has been a real estate appraiser and a member of the Appraisal Institute of Canada ("AAIC") since 1972, a designation which allows a person so qualified to appraise any kind of property. In that capacity, he has appraised all manner of property including airports, golf courses, hotels, motels, care facilities for seniors, cemeteries and numerous other kinds of properties in Ontario. His report concluded that the market value estimate of Valuation Day was $6,140,000 and a per room value of $51,167. Mr. Lansink attended at the property on December 20, 2011 for the purpose of inspecting it, the neighbourhood and the surrounding community. He also reviewed the Financial Statements for the period ending February 14, 2008, as well as the Statement of Income and Expense for the periods ending March 11, 2010 and April 8, 2010.

[59] Mr. Lansink's valuation took into account the desirable waterfront location of the historic hotel built by the Canadian National Railroad in 1911, the number of rooms, the amenities, as well as comparison with other competitors in the community.

[60] Mr. Lansink described the various methods that can be used to estimate the value of property as compared to other properties: the direct comparison approach; the income approach; and the cost approach. He did not use the cost approach as that approach is more appropriate for new construction. Thus, Mr. Lansink used the first two methods to come to his final valuation.

[61] When Mr. Lansink was cross-examined on the factors he considered in coming to his ultimate value, he disagreed that a hotel had to be valued in the manner recommended by the Sauder School of Business and insisted that hotels were valued in the same way as any property. Mr. Lansink's report did not make reference to many of the aspects of hotel operation that were considered by the other appraisers such as demand generators, travel forecasts, competition, market performance, supply and demand analysis, and occupancy projections. Mr. Lansink's valuation also did not utilize the Uniform System of Accounts used by the other experts to convert reported financial data into a system that could permit comparison among various hotel properties. While this does not mean that one could conclude that Mr. Lansink's approach to valuation was wrong, his approach made

it more difficult to compare and contrast the values assigned to the Hotel by the various appraisers.

[62] In arriving at his opinion that the Net Operating Income of the Hotel was $460,860, Mr. Lansink, unlike all the other experts, did not include a 3 per cent management fee nor a 4 per cent reserve for replacement of assets. It was his view that the amount set aside for repairs and replacement included replacement of assets. As well, the arrangement that the Pauls and Mr. Bahia entered into with BDC included the payment of a monthly amount in excess of $11,000 to be held by BDC and drawn against for the purpose of repairs and replacements created a reserve. Since this arrangement was already in place, Mr. Lansink determined that a further 4 per cent reserve was unnecessary.

[63] The other significant difference between the value placed on the Hotel by Mr. Lansink and the other experts was the capitalization rate of 7.5 per cent he applied. He arrived at this amount by comparing the capitalization rates for six hotels sold around the time of Valuation Day, that is from January to March 2008. In fact, the Canadian Hotel Transaction Report that was made an exhibit at trial reported 21 hotel transactions during the same period selected by Mr. Lansink for comparison with the Hotel. The average capitalization rate of all the 21 transactions was 10.20 per cent and the median rate 10.9 per cent.

[64] Even accepting that a number of the 21 transactions were not comparable to the Hotel, there were a number which had been properly used as comparables by the other appraisers and which I find Mr. Lansink should have included. Had he done so, the average or median capitalization rate would have been in the 10.2 per cent to 10.9 per cent range, in line with that of the other appraisers. Also, if he added a reserve for replacement of 1 per cent of gross sales as suggested by counsel for the defendants, Mr. Lansink's final value would have been between $4,225,000 and $3,953,700, also in line with the value of the Hotel set by the other appraisers.

[65] Before leaving the issue of Mr. Lansink's opinion that the amounts recorded in the Corporation's financial statements for repairs and maintenance was sufficient to cover the cost of asset replacement, this opinion is not supported by a review of the financial statements of the Hotel including the balance statements. In addition to the amounts expended for repairs and maintenance, there was an additional $617,845 spent from the time of the purchase of the Hotel to February 28, 2008 which is close to the 4 per cent reserve for Asset Replacement included by the other appraisers in their opinions of the value of the Hotel.

[66] Support for the inclusion of the 4 per cent reserve for asset replacement in an analysis of the ongoing annual expenses of a hotel is found in the Capex 2007 study of capital expenditures in the hotel industry. This is a document prepared for hoteliers by the International Society of Hospitality Consultants for the purpose of providing information regarding hotel expenditures for capital needs. In the introduction it is pointed out that what the data collection revealed in the study was that capital expenditures for a hotel generally increase with the age of the hotel. The Hotel was built in 1911 and I heard a

significant amount of evidence from most of the witnesses about the condition of the Hotel and its physical plant needs.

[67] Counsel for the plaintiffs urged me to find that the monthly payment by the Hotel to BDC provided for in agreements to be held by BDC until drawn down by the Hotel on presentation of satisfactory invoices or estimates had the effect of creating such a reserve. With respect, I disagree. I find that the BDC account could be used for a much wider purpose including repairs and maintenance and was not set aside for asset replacement. I find, therefore, that a 4 per cent reserve for asset replacement should be included in determining the net operating income of the Hotel.

HVS Report

[68] Monique Rosszell, a principal of HVS Consulting and Valuation in Toronto prepared a valuation at the request of Mr. Bahia. Unlike the other valuations, Ms. Rosszell was not made aware of the purpose for which the report was requested. By way of experience, Ms. Rosszell has impressive credentials. Besides having the AACI designation as did Mr. Lansink and Mr. Raymer, she is a member of the Royal Institute of Chartered Surveyors ("MRICS"), and has both a degree in hotel management from Ecole Hoteliere de Lausame, Switzerland, and practical experience in working in the hotel industry itself with three large hotel chains.

[69] Unlike Mr. Lansink, Ms. Rosszell did not inspect the Hotel during the preparation of her report. It was inspected by an associate, not an AACI accredited appraiser. Ms. Rosszell testified, however, that she had inspected the Hotel in 2011. Her report delivered on October 26, 2012, expressed the opinion that the retrospective market value of the Hotel as of March 19, 2008, based on the income capitalization approach was $4,200,000, equating to a $35,000 per room value, considerably below that of Mr. Lansink's appraisal which set a per room value of $51,167.

[70] She also expressed the view that based on a sales comparison approach, the value of the Hotel would be $3,200,000 to $6,400,000. Ms. Rosszell did not find that given the unique nature of the Hotel, subjective rather than objective adjustments would need to be made between the subject property and other properties, thus diminishing the reliability of the sale comparison approach. In any event, it was her opinion that the typical hotel investor does not approach a purchase from a sales comparison approach except to establish broad value parameters.

[71] Ms. Rosszell confirmed that her approach to hotel valuation was in accordance with the principles taught at the University of British Columbia Sauder School of Business, Real Estate Division where she studied and received her AACI designation. Accordingly, she converted the financial documentation she received into the uniform system of accounts used by hotels in which certain expenses are allocated to certain categories to be better able to evaluate the performance of a hotel in comparison to other hotels. As well, Ms.

Rosszell included a 3 per cent management fee and a 4 per cent reserve for asset replacement. To not include such a reserve would result in a loss of market share if the appearance of the rooms and other guest areas were neglected.

[72] Some of the factors which influenced Ms. Rosszell's valuation included a comparison of the Hotel's performance in relation to the competition in Thunder Bay, including the revenue per available room or RevPAR as it is referred to in the hotel industry. This is the average room rate multiplied by the occupancy of the available rooms on an annual basis. Using this calculation, the Hotel had the lowest RevPAR in 2006 and 2007 of comparable hotels. Other hotels in Thunder Bay had increased their number of rooms which ate into the Hotel's market share. While the Hotel entered into a contract for $300,000 at the end of 2007 with Canadian Pacific for rooms which would increase their projected room nights, it would reduce the average per room cost to $77.61 from $82.24 because the contract was for 300 rooms at $52.00 each night.

[73] Ms. Rosszell also commented on the dated nature of the Hotel including older beds and furniture which she found accounted for the fact that the Hotel was not doing as well as its competitors. She also reviewed the internal financial documents of the Hotel and compared them with the audited financial statements as opposed to the financial statements of the Corporation as the internal Hotel documents were more detailed. She was unaware, however, that Mr. Bahia had been receiving approximately $100,000 per year as management fees and reported that there were no management fees being paid.

[74] Ms. Rosszell was challenged at length on cross-examination, particularly in relation to her financial conclusions based on the financial statements and other documents. I find that some of the disparity in her financial analysis, particularly in relation to her insistence that a 4 per cent asset replacement reserve was required along with a 3 per cent management fee was based on a rate application of principles without factoring in the particular circumstances of the Hotel. Even though the Hotel was depositing over $11,000 per month with BDC for revenue for repairs, maintenance and replacement of items, and Mr. Bahia was receiving a management fee of almost $100,000 per year, these undisputed facts were not reflected in her report.

PKF Report

[75] Brian Stanford, a principal of PKF Consulting, and Stephen Raymer, also associated with PKF, testified with respect to the valuation of the Hotel completed by that firm on February 26, 2010, effective March 19, 2008, as well as a second valuation submitted the same day which valued the Hotel as of March 1, 2010. For reasons that were never made clear, the existence of these valuations were not made known until after the plaintiffs had brought a motion in 2011 to ask the court to appoint an appraiser pursuant to s. 85 (25) of the *OBCA*. I will have more to say about that provision of the *OBCA* later in this judgment.

[76] Mr. Stanford is not qualified as an appraiser by the AAIC but has been involved with many hotel valuations since 1983 when he joined PKF as an intern with a degree in

tourism and hospitality from Ryerson. He attended at the Hotel, to assess the Hotel, some of its competitors as well as the community and factors that impact on the value of the Hotel.

[77] It was Mr. Stanford who also reviewed the financial statements of the Hotel and pointed out that the Hotel has 121 rooms, not 120 as one room is used for administrative purposes. Nevertheless, he said it should be described as a 121 room hotel as the additional room adds to the value of the property. Although in need of significant updating in terms of the room furnishing, bathrooms and elevators, it has the advantage of good space for meetings and a waterfront location near the casino.

[78] Like Ms. Rosszell, Mr. Stanford pointed out that the RevPAR of the Hotel was the lowest among the competition and had been for a number of years. Also, like Ms. Rosszell, he converted the financial information he reviewed into the uniform system of accounts for hotels. Unlike Ms. Rosszell, Mr. Stanford reduced the operating expense for administration by $99,000, the amount received by Mr. Bahia annually, but added a 3 per cent management fee as well as a 4 per cent reserve for asset replacement. Taking into account a number of factors including a review of economic factors impacting on the Thunder Bay economy, tourism statistics and projections, the age of the Hotel and the updating required, he determined that an 11 per cent capitalization was appropriate. Based on his calculations, this resulted in a value of the Hotel on Valuation Day of $4,100,000. A report of the same day but effective March 1, 2010, put the value of the Hotel at $3,600,000, a significant decrease in value in just under two years. From Mr. Bahia's perspective, the lower value in 2010 impacted negatively on his ability to get financing, the purpose for which that report was completed. In contrast, the higher value in 2008 impacted on what the Corporation would have to pay the Pauls for their 20 per cent minority interest. Counsel for the defendants pointed out that this was supportive of the neutrality of the PKF approach.

[79] Stephen Raymer who is qualified by AAIC signed the PKF appraisal after spending seven to eight hours reviewing the report. He agreed with the $4,100,000 value. He acknowledged that he had not inspected the Hotel as part of the appraisal and that he had relied on the observations and opinions of Mr. Stanford in relation to the physical plant. He did say, however, that because of family connections in Thunder Bay, he was very familiar with the Hotel.

[80] Mr. David Kubinec is a public accountant with BDO Canada, the accountants for the Hotel, and in that capacity his firm had audited the Hotel since 2006. Much of his evidence was related to reviewing the financial statements in Exhibit 17 and explaining the limited nature of the BDO report that accompanied Mr. Bahia's offer to purchase the Pauls' shares explaining the difference between repairs and maintenance expenses as opposed to capital expenditures, pointing out that repairs are not considered capital expenditures. The latter are capitalized and identified under plant and equipment on the balance sheet. There are also different tax consequences for repairs and maintenance as opposed to capital expenditures. Repairs and maintenance expenditures are operating

expenditures and are direct deductions from revenue. Capital expenditures, on the other hand, are accrued and deducted (depreciated) over time.

[81] According to a review of the audited statement, the total capital investment in the Hotel since its acquisition, has been $795,000. Mr. Kubinec was confident that there were no capital expenditures reported as repairs and maintenance.

[82] On cross-examination, Mr. Kubinec acknowledged that the BDC reserve account was used over the years for both repairs and maintenance and capital expenditures. In addition, he acknowledged that he did not examine each and every invoice but rather reviewed a sample of expenditures in various categories, additions to or replacement of furniture and equipment to assess the appropriate category. In 2006, $43,943 was spent on furniture and equipment, $17,802 was spent in 2007 and in 2004 capital expenditures were $13,000.

[83] Mr. Kubinec was questioned at length about the entries in the financial statements regarding the accrual of interest by Mr. Bahia and the fact that the different treatment of the interest in regard to the Pauls was never confirmed with the Pauls. Mr. Kubinec relied on information he received from Mr. Bahia and the management staff at the Hotel.

Analysis of the Different Approaches to Valuation

[84] The key differences in the case before me between valuations are: the capitalization rate, the inclusion of a management fee, the inclusion of a reserve for asset replacement, the treatment of the accrued interest and the time at which the valuations were carried out.

[85] The Lansink valuation uses a capitalization rate of 7.5 per cent. Counsel for the defendants argued that the median capitalization rate used by Lansink was incorrect and that it should have been 9.6 per cent based on counsel's statistical calculations. A capitalization rate of 7.5 per cent results in a final value of $6,144,804 while a capitalization rate of 9.6 per cent results in a final value of $4,800,625, with all other factors being equal, using Lansink's numbers.

[86] Counsel for the defendants went on to assert that the report used by Lansink actually shows a median capitalization rate of 10.9 per cent, which is in the 10-11 per cent range used by PKF. This would result in a final value of $4,228,073 as opposed to the $6,144,804. This appears to be the largest source of discrepancy between the valuations and brings Lansink's valuation closer to that of PKF and HVS. Any further discrepancy can be explained by the inclusion of the management fee and reserve. Of further note, PKF's valuation was done much closer to the date in question, giving it additional weight following the reasoning in *Brant*.

[87] Overall, the greatest discrepancy in the various values of the Hotel on an income basis is in the capitalization rate used. Mr. Lansink applied a rate that I find was not supported in his report, as he did not consider a number of hotels in the comparison that should have been included. Using the correct median capitalization rate, the value of the Hotel comes

within the range of the other valuations. Incorporating a management fee and reserve would bring the valuation between $4,100,000 and $4,200,000 as suggested by the PKF report and the HVS report. I find that $4,100,000 is the value of the hotel to be used in assigning a share value. While I am aware that the second PKF valuation as of March 2010 reduced the value by approximately $500,000, the law is clear that I must use the Valuation Day value for calculating the fair value of the shares.

[88] The defendants called as an expert Donna Marie Bain Smith, a chartered business valuator, to provide a report and an opinion as to the *en bloc* share value of the Corporation which she found to be between $1,226,000 and $1,256,000 using the PKF value of the Hotel of $4,100,000. In her first report she used that value to create an asset valuation and arrived at this value by taking the fair market value of the hotel and subtracting the net book value, tax shield forgone, and future income taxes.

[89] Ms. Bain Smith provided a second report on January 29, 2013, based on the HVS valuation of $4,200,000. Using the same approach as in her first report, she found the *en bloc* share value to be between $1,326,000 and $1,356,000. It was Ms. Bain Smith's evidence on cross-examination that while she had done an asset based evaluation, she agreed that she could have approached her evaluation from an earnings based approach which would not take into account the tax shield foregone.

[90] The "asset-based approach" is an accepted approach to determining fair market value (*Faulkner v. Faulkner*, [1997] A.J. No. 730; *Calmont Leasing Ltd. v. Kredle* (1996), 38 Alta. L.R. (3d) 296). However, the method suggested by the plaintiff, the income/investment method, has more support in the case law (*Domglas Inc. v. Jarislowsky* (1980), 13 B.L.R. 135 at paras. 373-374). In *Manning v. Harris Steel Group Inc.* (1986), 7 B.C.L.R. (2d) 69 (Sup. Ct.), Justice Proudfoot found:

> This value (the income/investment method) seems the method most often used. I refer again to the cases of Cyprus Anvil Mining Corporation v. Dickson et al. (1983), 40 B.C.L.R. 180, Diligenti v. RWMD Operations Kelowna Ltd. (1978), 4 B.C.L.R. 134 as well as Les Investissements Mont-Soleil Inc. v. National Drug Limited (1983), 22 B.L.R. 139. The reason for this method most often being used no doubt being that one is in business to earn income, it must follow that the value of a business must depend upon the capacity to generate income. Greenberg, J., in Domglas stated: "The basic concept currently accepted by valuation theorists is that as business is worth only what it can earn except where it is worthless on an earning basis than the amount that would be realized if it were liquidated". It then seems to become necessary to look at the situation on the basis of the value of a going concern.

[91] Proudfoot J. went on to state that the capitalization of earnings approach is most appropriate to determine the fair market value of shares. Generally, the income based approach is used where a business is of "going concern", and the asset based approach is

used for businesses that are being liquidated. However, the Alberta Court of Appeal rejected the notion that a trial judge is bound by one valuation method in *Pocklington Foods Inc. v. Alberta (Provincial Treasurer),* 2000 ABCA 8, 75 Alta. L.R. (3d) 263:

> Because share valuation involves primarily the judgment and discretion of a trial judge based on the facts of the case, a lower court's valuation approach should not be interfered with on appeal unless that technique displays a "manifest error": see Domglas Inc. v. Jarislowsky, Fraser & Co. Ltd. et al. (1982), 138 D.L.R. (3d) 521 at 523 (Que. C.A.); see also Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114 at 121.
>
> At trial, the learned trial judge heard expert evidence from both parties on the compelling approaches available in the valuation of the shares. Each party advocated that a particular method be employed by the trial judge. However, after considering the evidence and determining that there were difficulties in the approaches advanced by each party, the trial judge selected a combination approach as the most appropriate method of valuation in the circumstances.

[92] The average *en bloc* share value using the asset-based approach at a hotel value of $4,100,000 is $1,240,500. Using the investment approach, the value is higher depending on which Hotel valuation is selected. As indicated above, a value of $4,100,000 to $4,200,000 is supported by the evidence. Since the investment approach is recommended in the case law, I find that this is the approach I should use.

Minority Discount

[93] Generally, a minority discount is applied to shares that are being sold because a willing buyer would be willing to pay less for a minority share than for a majority share due to the lack of control that comes with that share. While the application of a minority discount is an accepted practice at the discretion of the court and has been applied in some cases, I find that the circumstances of this case do not lend themselves to assigning a minority discount, in accordance with the reasoning in *Diligenti v. RWMD Operations Kelowna Ltd.* (1977), 4 B.C.L.R. 134, at para. 81:

> In the first place, while it is true that in the process of the initial step--determination of the *value of the business* as a going concern--one must look at what a willing purchaser would be prepared to pay a willing vendor for that business on the open market, in the second step --determination of the actual *price for the shares,* the situation here is quite different from that of a minority shareholder offering his shares on the open market. In such a situation, which is the approach taken in the revenue cases, including *Levitt,* supra, the purchaser would end up as a new minority shareholder, subject to all the disadvantages of the position of the original shareholder: obviously a minority discount

> would be applicable. But here, where the purchase will be by virtue of an order that existing shareholders, or the company, make the purchase, the result will be that existing shareholders will simply consolidate their positions. They do not become minority shareholders as a result of the purchase --they are already, as individuals, minority shareholders; in this case they become holders of one-third of the shares instead of one-quarter. Their position in relation to each other is not changed. On the basis of the facts I consider that the arguments as to the application of a minority discount do not apply to these circumstances.

Value of the Shares

[94] Accepting the approach articulated by Anderson J. in *Brant* set out earlier in this judgment, that is to arrive upon my own valuation based on my view of the evidence as a whole and without resort to any sophisticated method, I fix the *en bloc* value of the shares at $1,700,000 or $17,000 per share. I came to this value by accepting the value of the Hotel at $4,100,000, deducting the mortgage, allowing the accrued interest of Mr. Bahia and the management fees that were paid to him and approved by the shareholders and also acknowledging the $700,000 required for much needed upgrades to the hotel identified by both the PKF and the HVS reports. Each of the Pauls will receive $170,000 plus $50,000 as repayment of their shareholder loan. The shareholder loans are to be paid out forthwith with the value of the shares to be paid out within 90 days in three equal payments, along with the interest provided for later in this decision. I remain seized of any issues arising from this schedule.

Section 185(25) Court Appointed Appraisers

[95] Counsel for the plaintiffs submitted that more use should be made of this section by courts. I agree, particularly because the role of experts in relation to the court is being clarified to emphasise their obligation to be of assistance to the court rather than to the party who hired them. The appropriate time, however, to make such a request is early in a proceeding before one or more of the parties has obtained an appraisal of their own. Sorting through a number of different appraisals prepared by various experts is much less efficient and more costly for the parties involved than having one appraiser who would work under the direction of the court.

ISSUE 2: OPPRESSION REMEDY

Introduction

[96] It is clear that an action in oppression can be brought concurrently with an action involving dissenting shareholder rights, as Anderson J. held in *Brant* at paras. 40-41:

> Notwithstanding the anomaly to which I have referred I think it would be wrong to hold that a remedy under s. 234 was closed when the

> right to dissent under s. 184 was exercised. The variety of circumstances which might give rise to a remedy under s. 234, and the wide range of such remedies, would render such a decision unwise, even if the Act could be construed to give alternative remedies only. It may be that in a proper case, and upon interlocutory motion at some stage of the proceedings, a court might find it just and convenient to order a stay of one proceeding or the other, but that is a problem for another day and another case.
>
> It was open to the dissenting shareholders to bring the oppression action, which has failed on the merits.

[97] Like shareholder dissent rights, the oppression remedy is codified in the *OBCA* and the *Canada Business Corporations Act*.

> *Business Corporations Act* (Ontario)
>
> 248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71 (33).
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. R.S.O. 1990, c. B.16, s. 248 (2).
>
> *Canada Business Corporations Act*
>
> 241. (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

As with the dissent and appraisal rights, the federal and provincial legislation are almost identical.

[98] In *Bank Leu AG v. Gaming Lottery Corp.* (2003), 231 D.L.R. (4th) 251 (Ont. C.A.), Weiler J.A. explained the oppression remedy as follows:

> The oppression remedy is designed to afford a remedy when a corporation acts in an oppressive, unfair or prejudicial manner towards a minority shareholder or creditor or in a manner that unfairly disregards their interests. Important underpinnings of the oppression remedy are the expectations, intentions and understandings of the minority shareholder and creditor. Against these are to be balanced the extent to which the acts complained of were unforeseeable or the extent to which the creditor and minority shareholder could reasonably have protected itself from the acts about which complaint is now made: *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399 (Ont. Gen. Div. [Commercial List]) aff'd (1998), 162 D.L.R. (4th) 367 (Ont. C.A.).

[99] In *Abraham and Inter Wide Investments Ltd. et al* (1985), 51 O.R. (2d) 460 (H.C.), Griffiths J. held that for conduct to amount to oppression, it "must have been 'burdensome, harsh and wrongful' under which the shareholder is in effect coerced to submit to something unfair" (para. 28).

[100] In *Toole v. Acres Inc.* (2007), 30 B.L.R. (4th) 133, Cummings J. explained how the reasonable expectations of the parties works into the oppression analysis, and how courts are to assess the oppressive conduct within the context of the business-judgment rule:

> The statutory oppression remedy provided by s. 241 of the *CBCA* serves to protect the reasonable expectations of the parties created as "part of the compact of the shareholders." *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.).

> The existence of reasonable expectations is a question of fact, to be determined on an objective basis The questioned conduct of the corporation is to be assessed within the context of the so-called business-judgment rule', which recognizes the proper role of the board of directors in guiding the corporate entity as its directing mind. The court is not to second-guess the management of the corporation and must defer to the decision-making of the directors so long as such decision-making falls within the ambit of normative corporate decision-making in furtherance of the best interests of the corporation.

[101] The Supreme Court of Canada provided guidance on applying the oppression remedy under the *CBCA* in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560:

> **56** In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.

[102] The court went on to discuss "unfair prejudice", which has application in this case:

> **93** The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "[U]nfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include **squeezing out a minority shareholder**, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83. **[Emphasis added.]**

[103] Markus Koehnen in *Oppression and Related Remedies* (Toronto: Carswell, 2004), which is frequently cited by the courts, provides some guidance on what constitutes oppression at 79-84:

> **Oppression** is conduct that is coercive or abusive. It has also been described as conduct that is burdensome, harsh and wrongful, or an abuse of power that results in an impairment of confidence in the probity with which the company's affairs are being conducted

Unfair prejudice has been found to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Examples of unfair prejudice from corporate cases include

- squeezing out a minority shareholder because of a personal desire to exclude her;
- failing to disclose related party transactions in financial statements;
- amalgamating two corporations and thereby transferring the minority's interest from a corporation with a very low debt equity ratio to a very high debt equity ratio;
- paying management fees to certain shareholders to the exclusion of others;
- paying dividends without formal declaration.

Unfair disregard means to ignore or treat the interests of the complainant as being of no importance. Examples include

- failing to prosecute the claims of a corporation diligently where one of the directors benefited from the improper prosecution;
- educing a shareholder's dividend by setting off the value of other benefits against it when this had not been done in the past;
- failing to deliver property that belonged to the complainant.

[104] Finally, Greer J. offered *indicia* of oppression in *Millar v. McNally*, [1991] 3 B.L.R. (2d) 102 (Ont. Gen. Div.):

(i) lack of a valid corporate purpose for the transaction;

(ii) failure on the part of the corporation and its controlling shareholders to take reasonable steps to simulate an arm's length transaction;

(iii) lack of good faith on the part of the directors of the corporation;

(iv) discrimination between shareholders with the effect of benefiting the majority shareholder to the exclusion or to the detriment of the minority shareholder;

(v) lack of adequate and appropriate disclosure of material information to the minority shareholders; and

(vi) a plan or design to eliminate the minority shareholder.

The first of the *indicia* highlighted by Greer J. are the lack of a solid business rationale for the action taken by the majority shareholder and the fact that bad faith is not required to find oppression.

[105] Counsel for the plaintiffs asserted that Mr. Bahia had acted in an oppressive manner towards the Pauls:

1. Mrs. Downs Paul was removed as director of the Corporation;
2. Crediting interest on his shareholders' loan in spite of the agreement all the shareholders entered into with BDC;
3. Paying himself excessive management fees; and
4. The company adopted a resolution involving the issuance of scrip shares, which was oppressive to the plaintiffs and was not done for a valid business purpose.

1. The Plaintiff Mrs. Downs Paul Was Removed as a Director

[106] The plaintiffs assert that the removal of Mrs. Downs Paul as a director in June 2001 amounted to oppressive conduct. The defendants assert the purpose of the removal was so that Mr. Bahia could "move the company forward". The plaintiffs argued that the election of more directors would have resolved these concerns.

[107] I find that this was a business judgment rather than oppressive conduct. Mrs. Paul had been removed as a "manager" for reasons that I accept from the evidence of Mr. Bahia. The evidence of the Pauls did not convince me otherwise. It is trite law that the courts should not interfere with business decisions in these types of cases. With the lack of evidence to the contrary, I find this was not oppression conduct. The fact that Mrs. Downs Paul was emotionally distraught because of her removal does not make it oppressive conduct. The suggestion by the plaintiffs that the election of more directors would have resolved these concerns simply adds weight to the argument that this was a business decision, as the ideal size of the board of directors is a debateable issue.

2. The Paying/Accruing of Interest

[108] The BDC Corporation agreements entered into with the Corporation and the shareholders does not permit payments to be made to any shareholders while the Corporation remains indebted to BDC. This position was made clear in the BDC Letter Agreement that provided that interest shall not be paid on the loans:

> SECURITY
>
> 5. Assignment of shareholder loan totalling $1,400,000. Interest may not be paid.

The plaintiffs argued that Mr. Bahia fixed interest on the loan at 10 per cent or 12 per cent accruing his interest as a liability, thereby artificially reducing the equity/share value of the Corporation by $130,000 or more annually in violation of the agreement.

[109] The defendants argued that the plan to pay interest to the Pauls and to accrue Mr. Bahia's interest was approved at a Shareholders Meeting on July 29, 2002, by unanimous resolution which provided:

> INTEREST PAYMENTS
>
> By unanimous resolution, retroactive interest payments for the respective investment of each shareholder will be paid to each shareholder once the requirements of the Business Development Bank of Canada are satisfied.

[110] In addition, the plaintiffs accepted the interest payments every year it was paid including 2012 and never complained. All shareholders were paid or entitled to an identical rate of interest, that interest rate fluctuated depending on the Hotel profitability, with interest not being paid in a number of years.

[111] Considering the test for oppression, including the reasonable expectations of the parties, it is difficult to find that there was oppression with respect to the treatment of interest on the shareholder loans. The problem with the plaintiffs' position is that they accepted interest payments without complaint, suggesting that their reasonable expectation was met. Furthermore, there is no indication that the payment of interest was "unfair, oppressive, or prejudicial" to the minority shareholders. The interest rate was the same for all shareholders, and there was a benefit to the shareholders to receive these payments, with the corresponding cost of share value dilution.

[112] I find that since the plaintiffs accepted their interest payments and did not complain about these payments or refuse them, the accrual of interest by Mr. Bahia does not equate to oppressive conduct. If the plaintiffs had taken exception to the payments and refused them, they might have been able to argue that these payments did not meet their reasonable expectations with regards to the corresponding share value dilution.

3. The Majority Shareholder Paid Himself Management Fees

[113] The plaintiffs alleged that the defendant paid himself high management fees, including during periods when he was not on the property. They allege that his position was one of oversight, not management and that he was thus not entitled to these fees.

[114] The defendants argued that, again, there was no compelling evidence as to the expectations of the Pauls with respect to the need for oversight of the Hotel. Mr. Bahia testified that he was actively involved in the management of the Hotel. There was no evidentiary basis for the views of the Pauls that Mr. Bahia was not involved in active management and that Mr. Bahia was overpaid. He put in $90,000 for emergency repairs. Although it was paid back, without his involvement the value of the Hotel would not have increased. The defendants also pointed out that if the plaintiffs had objected to this practice, they could have complained about it earlier and resolved the issue. As it was, the

payments were approved at shareholder meetings. Mrs. Downs Paul also wrote herself a cheque for $10,000 to compensate herself for her management duties for the brief period during which she was in an oversight management role. Thus, the plaintiffs cannot reasonably dispute the management fees that Mr. Bahia paid to himself on the basis that the payment of such a fee did not accord with their reasonable expectations.

[115] In *Runnalls v. Regent Holdings Ltd.*, 2010 BCSC 1106, 72 B.L.R. (4th) 297, Smith J. was faced with a similar claim:

> **63** In giving examples of unfairly prejudicial conduct, the Supreme Court of Canada in BCE Inc. included "preferring some shareholders with management fees and paying directors' fees higher than the industry norm". In this case, there is no doubt that Mr. Ewachniuk has performed a management role and the minority shareholders have not. As for the value of those services, I am not persuaded that the fees charged by a commercial property manager, who has no equity in the business and may be working for a number of clients, is a valid comparison or that it constitutes evidence of an "industry norm".
>
> **64** A proper comparison would be to the income derived by the owner/operator of a business with similar asset value, income, and cash flow. No such evidence is before me and I suspect it is an area in which it would be very difficult to identify any kind of "industry norm". In the circumstances, I am unable to say that the management and directors' fees, other than the single payment conceded to be improper, are so unreasonable as to be oppressive. The petitioners are therefore entitled to an increase in Regent's value in the amount of $540,000.

[116] The circumstances here are similar. I find that Mr. Bahia did take an active part in management. The plaintiffs cannot complain that this was oppressive conduct. There was little evidence to support the plaintiffs' position that his pay was excessive for the work that he did. I find Mr. Bahia did, in fact, carry on the duties outlined he described. I find the evidence does not establish that his taking of management fees constituted oppression.

4. The Corporation adopted a resolution involving the issuance of scrip shares

[117] Section 57(1) of the *OBCA* provides the following:

> Under section 57(1) of the OBCA, a corporation may issue a certificate for a fractional share or scrip certificate that entitle the holder to receive a certificate for a full share by exchanging scrip certificates aggregating a full share. Subsection 57(2) permits the directors of the corporation to attach conditions to the scrip certificates, including a condition that the certificates become void if

> not exchanged for a full share before a specified date. A holder of a scrip certificate is not entitled to exercise voting rights or to receive dividend.

The Pauls alleged that the resolution regarding the issuance of scrip certificates was done to squeeze them out as minority shareholders without any compensation and was not done for any legitimate business purpose. As well, they alleged that the plan to squeeze them out began by letter dated December 8, 2006, wherein the Mr. Bahia demanded that they provide further funds to renovate the Hotel. The plaintiffs were asked to provide $417,600 while Mr. Bahia would provide $282,400. The difference in the amounts, according to Mr. Bahia, was to attempt to bring the amount of the plaintiffs' investment more in line with the number of shares they had in relation to the number of shares held by Mr. Bahia in relation to his proportionately greater investment.

[118] The Pauls refused the request. Mr. Bahia then called a special meeting of shareholders at which there would be a resolution, the result of which would be that articles of incorporation would be amended to reduce common shares on a 40 to 1 basis. This would leave Mr. Bahia with two common shares and the plaintiffs with ¼ of one common share each.

[119] The plaintiffs were to be issued scrip certificates for their fractional shares. The scrip certificates entitled them to a certificate for a full common share by exchanging scrip certificates aggregating a full common share by December 31, 2007; thereafter, the scrip certificates would be void. Since the scrip certificates aggregated ½ of 1 common share, the plaintiffs' interest in the Corporation would be lost entirely without any compensation.

[120] The defendants' position rested on essentially two points:

1. The minority shareholders owned 20% of the shares of the Corporation but had invested only 7.4% of the total amount loaned to the company;
2. The hotel badly needed renovations, and there was no other reasonable source of funding;

and thus, there was a valid business reason for the proposed resolution.

[121] It is clear that the parties had never turned their minds to what would happen if additional funding was required. Both Mr. Bahia and Mr. Paul agreed that costly renovations were necessary to allow the Hotel to compete in the market. Mr. Bahia also said that the demand for additional funding was to increase the plaintiffs' investment so as to be more proportionate with their ownership and with the amount that Mr. Bahia had invested.

[122] Counsel for the defendants argued that Mr. Bahia's intention at all times was to employ a lawful procedure to have the minority shareholders' interest bought out at fair market value. Although the parties were discussing the purchase of shares for fair market value,

they could not agree on a price. As a result, Mr. Bahia then began proceedings under the *OBCA* to amend the articles of incorporation and issue the scrip certificates.

[123] The scheme has been explained under the identical *CBCA* section in *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 710,

> 35 Clearly, there is nothing unlawful about the acquisition by a corporation of fractional shares. In fact, s. 49 reinforces the discretion that directors are given in dealing with fractional share interests, and supports the proposition that fractional shares may be acquired without a shareholder's consent. That section permits a corporation to issue scrip certificates representing fractional shares, which can be exchanged for a full share (s. 49(15)). The directors may attach conditions that "the scrip certificates become void if not exchanged for a share certificate representing a full share before a specified date" (s. 49(16)). While this specific mechanism was not used in LSI Canada's going private transaction, it is nevertheless instructive. If a corporation is permitted to issue scrip certificates with conditions that will terminate a shareholder's interest, how can it be unlawful for a corporation to acquire fractional shares without the consent of the shareholder. LSI Canada's cancellation of fractional share interests does in one step what s. 49 expressly permits a corporation to do in two.

[124] It is clear that as between the shareholders there was a stalemate that was negatively affecting the viability of the business of the Corporation. Additional funds were needed. The issue becomes the process that the defendants undertook to break the stalemate. Mr. Bahia employed a lawful procedure available under the *OBCA*. At the same time, the manner in which he exercised it rendered the shares of the Pauls worthless. They could not exchange the fractional share scrip certificates for a full share.

[125] While a lawful process was followed, it is not clear how such proposed resolution was in the best interests of the Corporation or that Mr. Bahia acted appropriately when he offered to purchase the Pauls' shares at a price he acknowledged he would not have accepted for his shares. The BDO "valuation" which was attached to the offer was replete with disclaimers that made the opinion of value meaningless. I find that the real purpose of the resolution was to squeeze out the Pauls, the minority shareholders, an action that was considered by the Supreme Court of Canada in *B.C.E. Inc.* to be oppressive conduct.

[126] Having found this act was oppressive, I have to consider what, if any, remedy is appropriate. On the facts of this case, it is my view that damages are minimal as the Pauls exercised their rights pursuant to s. 185 of the *OBCA* and are being paid out a court-determined value of their shares. The proposed resolution ultimately brought about an end that both parties sought, even though the parties could not agree on the value of the shares resulting in this lawsuit.

[127] Having found it to be oppressive conduct, I must consider an appropriate remedy. In all the circumstances of this case, I find that the damages for the oppression will be $45,000 which the Pauls have already received in interest.

ISSUE 3: PRE-JUDGMENT INTEREST

[128] The Pauls are entitled to pre-judgment interest on the value of their shares from Valuation Day, March 18, 2008, until that amount is paid in accordance with this judgment with the appropriate rate of interest being calculated in accordance with the Bank of Canada rate as of March 18, 2008, and being adjusted annually on March 18 in each successive year until paid. Since the remedy for oppression was a reduction in a cost award that has been outstanding since 2011, there is no pre-judgment interest payable on that amount.

COSTS

[129] If the parties are unable to agree on costs, I will receive written submissions no longer than 10 pages in length on costs pursuant to s. 185 (15) and/or costs pursuant to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, within 30 days sent to my attention through the trial coordinator.

SUMMARY OF CONCLUSION

[130] The following order shall issue:

1) The shareholder loans of the plaintiffs shall be paid out forthwith less $10,000 owing to the defendants in costs;

2) The value of the plaintiffs' shares is fixed at $17,000 each for a total of $340,000, plus pre-judgment interest calculated as set out in this judgment;

3) The damages for oppression is fixed in the amount of $45,000 which the Pauls have already received in interest;

4) Costs to be determined in accordance with paragraph 129 of this decision;

5) I remain seized in the event that there are issues arising from this decision.

Original signed by "*Mary Jo M. Nolan*"
Mary Jo M. Nolan
Justice

Released: December 13, 2013

CITATION: Paul v. 1433295 Ontario Limited, 2013 ONSC 7002
COURT FILE NO.: CV-08-15586CM
DATE: 20131213

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Doreen G. Downs Paul and Russell G. V. Paul

Plaintiffs

– and –

1433295 Ontario Limited and Parmjit Singh Bahia

Defendants

REASONS FOR JUDGMENT

Nolan J.

Released: December 13, 2013

TAB 11

75 F.Supp.3d 592
United States District Court,
S.D. New York.

MARBLEGATE ASSET MANAGEMENT, et al., Plaintiffs,
v.
EDUCATION MANAGEMENT CORP., et al., Defendants.

No. 14 Civ. 8584(KPF).
|
Signed Dec. 30, 2014.

Synopsis
Background: Corporate bondholders brought action against for-profit education corporation and its subsidiaries, alleging that corporation's proposed debt restructuring agreement violated the Trust Indenture Act. Plaintiffs moved for preliminary injunction.

Holdings: The District Court, Katherine Polk Failla, J., held that:

[1] plaintiffs failed to establish likelihood of irreparable harm;

[2] balance of equities did not favor injunctive relief;

[3] public policy did not favor injunctive relief; and

[4] plaintiffs would likely succeed on the merits.

Motion denied.

Attorneys and Law Firms

***594** Sean E. O'Donnell, Jessica Greenwood, Joseph Lee Sorkin, Lucy Caitlin Malcolm, Akin Gump Strauss Hauer & Feld LLP, New York, NY, Ariel Lavinbuk, Donald Burke, Lawrence Saul Robbins, Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Washington, DC, for Plaintiffs.

Emil A. Kleinhaus, John F. Lynch, Alexander Lees, Jasand Patric Mock, Lauren Marie Kofke, Mohit Gourisaria, Stephen R. Diprima, Wachtell, Lipton, Rosen & Katz, New York, NY, for Defendants.

AMENDED OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

****1** Plaintiffs Marblegate Asset Management, LLC, Marblegate Special Opportunities Master Fund, L.P. (together "Marblegate"), Magnolia Road Capital LP, and Magnolia Road Global Credit Master Fund L.P. (together "Magnolia," and with Marblegate "Plaintiffs") hold unsecured debt in Defendant Education Management LLC, which along with Defendant Education Management Finance Corporation is a subsidiary of Defendant Education Management ***595** Corporation ("EDMC," or together "Defendants"). Plaintiffs seek a preliminary injunction to block a proposed restructuring of Defendants' debt that would force Plaintiffs either to convert their debt to equity or to risk the elimination of their practical ability to recover their principal and remaining interest payments. The Ad Hoc Committee of Term Loan Lenders of Education Management LLC ("Intervenors") is a group of primarily secured creditors who support the restructuring, and who have intervened in opposition to the motion.

Plaintiffs acknowledge that a restructuring of Defendants' debt is almost certainly necessary to avoid insolvency, and that EDMC's insolvency is an unappealing option for all parties involved. Their complaint centers around the deal they and the other unsecured creditors have received in this version of the restructuring, and their contention that the restructuring, absent their consent, violates the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa–77bbbb. While Plaintiffs' legal arguments have merit, this Court is unwilling to introduce a highly disruptive injunction into the delicate regulatory and financial ecosystem in which the parties operate. More to the point, the Court is unwilling to accord to holders of $20 million in unsecured notes the legal right to stop a $1.5 billion restructuring. Because Plaintiffs have failed to demonstrate a likelihood of irreparable harm, and because the balance of the equities and the public interest weigh against granting the injunction, the motion is denied.

BACKGROUND[1]

A. Factual Background

1. The Parties

EDMC, founded in 1962, is one of the country's largest for-profit providers of college and graduate education, with an enrollment of roughly 118,090 students and 20,800 employees. (West Decl. ¶¶ 4, 11). In 2014 EDMC derived 78.6% of its net revenues from federal student aid programs under Title IV of the Higher Education Act of 1965, 20 U.S.C. §§ 1070–1099. (*Id.* at ¶ 13). Eligibility for Title IV funds is determined on both an institutional and a company-wide basis. Each institution must be (i) authorized by the relevant state agency; (ii) institutionally accredited by an accreditation agency recognized by the Department of Education ***596** ("DoE"); and (iii) certified as an eligible institution by the DoE. (*Id.* at ¶ 14). Because EDMC operates 18 institutions across the country, its institutions operate under the regulatory purview of a number of state agencies and regional accrediting agencies. (*Id.* at ¶ 19). EDMC regularly negotiates the eligibility of its institutions with each of these regulatory bodies, some of whom have expressed their concern over its financial condition. (*Id.* at ¶¶ 23–24).

****2** The DoE's oversight poses a special set of challenges for EDMC, as it assesses the eligibility of EDMC as a whole to receive Title IV funds. Because EDMC has not met the financial responsibility standards established by the Secretary of Education pursuant to 20 U.S.C. § 1099c(c), it is only provisionally certified, enabling the Secretary to require the posting of a letter of credit, *id.* § 1099c(c)(3)(A). The DoE currently requires EDMC to post a $302.2 million letter of credit, equal to 15% of its Title IV funds received. (West Decl. ¶¶ 16–18). Of critical importance, an institution loses its eligibility for Title IV funds if it, or a controlling affiliate, files for bankruptcy or has an order for relief in bankruptcy filed against it. *See* 20 U.S.C. § 1002(a)(4)(A); Conditions of Institutional Eligibility, 34 C.F.R. § 600.7(a)(2).

Marblegate is an investment management firm that focuses in part on "event-driven distressed corporate credit restructuring." (Milgram Decl. ¶ 3). Marblegate primarily invests in corporate debt rather than equity, and among its debt positions owns primarily first lien loans and secured bonds. (*Id.* at ¶ 5). Having had experience investing in the for-profit education sector, Marblegate began exploring investing in EDMC in September 2012. (*Id.* at ¶ 6). Despite the decline in EDMC's financial position, Marblegate determined that an investment in the unsecured notes of Education Management LLC made sense due to EDMC's then-limited debt burden and the interaction of the Title IV eligibility requirements with the notes' eligibility under the Trust Indenture Act. (*Id.* at ¶¶ 10–11). Marblegate believed that, with bankruptcy not a viable option due to Title IV, EDMC would have to pay the notes in full or obtain Marblegate's consent to any modification due to the Trust Indenture Act. (*Id.* at ¶ 12). Marblegate thus began purchasing notes in January 2013. (*Id.*). Marblegate then participated in a February 2013 exchange offer, exchanging the old notes for new notes (the "Notes") governed by the March 5, 2013 Indenture (the "Indenture"), ultimately acquiring $14.3 million of the Notes. (*Id.* at ¶¶ 13–15).

Magnolia is "an event-driven credit hedge fund" that, like Marblegate, invests primarily in corporate debt. (Donath Decl. ¶ 4). Magnolia took a "cautiously optimistic" view of EDMC's financial health, and, assessing EDMC's legal obligations in a similar manner as Marblegate, invested in the Notes in June 2013, expecting that the Notes would eventually have to be refinanced, and that any such refinancing would be on terms favorable to Magnolia. (*Id.* at ¶¶ 9–10). Magnolia presently owns approximately $6 million of the Notes. (*Id.* at ¶ 11).

Intervening in the litigation pursuant to Federal Rule of Civil Procedure 24(b) is the Steering Committee for the Ad Hoc Committee of Term Loan Lenders (the "Steering Committee," or "Intervenors"), a group of six asset management firms that collectively hold a significant portion of EDMC's secured debt and unsecured Notes (*see infra*) and support the Proposed Restructuring. Those firms are: HG Vora Capital Management, LLC, KKR Credit Advisors (US) LLC ("KKR"), Oak Hill Advisors, LP, Oaktree Capital Management, ***597** L.P., Regiment Capital Advisors, LP, and Centerbridge Partners, L.P.

2. EDMC's Debt

****3** EDMC has outstanding debt of $1.553 billion. (Beekhuizen Decl. ¶ 7). This consists of $1.305 billion in secured debt, divided between $220 million drawn from a revolving credit facility and $1.085 billion in term loans, and $217 million in unsecured Notes. (*Id.*). The secured debt is secured by collateral in "virtually all of the assets of" EDMC and its subsidiaries. (*Id.* at ¶ 8). The secured term loans were, until September 2014, governed by the Second Amended and Restated Credit and Guarantee Agreement (amended and restated as of December 7, 2010) (the "2010 Credit Agreement") (Def. Ex. 6). Among other provisions, the 2010 Credit Agreement gave the secured creditors, upon an "Event of Default," the right to "sell, transfer, pledge, make any agreement with respect to or otherwise deal with any of the Collateral as fully and completely as though the Collateral Agent were the absolute owner thereof for all purposes[.]" (2010 Credit Agreement § 6.1(h)).

The unsecured Notes are partially held by Plaintiffs (though Magnolia also owns a small amount of secured debt (Donath Decl. ¶ 14)). The Notes are due in 2018 with periodic interest payments, and are governed by the March 5, 2013 Indenture (the "Indenture") (Malcolm Decl. Ex. B), which has several relevant provisions. First, the Notes are qualified under the Trust Indenture Act (Indenture § 12.01), and under Section 6.07 the Notes receive the same protections provided for in Section 316(b) of the Act, 15 U.S.C. § 77ppp(b):

> *Rights of Holders of Notes to Receive Payment.* Notwithstanding any other provision of this Indenture, the right of any Holder of a Note to receive payment of principal, premium, if any, and Additional Interest, if any, and interest on the Note, on or after the respective due dates expressed in the Note ... or to bring suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such Holder.

(Indenture § 6.07).

One feature of the Notes that increased their value in the eyes of Marblegate and Magnolia was that, despite being issued by Education Management LLC, they were guaranteed by EDMC, the parent corporation (the "Parent Guarantee"). (*See* Donath Decl. ¶ 9; Hrg. Tr. 61–62). Yet the Indenture contains provisions by which the Parent Guarantee can be removed. First, Section 9.02 allows a majority of Noteholders to waive the Parent Guarantee on behalf of all Noteholders:

> *With Consent of Holders of Notes.* Except as provided below in this Section 9.02, the Issuers and the Trustee may amend or supplement this Indenture, the Notes and the Guarantees with the consent of the Holders of at least a majority in principal amount of the Notes ... then outstanding voting as a single class (including ... consents obtained in connection with a tender offer or exchange offer for, or purchase of, the Notes), and ... the Guarantees or the Notes may be waived with the consent of the Holders of a majority in principal amount of the then outstanding Notes[.]

****4** (Indenture § 9.02). And second, Section 10.06(a)(ii) provides for an automatic release of a guarantee in the event that the secured creditors release the same guarantor's guarantee of their own debt:

> *Release of Guarantees.* A Guarantee by a Guarantor shall be automatically and unconditionally released and discharged, ***598** and no further action by such Guarantor, the Issuers or the Trustee is required for the release of such Guarantor's Guarantee, upon: (a) ... (ii) the release or discharge of the guarantee by such Guarantor of the Senior Credit Facilities or the guarantee which resulted in the creation of such Guarantee, except a discharge or release by or as a result of payment under such guarantee[.]

(Indenture § 10.06(a)(ii)).

These features were highlighted in the February 1, 2013 Offering Circular that accompanied the Notes (the "Original Offering Circular") (Def. Ex. 17). In the summary, purchasers were informed that the Parent Guarantee was "being provided solely for the purpose of allowing the Issuers to satisfy their reporting obligations under the indenture that will govern the New Notes by furnishing financial information relating to Education Management Corporation instead of the Issuers and, accordingly, *you should not assign any value to such guarantee.*" (*Id.* at 5 (emphasis added)). And under "Risk Factors," the Original Offering Circular elaborated: "The lenders under the senior secured credit facility will have the discretion to release the guarantors under the senior secured credit agreement in a variety of circumstances, which will cause those guarantors to be released from their guarantees of the New Notes." (*Id.* at 33). Marblegate's Chief Investment Officer Andrew Milgram testified that while he was aware of this cautionary language, he did not accord it much weight. (Hrg. Tr. 59–64, 83–87).

At the time Plaintiffs acquired the Notes, there was no Parent Guarantee on the secured term loans. (Int. Opp. 15). Because the secured lenders had no Parent Guarantee of their own, there was thus no ability for them to release that guarantee and by doing so release the Parent Guarantee on the Notes through Indenture § 10.06. Nothing in the Indenture, however, restricted Section 10.06 to providing an automatic release of a guarantee only where the corresponding guarantee on the secured debt existed at the time of the Indenture's formation. And in September 2014, EDMC guaranteed the secured loans when it and a majority of secured lenders agreed to a restructuring of the 2010 Credit Agreement (*see infra*).

3. EDMC's Financial Distress

In a May 2014 conference call, EDMC informed its investors and creditors that it was experiencing significant financial distress. (Milgram Decl. ¶ 16; Donath Decl. ¶ 15). EDMC's earnings before interest, taxes, depreciation, and amortization ("EBITDA") had declined from $662 million in fiscal year 2013 to $276 million in fiscal year 2014, with a corresponding drop of 95% in its stock price.

(Beekhuizen Decl. ¶ 14). The company expects further declines in EBITDA in fiscal year 2015. (*Id.*). Given its declining income and mounting interest payments, EDMC anticipated "significant negative cash flow in fiscal 2015." (*Id.* at ¶ 17). Furthermore, this declining financial performance risked adverse regulatory action and erosion of student confidence in EDMC's long-term viability. (*Id.* at ¶ 18; West Decl. ¶¶ 32–33). In addition, the DoE recently announced proposed "Gainful Employment" regulations that evaluate programs' eligibility for Title IV funding based upon graduates' earnings relative to their debt. (West Decl. ¶ 25). EDMC estimates that over half of its programs may currently fail to meet the Gainful Employment standards (*id.*), risking a significant loss of future earnings (Taylor Report ¶ 39).

****5** In the same May 2014 conference call, EDMC announced that by the end of June it would no longer be in compliance with ***599** certain financial covenants under the secured credit facility. (*Id.* at ¶ 15). On June 23, 2014, the necessary majority of the secured lenders agreed to waive those covenants through September 15, 2014, in order to facilitate a longer-term restructuring of EDMC's balance sheet. (Burke Decl. Ex. F). On September 5, 2014, EDMC and the requisite majority of the secured lenders agreed to a Third Amended and Restated Credit and Guaranty Agreement (the "2014 Credit Agreement") (Kofke Decl. Ex. 7), which eliminated, altered, or delayed many of Education Management LLC's payment obligations to the consenting lenders. (*See id.*). In exchange, EDMC became a guarantor of the secured loans. (*Id.* §§ 1.1, 7.1).

The precise extent of EDMC's financial distress is the subject of some dispute among the parties. EDMC maintains that "without a restructuring, the Company would have been unable to pay its debts through fiscal year 2015." (Beekhuizen Decl. ¶ 17). It is generally agreed that without any renegotiation of its debts, EDMC will not be able to make the June 1, 2015 payment (subsequently postponed to July 2, 2015) on its revolving credit facility, amounting to $219.9 million. (*Id.* at ¶¶ 7, 17). Though Plaintiffs suggest that such a sizeable lump payment can generally be refinanced (*see* Hrg. Tr. 29–30 (Milgram cross)), they offer little evidence to support this optimism. Plaintiffs maintain that, at a minimum, EDMC has sufficient liquidity to pay the September 30, 2014 and March 30, 2015 interest payments on the unsecured Notes, regardless of whether it consummates the Proposed Restructuring. (Kearns Decl. ¶¶ 10–11). Defendants respond that this relies on an overstatement of Defendants' liquidity and an understatement of the risks of further adverse regulatory action; accordingly, it can only be stated with certainty that Defendants can make the September 30 interest payment. (Hannan Rebuttal Report ¶ 2).[2]

Furthermore, Plaintiffs do not contest that *if* EDMC were to enter bankruptcy (an admittedly unlikely outcome), the claims of the unsecured Noteholders stand behind those of the secured creditors in order of priority. (*See* Hrg. Tr. 370). And Plaintiffs do not offer a valuation of EDMC that contradicts the report of Defendants' expert John Taylor, who values EDMC at $1.05 billion. Because Plaintiffs' claims stand behind roughly $1.305 billion in secured debt, the Court finds that Plaintiffs would likely recover nothing in bankruptcy. Accordingly, the Court finds that absent any restructuring of Defendants' debt whatsoever, Plaintiffs' ultimate recovery on the Notes would be limited to between one and two interest payments of $1.5 million each (*see* Hrg. Tr. 116–17), with no recovery of principal. As discussed below, the precise number of interest payments does not affect the Court's conclusions of law.

4. The Proposed Restructuring

****6** At the same time EDMC was negotiating the 2014 Credit Agreement to provide ***600** short-term relief from its obligations to secured creditors, it began to seek a longer-term balance sheet restructuring. (Beekhuizen Decl. ¶ 25). EDMC negotiated with the Ad Hoc Committee of Term Loan Lenders (the "Ad Hoc Committee"), a group of 18 asset management firms that held 80.6% of EDMC's secured debt and 80.7% of its unsecured Notes. (Pl. Ex. 223). As Plaintiffs stress, while this group contained lenders who held only secured debt as well as lenders who held both secured and unsecured debt, it contained no lenders who held only unsecured Notes. (*Id.*).[3] However, Defendants point out that they agreed to pay the fees and expenses of multiple law firms to represent various creditor classes, including Paul, Weiss, Rifkind, Wharton & Garrison LLP to represent the unsecured Noteholders (among whose clients were entities holding $42 million in unsecured Notes and no secured debt whatsoever). (Beekhuizen Decl. ¶ 31). The negotiations were primarily conducted between EDMC and the Steering Committee, a subset of the Ad Hoc Committee consisting of six firms that at the time held 35.8% of EDMC's secured debt and 73.1% of the unsecured Notes. (*See* Memo to Intervene 1 n. 1; Pl. Ex. 223).[4]

The parties to the negotiations arrived at the Proposed Restructuring, which would involve the conversion of EDMC's debt into a smaller amount of debt and equity, with the exact ratio varying by the type of debt held. This restructuring is governed by the Restructuring Support

Agreement (Kofke Decl. Ex. 2). Three important features of the Restructuring Support Agreement are that it can only be amended by two-thirds of each relevant category of consenting creditors (*id.* § 8); absent such an amendment, any injunction of 20 days or more will automatically terminate the restructuring (*id.* § 7.01(c)(ii)); and with the support of two-thirds of each category of consenting creditors, all the signatories must proceed with the Intercompany Sale described below (*id.* § 4.05). In effect, the Restructuring Support Agreement provides two potential paths by which to accomplish the proposed restructuring.

The Proposed Restructuring will proceed along the first path if EDMC obtains the consent of 100% of creditors. Under this path, $150 million of the revolving loans would be repaid and made available for re-borrowing; certain letters of credit drawn from the revolver would be extended until March 2019; and the remainder of EDMC's secured debt (constituting $1.155 billion), including the term loans, would be exchanged for $400 million in new secured term loans and preferred stock convertible into roughly 77% of EDMC's common ***601** stock (subject to some dilution through warrants). (Beekhuizen Decl. ¶ 25; Pl. Ex. 223). Using Defendants' estimated post-restructuring equity value of $300 million (*see* Def. Ex. 125), this would leave the secured lenders with debt and equity worth $631 million, for a recovery of roughly 54.6% of the $1.155 billion secured debt. The Noteholders, meanwhile, would receive equity convertible into between 19% and 23.5% of EDMC's common stock, depending on whether holders of optionally convertible preferred stock and stock warrants convert into common stock. (*See* Hannan Report ¶ 6 n. 4). Assuming the 23.5% figure, this equity would be worth roughly $71 million to the Noteholders as a whole and $7 million to Plaintiffs, for roughly a 32.7% recovery of value. (*See* Def. Ex. 125). The current shareholders would receive 4% of EDMC's common stock, with additional warrants. (Beekhuizen Decl. ¶ 25).

****7** In order to effectuate this voluntary restructuring, Defendants commenced an exchange offer for the Notes on October 1, 2014 (the "Exchange Offer"). (*See* Pl. Ex. 1 (the "Exchange Offering Circular")). Holders of over 90% of the unsecured Notes have agreed to exchange their Notes, with Plaintiffs constituting all but $56,000 of the nonconsenting Noteholders. (Beekhuizen Decl. ¶¶ 27–28).[5] Defendants have also reached out to holders of their secured debt, acquiring 99% consent for the Proposed Restructuring. (*Id.* at ¶ 28).

If Defendants do not obtain 100% creditor consent, the Restructuring Support Agreement obligates the signatories to the agreement to undertake the Intercompany Sale. In the Intercompany Sale, a number of steps would occur with near simultaneity: (i) the secured lenders would release EDMC's parent guarantee of their loans (which the secured lenders recently obtained in the 2014 Credit Agreement), thus triggering the release of EDMC's parent guarantee of the Notes under Indenture § 10.06 (*see* Beekhuizen Decl. ¶ 34);[6] (ii) the secured lenders would exercise their rights under the 2014 Credit Agreement and Article 9 of the Uniform Commercial Code to foreclose on "substantially all the assets" of Defendants (*id.* at ¶ 33); and (iii) the secured lenders would immediately sell these assets back to a new subsidiary of EDMC (*id.*). This new subsidiary would then distribute debt and equity to the creditors who had consented to the Restructuring Support Agreement in accordance with that document's terms.[7]

Defendants were not shy about spelling out the consequences of the Intercompany Sale for those unsecured Noteholders who declined to participate in the Exchange Offer. The Exchange Offering Circular states:

> **Q: Why is it important that I tender my Notes in the Exchange Offer?** A: ... In the event an Intercompany Sale is consummated, Holders who do not tender their Notes in the Exchange Offer ***602** will continue to have claims against the Co–Issuers and certain of our subsidiaries that currently guarantee the Notes; however, *substantially all of our assets will have been transferred to New EM Holdings and will not be available to satisfy the claims of such Holders. As a result, we anticipate that such Holders will not receive payment on account of their Notes,* including then accrued and unpaid interest, from and after the date the Proposed Restructuring is consummated.

(Exchange Offering Circular 3 (emphasis added); *see also id.* at 8, 28). Defendants left this Hobson's choice open until 11:59 p.m. on October 29, 2014. (*Id.* at 17). This timing was designed to take advantage of a 30–day grace period that Defendants had before Noteholders could demand the interest payment nominally due September 30, 2014; thus, ideally, the restructuring could take place before any cash interest payments would be required. (*See* Hrg. Tr. 146–47; Beekhuizen Depo. Tr. 30–31).

****8** One hurdle that the Proposed Restructuring has yet to clear is regulatory approval. As noted, an unauthorized change of control could threaten EDMC's access to Title IV funding. (*See* Exchange Offering Circular 44; Hrg. Tr. 141–42, 148–49). In order to forestall this possibility, EDMC has been in discussions with state regulators, regional accrediting bodies, and the DoE to obtain preapproval for any restructuring, whether fully consensual or by means of the Intercompany Sale. (*See* Hrg. Tr. 149–77). In order to secure such approval for the Intercompany Sale in particular, Defendants have assured regulators that the Intercompany Sale will not *really* effect a change of control: "In no event does the Intercompany Sale change the ownership, debt structure, board, management or governance of EDMC or its institutions [.]" (Pl. Ex. 255 (e-mail from Tom Hylden of Powers Pyles Sutter & Verville PC (EDMC's counsel dealing with regulators) to Steven Finley of the DoE)). In effect, EDMC invites regulators to meet the new boss, same as the old boss.

An additional issue is whether a change of control would occur at the moment when the creditors exchange their debt for preferred stock (Step 1), or only at the point where the preferred stock was converted to common stock so as to leave the creditors with the vast majority of EDMC's common stock (Step 2). (*See* Hrg. Tr. 149–78). On November 25, 2014, Defendants represented to the Court that they had obtained the necessary regulatory approvals to proceed with Step 1, and remained in the process of obtaining approval of Step 2. (Dkt. # 49).

B. The Instant Litigation

Plaintiffs declined to participate in the Exchange Offer.[8] After discussions with Defendants failed to avert the Proposed Restructuring (*see* Milgram Decl. ¶¶ 24–26), Plaintiffs filed a motion for a temporary restraining order and preliminary injunction on October 28, 2014. Plaintiffs had already notified Defendants of their intent to do so, and after several hours of negotiations between and among Plaintiffs, ***603** Defendants, and Intervenors, the parties agreed to postpone both the Proposed Restructuring and any demand for the September 30, 2014 interest payment. (*See* Dkt. # 44). Setting aside the motion for a temporary restraining order, the parties agreed to an accelerated discovery and briefing schedule, with Defendants' (and subsequently Intervenors') response to Plaintiffs' motion due on November 13, 2014, at 11:59 p.m., and Plaintiffs' reply due on November 16, 2014, at 11:59 p.m. (*See id.*).

With the parties' briefs and exhibits submitted according to this schedule, the Court held a hearing on the motion for a preliminary injunction on November 18 and 19, 2014. Exactly what Plaintiffs seek to enjoin became clearer at the hearing. In their reply brief, Plaintiffs stressed that they

> seek relief in this action only against [Defendants]. Plaintiffs are not seeking to enjoin the Secured Lenders from exercising their remedies under the Senior Credit Facility. Plaintiffs seek only to enjoin the Company, specifically the Issuers and Guarantors of the Notes, from violating their duties under the Trust Indenture Act and the Indenture.

****9** (Pl. Reply 13). Pressed at oral argument, Plaintiffs identified Defendants' active participation in the Intercompany Sale—nominally a process of the secured creditors exercising their rights to foreclose against Defendants—as the element of the Intercompany Sale that would offend the Trust Indenture Act. (Hrg. Tr. 343–46). Plaintiffs further suggested the possibility that an injunction be granted and a trial date set within 20 days, which would force Defendants back to the negotiating table without triggering the automatic dissolution of the Restructuring Support Agreement pursuant to § 7.01(c)(ii). (*See* Hrg. Tr. 349–50).

On December 15, 2014, the Court filed an unredacted version of this Opinion under seal. On that same day, the Court provided the parties with a copy of the unredacted Opinion and allowed the parties to propose redactions. Pursuant to the Court's directions, the parties filed their materials publicly on December 29, 2014, with certain limited categories of information redacted in accordance with *Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110 (2d Cir.2006). On that date, the parties also filed a joint letter suggesting requesting permission to file certain other materials in redacted form, but declining to request redactions to the Opinion. In the intervening two weeks, Plaintiffs Magnolia Road Capital LP and Magnolia Global Credit Master Fund L.P. voluntarily dismissed their claims pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). (Dkt. # 53).[9] Accordingly, the Court now files this amended but unredacted Opinion publicly.

DISCUSSION

A. Applicable Law

The Supreme Court has made clear that "[a] preliminary injunction is an extraordinary remedy never awarded as of right," and, further, that "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 24, 32, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

Under the Second Circuit's traditional standard, a district court was entitled to ***604** grant a preliminary injunction where a plaintiff demonstrated (i) "irreparable harm," and (ii) either (a) "a likelihood of success on the merits" or (b) "sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." *Otoe–Missouria Tribe of Indians v. N.Y. Dep't of Fin. Servs.,* 769 F.3d 105, 110 (2d Cir.2014) (quoting *Lynch v. City of N.Y.,* 589 F.3d 94, 98 (2d Cir.2009)). The Supreme Court, in *Winter,* rejected an analogous flexible standard adopted by the Ninth Circuit, which allowed for a preliminary injunction where the plaintiff showed a "strong likelihood of prevailing on the merits" and a "possibility" of irreparable harm. 555 U.S. at 21, 129 S.Ct. 365 (internal quotation marks and citation omitted). The Court stated the standard for a preliminary injunction as requiring that a plaintiff "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20, 129 S.Ct. 365.[10] The Court additionally made clear that even if a plaintiff could establish both irreparable injury and a likelihood of success on the merits, such a showing could be (and in that case would be) outweighed by "the balance of equities and consideration of the overall public interest." *Id.* at 26, 129 S.Ct. 365.

****10** [1] Despite the seeming inconsistency of the standards for a preliminary injunction set forth by the Supreme Court and the Second Circuit, the Second Circuit has subsequently reaffirmed that its standard remains good law. *See* *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.,* 598 F.3d 30, 38 (2d Cir.2010). The appropriate way to reconcile these decisions was identified by the Second Circuit's most recent guidance in *Otoe–Missouria Tribe;* while the traditional two-pronged test controls in most cases as to the necessity of irreparable harm and the requisite degree of likelihood of success, *see* 769 F.3d at 110, a plaintiff must demonstrate as well that "the balance of equities tips in his favor[ ] and ... an injunction is in the public interest," *id.* at 112 n. 4 (alterations in original) (quoting *Winter,* 555 U.S. at 20, 129 S.Ct. 365) (internal quotation marks omitted). Thus Plaintiffs must establish four elements to prevail on their motion for a preliminary injunction: (i) a likelihood of irreparable harm; (ii) either a likelihood of success on the merits or sufficiently serious questions as to the merits plus a balance of hardships that tips decidedly in their favor; (iii) that the balance of hardships tips in their favor regardless of the likelihood of success; and (iv) that an injunction is in the public interest. *See* *Salinger v. Colting,* 607 F.3d 68, 79–80 (2d Cir.2010); *id.* at 78 (noting that this standard defines "the traditional principles of equity" and should apply broadly across different contexts).[11]

*605 B. Analysis

1. Plaintiffs Have Not Established a Likelihood of Irreparable Harm

[2] [3] Irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction," and "[i]n the absence of a showing of irreparable harm, a motion for a preliminary injunction should be denied." *Rodriguez ex rel. Rodriguez v. DeBuono,* 175 F.3d 227, 233–34 (2d Cir.1999) (internal quotation marks and citation omitted). "Irreparable harm is an injury that is not remote or speculative but actual and imminent, and 'for which a monetary award cannot be adequate compensation.' " *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.,* 60 F.3d 27, 37 (2d Cir.1995) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2d Cir.1979)). The instant case presents two issues on the question of irreparable harm: whether the Proposed Restructuring works an actual and imminent harm upon Plaintiffs, and if so whether such harm can be remedied by a monetary award.

a. Plaintiffs' Harm Is Not Actual and Imminent

[4] At first blush, Plaintiffs identify a straightforward harm: "they will be left with outstanding interest and principal payments on their Notes, and effectively no recourse for payment." (Pl. Br. 10). Yet EDMC's financial distress makes the situation more complicated. The evidence before the Court indicates that Plaintiffs are exceedingly unlikely to recover the principal on their Notes currently due in 2018, and that, absent any restructuring, Plaintiffs will only recover between one and two interest payments of $1.5 million. Defendants point out that Plaintiffs stand to gain more by participating in the restructuring—equity worth roughly $7 million—than by blocking it even under their most optimistic assumption of $3 million in interest payments. Plaintiffs offer two responses.

****11** The first is that the involuntary exchange of the certainty of debt for the uncertainty of equity works a harm regardless of the theoretical valuation of the equity. (*See* Hrg. Tr. 369–71). And indeed Plaintiffs are correct that Defendants' valuation of the equity offered in the Exchange Offer is highly uncertain, particularly given

EDMC's ongoing financial distress and the regulatory delay before Step 2 of the restructuring—when participants in the Exchange Offer would actually acquire common stock—could be consummated. Yet if the Proposed Restructuring were enjoined, Plaintiffs have only succeeded in demonstrating the certainty of a single forthcoming cash interest payment of $1.5 million. Under these unusual circumstances, the Court is not prepared to say with certainty that the interest payments that might come due on the Notes over the next several months outweigh the value of the common stock that Plaintiffs might acquire upon the completion of the restructuring. Faced with comparing the potential future income stream from the Notes absent a restructuring with the value of equity following such a restructuring, the Court cannot help but find any possible harm "remote or speculative" rather than "actual or imminent."

Plaintiffs' second response is that enjoining the Proposed Restructuring would not spell EDMC's demise, and thus would not actually constrain Plaintiffs' potential recovery to $3 million; given the overwhelming incentives that Defendants and their creditors share in avoiding bankruptcy and jeopardizing EDMC's Title IV funding, an alternative arrangement will be worked out. In particular, Plaintiffs have suggested an injunction long enough to "let people understand ... that the ***606** Trust Indenture Act, at least in the Court's mind, might mean something here," but short enough to avoid triggering the dissolution of the Restructuring Support Agreement. (Hrg. Tr. 349–50). Viewed cynically, Plaintiffs are petitioning the Court for leverage with which to extract a more generous deal from Defendants. Viewed more generously, Plaintiffs are seeking to allocate the legal entitlement to block a restructuring in accordance with what they view as the Trust Indenture Act's intent. If EDMC and its creditors can renegotiate in a frictionless market, the efficient solution—a restructuring—will still prevail, and the allocation of the property entitlement will serve only to redistribute resources from one set of parties to another. *See* Guido Calabresi & A. Douglas Melamud, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 Harv. L.Rev. 1089, 1094–95 (1972).

Yet as Calabresi and Melamud remind us, "no one makes an assumption of no transaction costs in practice"; the assumption is merely a theoretical device. Calabresi & Melamud, *supra,* at 1096. And indeed, the record before the Court amply demonstrates the transaction costs that would abound in renegotiating the Restructuring Support Agreement. (*See* Winthrop Decl. ¶ 3 ("The negotiation of the proposed restructuring involved an enormous amount of effort on the part of the Company, its creditors, and their financial and legal advisors."); Srivastava Decl. ¶ 6 ("The negotiation of the proposed restructuring involved an enormous amount of effort on the part of the Company, its creditors, and their respective financial and legal advisors."); Beekhuizen Decl. ¶ 37 ("The restructuring negotiations were extremely difficult and hard-fought, and the creditors that agreed to compromise their claims insisted that other creditors not 'free-ride' on the deal."); Beekhuizen Depo. Tr. 88–90).

****12** [5] The Restructuring Support Agreement, then, was designed precisely to avoid the holdout problem that results when multiple parties possess an entitlement to block a welfare-enhancing transaction. EDMC's own internal financial projections suggest that if the restructuring were to go forward, they could afford—at least temporarily—a limited number of holdouts who must be paid out the entire interest due under their respective indentures. (*See* Def. Ex. 223, at 6). Yet Plaintiffs have brought forward little evidence to suggest that the collective action problem inhibiting a new restructuring deal could easily be overcome, and Defendants have provided ample reason for doubt. The Court thus finds that, while the Proposed Restructuring may work a harm upon Plaintiffs as compared to a hypothesized ideal, granting the injunction will not lead to a smooth rearrangement to Plaintiffs' benefit.[12] Rather, enabling each bondholder to enjoin the restructuring may prove value-destructive for all bondholders, Plaintiffs included. When considering irreparable harm, "the injunction must address the injury alleged to be irreparable—the Court should not grant the injunction if it would not so prevent that ***607** injury." *Toney–Dick v. Doar,* No. 12 Civ. 9162(KBF), 2013 WL 1314954, at *9 (S.D.N.Y. Mar. 18, 2013). Some loss of value in the Notes appears inevitable, and Plaintiffs have not carried their burden to convince the Court that the cure they seek would not be worse than the disease of which they complain.

b. Any Harm to Plaintiffs Is Not Irreparable

[6] [7] "[I]t is settled law that when an injury is compensable through money damages there is no irreparable harm." *Beautiful Home Textiles (USA), Inc. v. Burlington Coat Factory Warehouse Corp.,* No. 13 Civ. 1725(LGS), 2014 WL 4054240, at *7 (S.D.N.Y. Aug. 15, 2014) (quoting *JSG Trading Corp. v. Tray–Wrap, Inc.,* 917 F.2d 75, 79 (2d Cir.1990)) (internal quotation marks omitted). Yet while Plaintiffs' injury is unquestionably monetary in nature and easily calculable, "courts have excepted from the general rule regarding monetary injury situations involving obligations owed by insolvents."

Brenntag Int'l Chemicals, Inc. v. Bank of India, 175 F.3d 245, 250 (2d Cir.1999). It is thus not sufficient that a monetary remedy be theoretically calculable; there must actually be a solvent defendant at the close of litigation from whom to recover such damages.

Given that the Intercompany Sale is explicitly designed to deprive unsecured Noteholders of assets and guarantors to claim against, Plaintiffs would appear to have a strong case for the insolvency exception to the monetary injury rule. Defendants respond by noting the availability of a fraudulent conveyance action against solvent parties—either EDMC or the new EM Holdings—under state law. (Def. Opp. 22). Yet the Court is not convinced that the existence of a fraudulent conveyance action against other entities suffices to render the harm reparable. The Second Circuit has recognized that, despite "the danger in finding irreparable harm where alternative, solvent defendants are available," a party should not be denied a preliminary injunction solely on those grounds where the primary claims "are far simpler and much stronger." *Brenntag,* 175 F.3d at 250. And indeed, Plaintiffs are right to note with dismay the difficulty of establishing a fraudulent conveyance relative to their straightforward ability to demand payment under the Indenture.[13] While Plaintiffs do not suffer irreparable injury simply because they may not be able to prevail in a subsequent claim, *see Sturm, Ruger & Co. v. Chase Manhattan Bank, N.A.,* No. 93 Civ. 7519(SS), 1994 WL 191512, at *3 (S.D.N.Y. May 17, 1994), ***608** they are not required to place their faith in an action of an entirely different nature.

****13** However, the nature of Plaintiffs' arguments on the merits belies the notion that a fraudulent conveyance claim would be their only recourse. Under the status quo, Plaintiffs have a claim to payment on their Notes against EDMC as a guarantor. If Plaintiffs are correct that the Intercompany Sale as conceived offends their rights under the Trust Indenture Act, a key element of that offense would be the removal of the Parent Guarantee (*see infra*). And if, as Plaintiffs contend, this Court has the ability to substantively review the Proposed Restructuring for its impairment of Plaintiffs' ability to recover on their Notes, then it must follow that the Court has the ability to deem the removal of the Parent Guarantee to be in violation of the Trust Indenture Act and Indenture § 6.07. A straightforward demand that EDMC pay the amounts due under the Indenture would then follow.

While courts have looked more favorably upon an injunction where there appears to be an active attempt to render a defendant judgment-proof—and such an inference is not difficult here, given the nature of the Intercompany Sale and the stark warnings to Noteholders contained within the Exchange Offering Circular—"this exception has not been applied where efforts to render a defendant judgment-proof may be remedied by enforcing the judgment against other companies and officers through corporate veil-piercing and other mechanisms." *Sea Carriers Corp. v. Empire Programs, Inc.,* No. 04 Civ. 7395(RWS), 2006 WL 3354139, at *5 (S.D.N.Y. Nov. 20, 2006).

And indeed, if the Court were to agree with Plaintiffs that the Trust Indenture Act has been violated, broad principles of veil-piercing would enable the Court to facilitate a demand for payment from EDMC wherever within its corporate structure assets happen to be located. A court in this District has denied injunctive relief in a similar case because the counterclaim defendant "corporations are closely related and operate as a single overall commercial unit." *Great Earth Int'l Franchising Corp. v. Milks Devs., Inc.,* 302 F.Supp.2d 248, 254 (S.D.N.Y.2004). The court found "no basis in the record to suggest that a judgment recovered by [plaintiffs] against [counterclaim defendant], if unsatisfied by that company, could not be enforced against other [subsidiaries] or officers, through corporate veil-piercing or other procedures." *Id.* And in a case even more strikingly apposite to the instant litigation, a court in this District denied a preliminary injunction because

> APWC is just one member of a large family of corporations of which PEWC is the head. Were APWC Gen'l to strip the assets of APWC, Set Top could still be returned to the position it previously occupied by an award of monetary damages against the persons or corporations responsible for the stripping.

Pac. Elec. Wire & Cable Co. v. Set Top Int'l Inc., No. 03 Civ. 9623(JFK), 2003 WL 23095564, at *5 (S.D.N.Y. Dec. 30, 2003). Should Plaintiffs prevail at trial and convince the Court to find EDMC liable for payment on their Notes, they have offered no reason to believe that they cannot obtain relief from EDMC, EM Holdings, or whatever other subsidiary takes hold of the assets disposed of through the Intercompany Sale. Accordingly, any harm Plaintiffs might suffer should the Proposed Restructuring proceed is not irreparable.

2. The Balance of the Equities Does Not Tip in

Plaintiffs' Favor

****14** [8] Even where a plaintiff can show a likelihood of irreparable injury, "[i]n each case, courts 'must balance the competing ***609** claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.' " *Winter,* 555 U.S. at 24, 129 S.Ct. 365 (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska,* 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987)). "A preliminary injunction may not issue unless the movant clearly shows that the balance of equities favors the movant." *Litwin v. OceanFreight, Inc.,* 865 F.Supp.2d 385, 401 (S.D.N.Y.2011).

[9] Here, for many of the same reasons as set forth above, there is little question that the harms on Defendants' side of the ledger vastly outweigh those on Plaintiffs'. Plaintiffs face the potential loss of ability to recover interest and principle on Notes worth, nominally, just over $20 million (and in reality far less than that absent a restructuring), constituting 3.5% and 4.5% of Marblegate's and Magnolia's respective assets under management. (*See* Milgram Decl. ¶ 15; Donath Decl. ¶¶ 4, 11). Defendants and their creditors at a minimum risk the imperilment of a painstakingly negotiated $1.5 billion debt restructuring, one which the overwhelming majority of creditors support. More broadly, given EDMC's perilous financial condition and the regulatory constraints, there is a serious risk of insolvency that would spell the end of a company valued, according to the evidence before the Court, at $1.05 billion. While the disparity in dollar amounts at risk is not quite so large as that in *Litwin, see* 865 F.Supp.2d at 401 ("Plaintiff in this case owns eight shares of OceanFreight stock worth approximately $75. If granted, her motion would delay and quite possibly imperil a $239 million transaction which was negotiated over a period of months[.]"), it is nevertheless compelling reason to find that the equities do not favor an injunction.

None of the cases cited by Plaintiffs offers remotely comparable risks. (*See* Pl. Br. 15–16 (citing *Int'l Controls Corp. v. Vesco,* 490 F.2d 1334, 1338 (2d Cir.1974) (granting a preliminary injunction where a defendant fled to "Nassau, the Bahamian capital, beyond the reach of the United States," and sought to dispose of the only fixed assets that potential victims of securities fraud might recover); *In re Netia Holdings S.A.,* 278 B.R. 344, 357 (Bankr.S.D.N.Y.2002) (granting a preliminary injunction against the disbursement of funds from a bankrupt estate where there was no evidence that keeping the funds in place "would cause anyone any injury whatever"); *Quantum Corporate Funding, Ltd. v. Assist You Home Health Care Servs. of Va.,* 144 F.Supp.2d 241, 248–49 (S.D.N.Y.2001) (finding a balance of hardships tipping in plaintiff's favor where there was "a continuing pattern of bad-faith by [defendant] in evading creditor claims" and no serious risk to defendant's business))). The ramifications of an injunction are, as this Court has acknowledged, highly uncertain (*see* Hrg. Tr. 338–39), but the potential costs of erring in favor of an injunction plainly dwarf the costs of erring against an injunction.

3. The Public Interest Does Not Favor an Injunction

****15** [10] The Court must also "ensure that the 'public interest would not be disserved' by the issuance of a preliminary injunction." *Salinger,* 607 F.3d at 80 (quoting *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006)). Defendants point out that any injunction, by jeopardizing the future of EDMC, creates a significant risk of harm to its 118,090 current students, more than 400,000 alumni, and 20,800 employees. (*See* West Decl. ¶¶ 4, 11, 35). Plaintiffs offer two responses.

First, Plaintiffs point to the example of Corinthian Colleges, Inc. ("Corinthian") to ***610** demonstrate that failure to meet the DoE's Title IV requirements will not result in an immediate dissolution and leave current students in the lurch. (Hrg. Tr. 308–13). Yet Defendants persuasively counter that following Corinthian—which is undergoing a "teachout" or "runoff" in which it can matriculate current students but accept no more as it winds down—would be a terrible outcome for EDMC and its students. (*See* Hrg. Tr. 393). The Court is inclined to agree that EDMC's current students and alumni would be less than thrilled to see their diplomas bear the name of a defunct institution.

Second, Plaintiffs simply argue that enforcement of the laws is in the public interest. (*See* Pl. Br. 17–18). Yet this argument, logically extended, would imply that any time a plaintiff demonstrated a likelihood of success on the merits, the public interest in enforcement of the laws would necessarily be served by an injunction. Such an interpretation would effectively read the public interest prong out of the test for a preliminary injunction, and run counter to the Supreme Court's admonition that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction," and that "[a]n injunction ... does not follow from success on the merits as a matter of course." *Winter,* 555 U.S. at 24, 32, 129 S.Ct. 365 (internal citation and quotation marks omitted). While the public undoubtedly has an interest in seeing the rights of bondholders protected, Plaintiffs offer no reason why the public's interest—as opposed to their own—is best served by an injunction rather than post hoc liability.

4. Plaintiffs Have Demonstrated a Likelihood of Success on the Merits

As noted above, Plaintiffs cannot obtain a preliminary injunction due to their inability to demonstrate irreparable harm, and additionally fail to demonstrate that the balance of the equities weighs in their favor and that an injunction would be in the public interest, as required by *Winter.* Nevertheless, this Court will consider the merits of Plaintiffs' claims in the hopes of providing clarity for subsequent litigation in this and other cases.

As relevant to the instant litigation, the Intercompany Sale involves two major elements: the foreclosure on Education Management LLC's assets by the secured creditors, and the removal of EDMC's Parent Guarantee on the unsecured Notes of Education Management LLC held by Plaintiffs. Plaintiffs do not contest that both elements have valid contractual bases; the foreclosure is provided for by the 2014 Credit Agreement and earlier iterations, and is a valid exercise of the secured creditors' rights under UCC Article 9, while the removal of the Parent Guarantee is contemplated by Sections 9.02 and 10.06 of the Notes' Indenture. However, Plaintiffs argue that the Intercompany Sale broadly conceived, and the removal of the Parent Guarantee in particular, impermissibly impairs or affects their right to receive payment on their Notes, which is enshrined in both Section 6.07 of the Indenture and Section 316(b) of the Trust Indenture Act. Because the claims over the Parent Guarantee and the Intercompany Sale are inextricably intertwined, and because Section 6.07 of the Indenture precisely replicates the protections of Section 316(b) of the Trust Indenture Act, the questions presented on the merits essentially boil down to a dispute over the scope of the protections afforded by the Trust Indenture Act: Is it a broad protection against nonconsensual debt restructurings, or a narrow protection against majority amendment of certain "core terms"? For ***611** the reasons set forth below, the Court finds the former interpretation more persuasive, and thus finds that Plaintiffs have demonstrated a likelihood of success on the merits.

a. The Trust Indenture Act Affords a Broad Protection Against Nonconsensual Debt Reorganizations

****16** It is a "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). Where these "[o]rdinary principles of statutory construction apply," courts should first "examine the statute's text in light of context, structure, and related statutory provisions." *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 558, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). Where a statute's meaning cannot be divined from text alone, courts may turn to a statute's "basic purpose" and "legislative history," *Muscarello v. United States,* 524 U.S. 125, 132, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998), while remaining mindful of the Supreme Court's warning that "legislative history is itself often murky, ambiguous, and contradictory," and vulnerable to being used to confirm a preexisting inclination rather than provide an independent authority, *Allapattah,* 545 U.S. at 568, 125 S.Ct. 2611. Because the text of Section 316(b) lends itself to multiple interpretations, this Court must turn to the legislative history, which confirms a broad reading of this provision, but also provides a standard by which to prevent courts from running amok.

Section 316(b) of the Trust Indenture Act reads in relevant part:

> Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder[.]

15 U.S.C. § 77ppp(b). At issue here is whether the "right ... to receive payment" is to be read narrowly, as a legal entitlement to demand payment, or broadly, as a substantive right to actually obtain such payment.

Plaintiffs argue initially that the "right" created by Section 316(b) is "absolute and unconditional," citing for this proposition *UPIC & Co. v. Kinder–Care Learning Ctrs., Inc.,* 793 F.Supp. 448, 455 (S.D.N.Y.1992). Yet the right that *UPIC* declares "absolute and unconditional" is defined elsewhere as "a noteholder's absolute and unconditional statutory right to bring an action for principal and interest due and owing under a debenture," as "the right of a debentureholder to sue on his debenture for payment when due," and as the "right to bring an action to recover principal and interest." *Id.* at 454, 455, 457. Ultimately, the *UPIC* court agreed with the defendant's contention that "although Section 316(b) may guarantee a Securityholder's 'procedural' right to commence an action for nonpayment, Section 316(b) does not [affect] or alter the substance of a noteholder's right to payment of principal and interest under the Indenture and, in particular, cannot 'override' the Indenture's subordination provisions." *Id.* at 456–57. There is little question that "[n]othing in Section 316(b), or the [Trust Indenture Act] in general, requires that bondholders be afforded 'absolute and unconditional' rights to payment." *Bank of N.Y. v. First Millennium, Inc.,* 607 F.3d 905, 917 (2d Cir.2010).

***612 **17** At least two courts have taken this logic a step further, and explicitly declared that Section 316(b) "applies to the holder's *legal* rights and not the holder's *practical* rights to the principal and interest itself ... there is no guarantee against default." *In re Nw. Corp.,* 313 B.R. 595, 600 (Bankr.D.Del.2004) (emphasis in original); *accord YRC Worldwide Inc. v. Deutsche Bank Trust Co. Am.,* No. 10 Civ. 2106(JWL), 2010 WL 2680336, at *7 (D.Kan. July 1, 2010) ("TIA § 316(b) does not provide a guarantee against the issuing company's default or its ability to meet its obligations. Accordingly, the fact that the deletion of section 5.01 might make it more difficult for holders to receive payment directly from plaintiff does not mean that the deletion without unanimous consent violates TIA § 316(b) [.]"). The language and logic of the *Northwestern Corp.* and *YRC Worldwide* decisions would suggest that Plaintiffs have no claim, as nothing about the Intercompany Sale or the removal of the Parent Guarantee prevents them from asserting a legal claim to payment against the soon-to-be judgment-proof Education Management LLC.

A court in this District, however, has taken the opposite tack, finding that the Trust Indenture Act protects the *ability,* and not merely the formal right, to receive payment in some circumstances:

> By defendant's elimination of the guarantors and the simultaneous disposition of all meaningful assets, defendant will effectively eliminate plaintiffs' ability to recover and will remove a holder's "safety net" of a guarantor, which was obviously an investment consideration from the outset. Taken together, these proposed amendments could materially impair or affect a holder's right to sue. A holder who chooses to sue for payment at the date of maturity will no longer, as a practical matter, be able to seek recourse from either the assetless defendant or from the discharged guarantors. It is beyond peradventure that when a company takes steps to preclude any recovery by noteholders for payment of principal coupled with the elimination of the guarantors for its debt, that such action does not constitute an "impairment" or "affect" the right to sue for payment.

Federated Strategic Income Fund v. Mechala Grp. Jam. Ltd., No. 99 Civ. 10517(HB), 1999 WL 993648, at *7 (S.D.N.Y. Nov. 2, 1999). Unsurprisingly, Plaintiffs urge the Court to follow *Mechala* and discount the later errant cases from other districts.

Defendants offer three primary arguments as to why this Court should side with *Northwestern Corp.* and *YRC Worldwide* rather than *Mechala.* First, they argue that courts have followed *UPIC'* s lead in restricting the protections of Section 316(b) to "core term[s]," which are defined as "one[s] affecting a securityholder's right to receive payment of the principal of or interest on the indenture security on the due dates for such payments." *UPIC,* 793 F.Supp. at 452. This is correct, but does little to answer the underlying question of what the "right" consists of, or when an action "affect [s]" such a right. If Plaintiffs are correct that the right is substantive rather than formalist, then they are right to say that "[y]ou have to look at the overall structure" to determine whether a given term affects that right in the context of a particular transaction, and thus whether or not it is a "core term." (*See* Hrg. Tr. 381).[14]

***613 **18** Second, Defendants argue that a bondholder's "right to payment may be conditioned or limited by the Indenture itself, as it was here." (Def. Opp. 18).[15] This is correct as well, but this time Defendants prove too much. As the Intervenors acknowledge, Section 316(b) "prohibit[s] non-consensual amendments to contractual payment rights." (Int. Opp. 16 (citing *First Millennium,* 607 F.3d at 917)). Yet if the Trust Indenture Act protects only those rights that are enshrined in an indenture, subject to whatever limitation contained therein, and nothing prevents an ex ante limitation on the right to receive payment (including through majority vote), then the Trust Indenture Act would fail to prohibit indentures allowing for majority modification of payment terms. In effect, the statute would prohibit nothing more than violations of the indenture contract, rendering it superfluous.[16] The Trust Indenture Act, then, must protect *some* rights against at least *some* ex ante constraints.

Finally, Defendants offer a parade of horribles if this Court were to adopt the *Mechala* approach: "If plaintiffs' position were correct ... [the Trust Indenture Act would] permit any noteholder to attack any transaction based on a standardless 'ability to receive payment test[.]' " (Def. Opp. 15–16; *accord* Int. Opp. 17). Certainly this Court does not wish to find itself in the position of evaluating whether a proposed investment in a new widget factory is likely to erode an issuer's financial stability and thus negatively affect a bondholder's ability to receive payment. Yet the Court finds equally unsatisfying the notion that Section 316(b) protects only against formal, explicit modification of the legal right to receive payment, and allows a sufficiently clever issuer to gut the Act's protections through a transaction such as the one at issue here.

Fortunately, a way out of this dichotomy is provided by the legislative history. The reports of the House and Senate subcommittees responsible for drafting the Trust Indenture Act offer precisely the same understanding of the purpose of Section 316(b): "Evasion of judicial scrutiny of the fairness of debt-readjustment plans is prevented by this prohibition.... This prohibition does not prevent the majority from binding dissenters by other changes in the indenture or by a waiver of other defaults, and the majority may of course consent to alterations of its own rights." H.R. Rep. 76–1016, at 56 (1939); ***614** S.Rep. No. 76–248, at 26–27 (1939). This Court is wary of the murkiness of legislative history, and the risk that "judicial reliance on legislative materials like committee reports ... may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Allapattah,* 545 U.S. at 568, 125 S.Ct. 2611. Yet courts and commentators to consider the legislative purpose and history of the Trust Indenture Act have come to the same conclusion, even while often disparaging the result: that Section 316(b) was intended to force bond restructurings into bankruptcy where unanimous consent could not be obtained. *See Brady v. UBS Fin. Servs., Inc.,* 538 F.3d 1319, 1325 (10th Cir.2008) ("Section 316(b) was adopted with a specific purpose in mind—to prevent out-of-court debt restructurings from being forced upon minority bondholders.... Specifically, § 316(b) was designed to provide judicial scrutiny of debt readjustment plans to ensure their equity." (internal alterations, citations, and quotation marks omitted)); *UPIC,* 793 F.Supp. at 453 ("The Securities Exchange Commission was undoubtedly aware that requiring unanimity in bondholder voting—rather than mere majority action—would frustrate consensual workouts and help induce bankruptcy. And convinced that insiders or quasi-insiders would damage bondholders, the Commission welcomed the prospect."); Jonathan C. Lipson, *Governance in the Breach: Controlling Creditor Opportunism,* 84 S. Cal. L.Rev. 1035, 1054 (2011) ("Those who hold bonds subject to the Trust Indenture Act can always effectively thwart a negotiated modification to the core provisions of the bond—maturity date, interest, principal amount—which would, in turn, impair a reorganization outside bankruptcy."); Mark J. Roe, *The Voting Prohibition in Bond Workouts,* 97 Yale L.J. 232, 234 (1987) (criticizing Section 316(b) as anachronistic, but noting that "William O. Douglas, the principal architect of the prohibition ... offered bondholder protection as the rationale for prohibiting votes. Douglas and his colleagues at the SEC were not only aware that requiring near unanimity would help induce bankruptcy, they welcomed the prospect."). If Defendants and Intervenors were correct that Section 316(b) is limited to preventing formal majority modification of an indenture's payment term, then the case at hand amply demonstrates that the provision would *not* prevent "[e]vasion of judicial scrutiny of the fairness of debt-readjustment plans." H.R. Rep. 76–1016, at 56; S.Rep. No. 76–248, at 26–27. The Court cannot accept an interpretation that is neither mandated by the statute's text nor remotely in conformity with the statutory purpose and legislative history.

****19** [11] Not only do the legislative history and statutory purpose refute the interpretation advanced by Defendants and Intervenors, but they also provide a limiting principle that averts the proffered specter of untrammeled judicial intrusion into ordinary business practice. (*See* Def. Opp. 15–16; Int. Opp. 17). Practical and formal modifications of indentures that do not explicitly alter a core term "impair[ ] or affect[ ]" a bondholder's right to receive payment in violation of the Trust Indenture Act only when such modifications effect an involuntary debt restructuring. Such a standard does not contravene the decisions that have allowed preexisting subordination terms to survive a challenge under Section 316(b). *See UPIC,* 793 F.Supp. at 457. Nor does it prevent majority amendment of a significant range of indenture terms, including many that can be used to pressure bondholders into accepting exchange ***615** offers. *See* John C. Coffee, Jr. & William A. Klein, *Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers* *and Recapitalizations,* 58 U. Chi. L.Rev. 1207, 1224–25 (1991) ("Although the Trust Indenture Act of 1939 provides that bondholders may not alter certain 'core' provisions of publicly issued debt obligations, bondholders can agree to eliminate other important protective covenants—for example, covenants prohibiting the firm from paying dividends, covenants requiring the firm to maintain a specified net worth, or covenants prohibiting the firm from incurring debt senior in any respect in right of payment to the debt for which the exchange offer is made."). But where a debt reorganization that seeks to involuntarily disinherit the dissenting minority is brought about by a majority vote, that violates the fundamental purpose of the Trust Indenture Act.

b. The Proposed Restructuring Likely Violates the Trust Indenture Act

[12] The Court does not deny that the standard identified in the preceding section might produce close, difficult cases. The record before this Court, however, leaves little question that the Intercompany Sale is precisely the type of debt reorganization that the Trust Indenture Act is designed to preclude. The Restructuring Support Agreement makes its intent plainly known in its recital clauses, where it announces that "the Companies and the Restructuring Support Parties have agreed to a restructuring of the Companies' Obligations under the Credit Agreement and its indebtedness under the Indentures" (Malcolm Decl. Ex. C), and that the Intercompany Sale is designed as "an out-of-court restructuring" (*id.* § 4.01(c)). The Exchange Offering Circular defines the Proposed Restructuring as "intend[ed] to restructure [EDMC's] existing indebtedness," and that in the case of dissenters the Restructuring Support Agreement requires the parties to it "to implement the Proposed Restructuring over any such objection" via the Intercompany Sale, ensuring that such dissenters "will not receive payment on account of their Notes." (Exchange Offering Circular 7–8).

****20** Furthermore, the mechanism by which the Intercompany Sale is to be carried out operates, in context, to effect a complete impairment of dissenters' right to receive payment. It is true that the Indenture by which the Notes are governed contains two clauses, common to many indentures (*see* Gadsden Report), that provide for the release of the Parent Guarantee: Section 9.02 by majority vote of the Noteholders, and Section 10.06 by action of the secured creditors.[17] One can imagine contexts where those clauses would be invoked without implicating Section 316(b). Section 9.02 might be invoked to release the Parent Guarantee where the Noteholders determined that it impaired flexibility and bargained it away, much like the covenants identified by Professors Coffee and Klein. Section 10.06 might be invoked, much like the senior creditors' Article 9 rights to foreclose on their collateral, in a genuinely adversarial attempt to safeguard some recovery ***616** against a company they have come to regard as unable to pay its debts.

But this is not such a case. The Parent Guarantee that the senior creditors intend to release (and by so doing, release the Parent Guarantee on the Notes) was conferred less than a month ago by EDMC, albeit for significant concessions. More importantly, EDMC has assured regulators that the foreclosure is purely a formality, and that "[i]n no event does the Intercompany Sale change the ownership, debt structure, board, management or governance of EDMC or its institutions[.]" (Pl. Ex. 255).[18] Although Plaintiffs were cautioned in the Original Offering Circular that they "should not assign any value to such guarantee" (Original Offering Circular 5), the Court does not believe that such cautionary language can undo the protections of the Trust Indenture Act. Plaintiffs may have been warned that modifications were possible, but they were not told that they could be forced to accept a wholesale abandonment of their right to receive payment. Accordingly, the Court must find that Plaintiffs have a likelihood of succeeding on an eventual claim for payment against EDMC and its subsidiaries.

If this Court were inclined to grant an injunction, it would face the task of disentangling precisely what elements of the Intercompany Sale improperly impaired Plaintiffs' rights. Yet as noted above, "[a]n injunction ... does not follow from success on the merits as a matter of course." *Winter,* 555 U.S. at 32, 129 S.Ct. 365. Accordingly this Court declines to grant Plaintiffs the injunctive relief sought, even while observing that, absent EDMC's insolvency, Plaintiffs may ultimately be able obtain payment on their debts as they come due. Doing so gives effect to the understanding embedded in the Trust Indenture Act that minority bondholders are to be protected from involuntary restructuring, but are not granted the right to hold hostage a majority willing to make sacrifices. *See* H.R. Rep. 76–1016, at 56 ("[T]he majority may of course consent to alterations of its own rights."); S.Rep. No. 76–248, at 27 (same). And the creation of a liability rule rather than a property rule avoids the worst of the collective action problems associated with granting diffuse parties the ability to block a value-enhancing transaction.

****21** This Court is not so naïve as to think that establishing Plaintiffs' ultimate right to full payment will not pose problems for the Proposed Restructuring. Where individual bondholders can free-ride off an exchange offer, as they retain claims for the full value of their debt against a newly solvent issuer, they are better off refusing the offer; "[i]f enough bondholders refuse, they will frustrate the workout," leaving the bondholders "locked in game theory's prisoners' dilemma." Roe, *supra,* at 236–37. The problem is even more acute here ***617** due to the unusual role played by Title IV's funding requirements for for-profit education institutions, which removes bankruptcy as a viable option or a credible threat for EDMC. While the difficulty of negotiating a deal with multiple creditors who have incentives to hold out can be fatal, *see id.* at 239, this Court notes optimistically that many restructurings overcome the problem by requiring 80–85% bondholder approval as a prerequisite to a restructuring, *id.* at 236–37 & n. 11, forcing large bondholders in particular to weigh the benefits of holding out against the risk to the restructuring at large. Yet whatever the ultimate cost to EDMC, its creditors, its employees, and its students, the Trust Indenture Act simply does not allow the company to precipitate a debt reorganization outside the bankruptcy process to effectively eliminate the rights of nonconsenting bondholders.

CONCLUSION

Because Plaintiffs have failed to demonstrate a likelihood of irreparable harm, that the balance of equities tips in their favor, or that an injunction is in the public interest, the motion for a preliminary injunction is DENIED. The requests of the parties to file certain documents in redacted form is GRANTED.

SO ORDERED.

All Citations

75 F.Supp.3d 592, 2014 WL 7399041, Fed. Sec. L. Rep. P 98,335

Footnotes

1 The facts set forth herein are not in dispute, except where specifically identified, and are drawn from the parties' exhibits ("Pl. Ex." and "Def. Ex."); the exhibits to the declarations of Lucy Malcolm for Plaintiffs ("Malcolm Decl."), Lauren M. Kofke for Defendants ("Kofke Decl."), and James Burke for Intervenors ("Burke Decl."); the declarations of various witnesses ("___ Decl."); the expert reports submitted by the parties ("___ Report"); and transcripts from depositions ("___ Depo. Tr.") and testimony at the hearing ("Hrg. Tr.").

For convenience, the parties' memoranda of law will be referred to as follows: Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction as "Pl. Br."; Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction as "Def. Opp."; Intervenors' Opposition to Plaintiffs' Motion for a Preliminary Injunction of the Steering Committee for the Ad Hoc Committee of Term Loan Lenders of Education Management LLC as "Int. Opp."; Plaintiffs' Reply Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction as "Pl. Reply"; and Intervenors' Memorandum of Law in Support of the Motion of the Steering Committee for the Ad Hoc Committee of Term Loan Lenders of Education Management LLC to Intervene as "Memo to Intervene." Several of these documents were filed under seal and then refiled in redacted form pursuant to the Court's instructions.

2 The Court has significant qualms about relying on the expert report of Stephen Hannan. Hannan is employed by Evercore Partners ("Evercore"), an investment banking advisory firm that was retained by EDMC in March 2014 to assist with the restructuring process. (Hannan Report ¶¶ 1–2). Though Hannan is not being reimbursed specifically for his services as an expert (*id.* at ¶ 6), Evercore has a significant stake in the success of EDMC's restructuring, and accordingly in the outcome of this litigation (Pl. Ex. 262). Given Hannan's personal involvement and paucity of expert qualifications (*see* Hannan Report ¶ 5), it is far from clear that he is properly identified as an expert rather than a fact witness. Because the Court does not rely on any of his assertions as expert, however, it need not reach the question of his qualifications.

3 Evidence was presented to the Court about possible missed opportunities that Marblegate had to participate more actively in the negotiations over the Proposed Restructuring. (*See* Hrg. Tr. 39–42). The Court does not find relevant for purposes of the preliminary injunction motion whether Marblegate was actively denied the opportunity to participate or simply declined to pursue participation as vigorously as might have been possible.

4 The Court notes some discrepancy between the firms identified as part of the Steering Committee in the Intervenors' papers and those identified in email correspondence from May 2014. (*See* Pl. Ex. 221). The discrepancy is not material: both sets own more secured debt than unsecured debt in absolute terms, own a higher proportion of the unsecured debt than the secured debt, and do not include Plaintiffs.

The Court further notes that the Steering Committee, as of their November 5 motion to intervene, claim to hold or control $565 million in secured debt, which would amount to 43.5% of EDMC's secured debt. Again, the difference between these amounts is not material to the resolution of this motion.

5 The holders of these $56,000 of Notes, along with the roughly 1% of the secured debt not to have consented, are represented by Defendants to be merely as-yet-unidentified rather than actively refusing to participate. (*See* Hrg. Tr. 411–12 ("I think the Company is hopeful they'll deal with what they view [as] a mechanical problem.")).

6 Defendants state that as a matter of "belt and suspenders" the Parent Guarantee would also be released by a majority vote of the Noteholders pursuant to Indenture § 9.02. (Def. Opp. 17).

7 While the nonconsenting Noteholders would receive nothing from this distribution, any nonconsenting secured creditors would receive debt in the new EM Holdings. However, this debt would become junior to that of the consenting secured creditors. (*See* Malcolm Decl. Ex. C, at 4).

8 In the briefing and at the hearing, there was significant discussion of whether Marblegate's stance was motivated by Milgram's ire with KKR over a previous unrelated transaction. (*See* Hrg. Tr. 42–50; Def. Opp. 1, 10–11; Int. Opp. 2). Milgram testified that some of his more colorful comments were born of a combination of frustration and posturing, and that he would not risk a major investment for Marblegate over a vendetta. (Hrg. Tr. 43–45, 82–83). The Court is inclined to believe Milgram (*see id.* at 359–60), but does not find his motives legally relevant, particularly as Magnolia adopts precisely the same position as Marblegate absent any allegation of impure motive.

9 Although Magnolia is no longer party to the case, the Court took its position into consideration in deciding the motion. Accordingly, the Opinion has not been otherwise altered to reflect Magnolia's dismissal.

10 The Court elaborated in *Nken v. Holder,* 556 U.S. 418, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009), that the "possibility" standard was too lenient for the likelihood of success prong, in addition to the irreparable harm prong, and that "[i]t is not enough that the chance of success on the merits be 'better than negligible.' " *Id.* at 434, 129 S.Ct. 1749 (quoting *Sofinet v. INS,* 188 F.3d 703, 707 (7th Cir.1999)).

11 None of the circumstances that might justify heightening this standard—(i) if the moving party seeks to enjoin a regulation in the public interest; (ii) if an injunction would provide all the relief sought and could not be undone; or (iii) if the injunction sought is mandatory rather than designed to preserve the status quo—is present here. *See Citigroup Global Mkts.,* 598 F.3d at 35 n. 4.

12 The Court notes three distinctions between the instant case and one relied upon heavily by the Plaintiffs to establish irreparable harm, *Federated Strategic Income Fund v. Mechala Grp. Jam. Ltd.,* No. 99 Civ. 10517(HB), 1999 WL 993648 (S.D.N.Y. Nov. 2, 1999). First, the evidence of Defendants' financial distress is much more compelling here than in *Mechala. See id.* at *8. Second, the court in *Mechala* had reason to be confident that a superior arrangement could be reached quickly. *See id.* at *9–10. And third, if there were not irreparable harm here, this Court would still have to follow *Winter* and consider the balance of the equities and the public interest, unlike the court in *Mechala.*

13 Though the Court declines to speculate on Plaintiffs' chances of prevailing on such a claim, it does note that at a minimum under New York law Plaintiffs must prove that any transfer was made without "fair consideration." *See, e.g., Palermo Mason Constr., Inc. v. Aark Holding Corp.,* 300 A.D.2d 458, 460, 752 N.Y.S.2d 99 (2d Dep't 2002).

The Court also notes that *Brenntag'* s guidance is in some tension with the Supreme Court's admonition in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999), that injunctive relief should not issue against a debtor's disposition of property when the creditor has not established a legal interest in such property. *See id.* at 322, 119 S.Ct. 1961 ("The law of fraudulent conveyances and bankruptcy was developed to prevent such conduct; an equitable power to restrict a debtor's use of his unencumbered property before judgment was not."). The Court is additionally concerned that it "ha[s] no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages," *id.* at 333, 119 S.Ct. 1961; however, as the Court declines to grant the injunction, it need not interrogate its jurisdiction to do so.

14 This contextual understanding of the core/non-core distinction would also diminish the implications of the Gadsden expert report. Because releases of guarantees through automatic or majority-vote provisions are commonplace in the

bond market (*see* Gadsden Report), Defendants argue that such provisions are not understood to run afoul of the Trust Indenture Act. Yet this Court would not have to condemn widespread market practice in order to find that the release of the Parent Guarantee violates the Trust Indenture Act in this context.

15 Defendants are not the first party to advance this theory. *See* Harold S. Bloomenthal & Samuel Wolff, 3B *Sec. & Fed. Corp. Law* § 11:8 (2d ed. rev.2014) ("An interesting issue arises when the obligor purports to limit the debtholders' rights as specified in Section 316(b) before the securities are sold, on the theory that by purchasing the securities, the investor is 'consenting' to the variant term. The staff [of the SEC] has objected to this theory in the past.").

16 Defendants and Intervenors argue that Section 316(b) is designed to "ensure[ ] ... that noteholders ... retain the power to exercise creditor remedies under state law" (Def. Opp. 15), or to add "a further gloss on such rights" (Int. Opp. 17 (quoting *In re Bd. of Dirs. of Multicanal S.A.,* 307 B.R. 384, 389 (Bankr.S.D.N.Y.2004))). One possibility thus hinted at is that Section 316(b) is merely designed to provide a federal forum for breach of contract and other state law claims. However, no evidence of so limited an intent appears in the legislative history. *See* H.R. Rep. 76–1016 (1939); S.Rep. No. 76–248 (1939).

17 Intervenors urge the Court to distinguish, if necessary, between the releases contained within Sections 9.02 and 10.06 on the basis that the former operates by majority vote and the latter automatically. (*See* Hrg. Tr. 449–51). While Section 9.02 may run more squarely afoul of Trust Indenture Act § 316(b)'s minority-protective intent, Section 10.06 as deployed here allows one class of creditors, with company assistance, to force a debt reorganization onto another class of creditors. Given the overall design of the Intercompany Sale, the Court does not find it material which of the two clauses is utilized to impair the rights of nonconsenting Noteholders.

18 Intervenors argue that even EDMC's enthusiastic assurances to regulators are merely part of the secured creditors' contractual rights. And indeed, the 2014 Credit Agreement offers some support for this position:

> The Credit Parties shall, and shall cause their affiliates, and each of their respective representatives, agents and employees to, take such steps as are reasonably necessary or desirable to consummate the Exchange ... in the reasonable good faith determination of the Company in consultation with the Lenders.

(2014 Credit Agreement § 5.16). The Court is skeptical that this language could be used to force quite the current level of participation from EDMC, in particular its assurances that its entire management team will remain at the helm of the reconstituted enterprise following the Intercompany Sale. Yet even if Credit Agreement § 5.16 did go that far, the Court does not think that an issuer could excuse its own violation of the Trust Indenture Act by constraining itself in another contract.

End of Document

TAB 12

80 F.Supp.3d 507
United States District Court,
S.D. New York.

MEEHANCOMBS GLOBAL CREDIT OPPORTUNITIES FUNDS, LP, Relative Value–Long/Short Debt, a Series of Underlying Funds Trust, SB 4 CF LLC, CFIP Ultra Master Fund, Ltd., and Trilogy Portfolio Company, LLC, Plaintiffs,
v.
CAESARS ENTERTAINMENT CORP. and Caesars Entertainment Operating Co., Inc., Defendants.
Frederick Barton Danner, individually and on behalf of all others similarly situated, Plaintiffs,
v.
Caesars Entertainment Corp. and Caesars Entertainment Operating Co., Inc., Defendants.

Nos. 14–cv–7091 (SAS), 14–cv–7973 (SAS).
|
Signed Jan. 15, 2015.

Synopsis

Background: Holders of corporate notes brought action against issuing corporation and its parent corporation, alleging that transaction removing guarantees on notes violated the Trust Indenture Act (TIA) and breached the governing indentures as well as the implied covenant of good faith and fair dealing. Defendants moved to dismiss.

Holdings: The District Court, Shira A. Scheindlin, J., held that:

[1] plaintiffs stated claim under TIA, and

[2] no-action clauses in indentures did not bar state law claims.

Ordered accordingly.

Attorneys and Law Firms

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OPINION AND ORDER

SHIRA A. SCHEINDLIN, District Judge.

I. INTRODUCTION

****1** The plaintiffs[1] in these related actions are holders of Notes issued by Caesars Entertainment Operating Company, Inc. ("CEOC") pursuant to indentures, and—until the issuance of supplemental indentures in August 2014 (the "August 2014 Transaction" or the "Amendments")—guaranteed by Caesars Entertainment Corporation ("CEC"; together with CEOC, "Caesars"). Plaintiffs allege that the August 2014 Transaction violated the Trust Indenture Act of 1939 ("TLA")[2] and breached the governing Indentures as well as the implied covenant of good faith and fair dealing.

Plaintiffs contend that the August 2014 Transaction removed the Guarantees given by the asset-rich parent company, CEC, leaving plaintiffs and the other bondholders with a worthless right to collect principal and interest from the issuer, CEOC, a company divesting itself of assets and holding approximately $17 billion of senior secured debt. The crux of plaintiffs' allegations is that the release of the Guarantees effected a non-consensual change to plaintiffs' payment rights and affected plaintiffs' practical ability to recover payment in violation of section 316 of the TIA and the governing Indentures.

***510** Both defendants moved to dismiss the Complaint[3] for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On January 13, 2015, holders of Second Lien Notes issued by CEOC filed an involuntary chapter 11 petition against CEOC in the United States Bankruptcy Court for the District of Delaware.[4] As a result, this action is stayed as to CEOC pursuant to section 362(a) of the Bankruptcy Code. However, this action is not stayed as to non-debtor defendant CEC,[5] and for the following reasons CEC's motion to dismiss the Danner Complaint is DENIED in its entirety, and its motion to dismiss the MeehanCombs Complaint is GRANTED in part and DENIED in part.

II. FACTS[6]

A. The Notes and Indentures

CEC, formerly known as Harrah's Entertainment, Inc., owns, manages, and operates dozens of casinos throughout the United States. CEOC is a direct operating subsidiary of CEC.[7]

Pursuant to Indentures dated September 28, 2005 and June 9, 2006, CEOC issued $750 million of 2017 Notes and $750 million of 2016 Notes.[8] MeehanCombs is the beneficial holder of approximately $15,318,000 of the 2016 Notes and $5,632,000 of the 2017 Notes.[9] Danner is the beneficial holder of 2016 Notes.[10] Holders of the 2016 Notes are entitled to receive interest payments each year on June 1 and December 1; holders of the 2017 Notes are entitled to receive interest payments on April 1 and October 1 annually.[11] The vast majority of outstanding Notes—approximately $137 million—are held by individual investors.[12]

When issued, the 2017 and 2016 Notes were investment grade.[13] The governing Indentures each included unconditional Guarantees by CEC and provisions prohibiting CEOC from divesting its assets.[14]

B. The August 2014 Transaction

****2** In January 2008, Caesars was acquired in a leveraged buyout by two private equity ***511** funds, Apollo Global Management, Inc. and TPG Capital, LP.[15] Caesars subsequently entered into a series of transactions aimed at transferring assets away from CEOC to affiliates, and leaving it (CEOC) holding company debt.[16]

CEC's ultimate plan is to push CEOC into bankruptcy while protecting Apollo and TPG from CEOC's creditors.[17] The Amendments effectively left CEC free to transfer CEOC's assets without any obligation to back CEOC's debts.[18] Furthermore, the purchase price paid for the Notes of the noteholders who approved the August 2014 Transaction (the "Favored Noteholders")—par plus accrued interest and transactional fees and costs—represented an extraordinary one hundred percent premium over market. In exchange for receiving all amounts owed under their Notes, the Favored Noteholders promised to: (1) support any future restructuring proposed by Caesars; (2) consent to "the removal and acknowledgment of the termination of the CEC guarantee of the Securities"; and (3) consent to the "modif[ication of] the covenant restricting disposition of 'substantially all' of CEOC's assets to measure future asset sales based on CEOC's assets as of the date of the amendment."[19]

III. STANDARD OF REVIEW

A. Rule 12(b)(6) Motion to Dismiss

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the court "must accept all non-conclusory factual allegations as true and draw all reasonable inferences in the plaintiff's favor."[20] "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."[21] A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[22] Plausibility requires "more than a sheer possibility that a defendant has acted unlawfully."[23]

When deciding a motion to dismiss, "a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint."[24] A court may also consider a document that is not incorporated by reference "where the complaint 'relies heavily upon its terms and effect,' thereby rendering the document 'integral' to the complaint."[25] In an action under the TIA, a court may refer to the Indenture and its exhibits.[26]

*512 IV. APPLICABLE LAW

A. The Trust Indenture Act

[1] The TIA provides that instruments to which it applies must be issued under an indenture that has been qualified by the Securities and Exchange Commission ("SEC").[27] The requirements of such indentures are "designed to

vindicate a federal policy of protecting investors."[28]

Section 316 of the TIA relates to collective action clauses. For example, it is permissible for a majority of noteholders to direct the trustee to exercise its powers under the indenture or for not less than seventy-five percent of noteholders "to consent on behalf of the holders of all such indenture securities to the postponement of any interest payment for a period not exceeding three years from its due date."[29] Section 316(a)'s terms are permissive—meaning an indenture can expressly exclude such majority action.

****3** However, section 316(b) is mandatory. It states that:

> Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder, except as to a postponement of an interest payment consented to as provided in paragraph (2) of subsection (a) of this section, and except that such indenture may contain provisions limiting or denying the right of any such holder to institute any such suit, if and to the extent that the institution or prosecution thereof or the entry of judgment therein would, under applicable law, result in the surrender, impairment, waiver, or loss of the lien of such indenture upon any property subject to such lien.[30]

Thus, section 316(b) acts to protect a bondholder's right to receive payment of both principal and interest.

Section 316(b) addressed prior practice whereby majority bondholders—often controlled by insiders—used collective or majority action clauses to change the terms of an indenture, to the detriment of minority bondholders.[31] As result of section 316(b), ***513** a company cannot—outside of bankruptcy[32]—alter its obligation to pay bonds without the consent of each bondholder.[33] In this way, section "316(b) was designed to provide judicial scrutiny of debt readjustment plans to ensure their equity."[34]

B. No–Action Clauses

[2] No-action clauses generally require individual bondholders to satisfy conditions precedent before initiating suit. A "no-action clause ... protect [s] issuers from the expense involved in defending individual lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors."[35] This goal ***514** is generally achieved "by delegating the right to bring a suit enforcing rights of bondholders to the trustee, or to the holders of a substantial amount of bonds, and by delegating to the trustee the right to prosecute such a suit in the first instance."[36]

[3] [4] The terms of no-action clauses are strictly construed.[37] They are regularly enforced by federal and state courts to preclude state law claims.[38] However, when a claim is brought under the TIA, section 316(b) preempts inconsistent indenture provisions, including no-action clauses.[39] Thus, while a no-action clause may bar state law claims, it cannot bar claims under the TIA.

C. Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing

[5] To state a breach of contract claim under New York law, a plaintiff must allege: (1) a valid contract; (2) plaintiff's performance; (3) defendant's failure to perform; and (4) damages resulting from the breach.[40]

****4** [6] [7] "Under New York law, the implied covenant of good faith and fair dealing inheres in every contract."[41] However, breach of this implied covenant is "merely a breach of the underlying contract," not a separate cause of action.[42] " '[I]f the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated.' "[43]

*515 V. DISCUSSION

A. Plaintiffs' Claims Under TIA Section 316

1. Plaintiffs State a Claim Under TIA Section 316(b)

[8] CEC argues that the Complaint fails to allege impairment of the legal right to payment under the Notes because CEOC is not in default of its obligation to make payments. According to CEC, "the statute does not guarantee that the issuer will be able to meet its obligations. Rather, it protects only a noteholder's *legal* right to receive payment when due."[44]

"[T]he starting point in any case of [statutory] interpretation must always be the language itself, giving effect to the plain meaning thereof."[45] Under section 316(b), a noteholder's right "to receive payment of the principal of and interest on [the] indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder[.]"

CEC's narrow reading is not mandated by the statutory text; it is possible for a right to receive payment to be impaired prior to the time payment is due. Nor does CEC's narrow reading follow from the legislative history and purposes of the TIA. Although there is scant case law on point, I find the reasoning of two decisions from this District persuasive, particularly in light of the conduct alleged in the Complaint.[46] Specifically, "the Court finds [ ] unsatisfying the notion that Section 316(b) protects only against formal, explicit modification of the legal right to receive payment, and allows a sufficiently clever issuer to gut the Act's protections through a transaction such as the one at issue here."[47] As explained in *Federated Strategic Income Fund:*

> By defendant's elimination of the guarantors and the simultaneous disposition of all meaningful assets, defendant will effectively eliminate plaintiffs' ability to recover and will remove a holder's "safety net" of a guarantor, which was obviously an investment consideration from the outset. Taken together, these proposed amendments could materially impair or affect a holder's right to sue. A holder who chooses to sue for payment at the date of maturity will no longer, as a practical matter, be able to seek recourse from either the assetless defendant or from the discharged guarantors. It is beyond peradventure that when a company takes steps to preclude any recovery by noteholders for payment of principal coupled with the elimination of the guarantors for its debt, that such action ... constitute[s] an "impairment" ... [of] the right to sue for payment.[48]

***516 **5** Likewise, I find that the Complaint's plausible allegations that the August 2014 Transaction stripped plaintiffs of the valuable CEC Guarantees leaving them with an empty right to assert a payment default from an insolvent issuer are sufficient to state a claim under section 316(b).

For the same reason stated by the court in *Marblegate Asset Management,* I reject the cases relied on by CEC because "[t]he language and logic of the *Northwestern Corp.* and *YRC Worldwide* decisions would suggest that Plaintiffs have no claim" just because they may still be able to "assert[ ] a legal claim [for] payment against the soon-to-be judgment-proof Education Management LLC."[49] CEC's attempt to distinguish the instant cases from *Marblegate Asset Management* on the ground that CEOC will soon be filing for bankruptcy protection and therefore "the transaction challenged here is not an out-of-court debt restructuring that 'involuntarily disinherits a dissenting minority' of its right to receive payment" is unavailing.[50] CEOC is the putative debtor, not CEC. Had the CEC Guarantees not been improperly removed, CEOC's filing would have had no impact on CEC's liability under the Guarantees.[51] Thus, as alleged in the Complaint, removal of the Guarantees through the August 2014 Transaction is an impermissible out-of-court debt restructuring achieved through collective action. This is exactly what TIA section 316(b) is designed to prevent.

2. MeehanCombs Failed to Adequately Allege Ownership or Control Under Section 316(a)[52]

[9] Section 316(a) permits the holders of a majority of the principal amount of any series of notes governed by the statute to direct the trustee to exercise any power conferred on the trustee by the indenture. However, the statute provides that in determining whether a majority of holders of the securities "have concurred in any such ***517** direction or consent," securities held by the issuer "or by any person directly or indirectly controlling or controlled by or under direct or indirect common control" of the issuer shall be disregarded.

MeehanCombs alleges that Caesars either controlled the Favored Noteholders or owned the Favored Noteholders' notes and therefore those notes should not have been counted toward the required majority needed for approval of the August 2014 Transaction.[53] Accordingly, MeehanCombs alleges that the Amendments are invalid.[54]

Because the August 2014 Transaction was structured so that the Favored Noteholders' consents were given *before* the notes were sold to Caesars, MeehanCombs does not allege *ownership.* In addition, the *control* allegations, as pled, are insufficient. The MeehanCombs Complaint "does not allege that the Participating Noteholders were anything other than unaffiliated, independent third parties that entered into an arm's length transaction to provide their consents."[55] Accordingly, MeehanCombs' claim under TIA section 316(a) is dismissed without prejudice.[56]

B. The No–Action Clauses

****6** [10] CEC argues that plaintiffs' *state law* claims are barred by the Indentures' no-action clauses.[57] There is no dispute that plaintiffs have not complied with the preconditions set forth in the Indentures' no-action clauses. But plaintiffs argue that under the Indentures they are excused from compliance with the no-action clauses because they are seeking to enforce their right to payment of principal and interest.[58]

CEC contends that the exception to the no-action clause—which tracks the language of section 316(b)—is only triggered after a payment default. Thus, CEC argues, "[f]or the same reasons that apply to the [s]ection 316(b) claim, this narrow exception [to the no-action clause] applies only to suits by Noteholders *after* a payment default, which has not occurred here."[59]

The starting point is the language of the Indentures. Section 508 of the 2016 Indenture provides:

> Unconditional Right of Holders to Receive Principal, Premium and Interest
>
> Notwithstanding any other provision in this Indenture, the Holder of any Security shall have the right, which is absolute and unconditional, to receive payment of the principal of and any premium and (subject to Section 307) interest on such Security on the respective Stated Maturities expressed in such ***518** Security (or, in the case of redemption, on the Redemption Date) and to institute suit for the enforcement of any such payment, and such rights shall not be impaired without the consent of such Holder.

Likewise, section 6.8 of the 2017 Indenture states:

> Unconditional Right of Holders to Receive Principal and Interest
>
> Notwithstanding any other provision in this Indenture, the Holder of any Notes shall have the right, which is absolute and unconditional, to receive payment of the principal of and interest, if any, on the Notes on the Stated Maturity (or, in the case of redemption, on the Redemption Date) and to institute suit for the enforcement of any such payment, and such rights shall not be impaired without the consent of such Holder.

In other words, both provisions grant an absolute and unconditional right to bring an action to enforce the payment obligations agreed to under the Indentures. This plain language does not limit the applicability of these provisions to suits for past due amounts.[60]

As discussed, the parties were obligated to include these provisions in the Indenture by section 316(b) of the TIA. Section 316(b) states that the bondholder has the right "to institute suit for the enforcement of any [ ] payment *on or after [the] respective [due] dates* ...." This modifying clause is the reason that courts have held that section 316(b) and similarly worded indenture provisions apply only to past due payments.[61] However, the modifying clause has been omitted from the Indentures. Under the doctrine of *expressio unius est exclusio alterius,* the omission of this language is deemed intentional, lending further support to the conclusion that these provisions are not limited to past due payments.[62]

****7** For this reason, CEC's reliance on cases interpreting indenture provisions that simply repeat section 316(b) is unavailing.[63] ***519** In its reply, CEC relies exclusively on *Emmet & Co., Inc. v. Catholic Health East,*[64] which considered a clause substantially similar to that in *Continental Casualty* and rejected the federal court's interpretation of New York law.[65]

The trial court explained:

> It is true that in *Continental Casualty,* the district court found this very language to be lacking an express limitation on suits for unpaid interest, though it did not explain the basis for its interpretation. Nevertheless, we find this reading unpersuasive. For one thing, it would be strange to preserve a bondholder's right to "enforce" a certain type of payment without similarly preserving the debtor's obligation to make such a payment. Limiting the scope of the final modifier to apply only to the debtor's obligation produces this somewhat odd, asymmetrical result. Moreover, policy considerations weigh against such a broad reading of the exception. Simply put, allowing lawsuits for unaccrued payment obligations would essentially allow all claims relating to the value of the bond,

> and would let the payment exception swallow the no-action clause.[66]

The Appellate Division affirmed, writing only that plaintiffs were not "excused from compliance by the indentures' 'principal and interest' clauses, which only authorize actions for past due principal and interest."[67]

Even assuming the reasoning of the trial court could be attributed to the Appellate Division, *Emmet & Co.* is still neither persuasive nor controlling authority. *First,* while similar, the provisions at issue here are materially different from the clauses in *Emmet & Co.* and *Continental Casualty Co.* because they are not susceptible to *Emmet & Co.'s* concern—the only concern based on the *language* of the clause—that "it would be strange to preserve a bondholder's right to 'enforce' a certain type of payment without similarly preserving the debtor's obligation to make such a payment."[68] The clauses here refer only to the rights of the bondholders, and the modifier occurs in the middle of the clauses, not at the end. Notably, the clauses here are substantially similar to the one at issue in *Cendant Corporation Securities Litigation,* and *Emmet & Co.* does not directly address the language of *that* provision. Moreover, *Emmet & Co.* involved municipal bond offerings, not TIA registered indentures. Accordingly, the court had no reason to consider the relevance of the parties' modification of the language mandated under section 316(b) of the TIA.

***520** *Second, Emmet & Co.'s* main disagreement with *Continental Casualty* was based on policy grounds.[69] But *Emmet & Co.* arises in a vastly different context. *Emmet & Co.* concerned municipal bond offerings not TIA qualified indentures.[70] Whereas notice of the partial redemptions was duly given in that case, plaintiffs here allege that the August 2014 Transaction was consummated a mere ten days after the initial disclosure, and "well before Plaintiff could have even complied with the 60[day] requirement set forth in the" Indentures.[71]

****8** Furthermore, accepting plaintiffs' allegations as true, the applicability of the policy concern articulated in *Emmet & Co.*—"preventing expensive lawsuits that do not have the support of a substantial portion of the creditors while also centralizing the prosecution of lawsuits whose benefits should properly accrue to all bondholders"—is questionable.[72] This is so because of the nature of the conduct alleged and because plaintiffs represent millions of dollars of aggregate principal due on the Notes.

C. The Complaint Adequately Alleges Breach of the Indentures

Each of the enumerated breach of contract claims, along with the claim for breach of the implied covenant of good faith and fair dealing, are ultimately derivative of the claim that section 508 of the 2016 Indenture and section 6.8 of the 2017 Indenture were breached. The Court therefore treats these claims as a single claim for purposes of this motion.

Based on the foregoing, the Complaint adequately alleges a breach in connection with these provisions. The Complaint plausibly alleges that the actions taken by CEC impaired plaintiffs' right to payment under the Notes and therefore plaintiffs' consent to the supplemental indentures was required.[73]

VI. CONCLUSION

For the foregoing reasons, CEC's motion to dismiss the Danner Complaint is DENIED in its entirety, and CEC's motion to dismiss the MeehanCombs Complaint is GRANTED with respect to the section 316(a) claim, without prejudice, and DENIED in all other respects. MeehanCombs shall have until January 29, 2015 to file an amended complaint. A conference is scheduled for February 3, 2015 at 4:30 p.m. The Clerk of the Court is directed to close these motions [Dkt. No. 16 in No. 14–cv–7091 and Dkt. No. 8 in No. 14–cv–7973].

SO ORDERED.

All Citations

80 F.Supp.3d 507, 2015 WL 221055, Fed. Sec. L. Rep. P 98,344

Footnotes

1 Plaintiffs MeehanCombs Global Credit Opportunities Funds, LP, Relative Value–Long/Short Debt, A Series of Underlying Funds Trust, SB 4 CF LLC, CFIP Ultra Master Fund, Ltd., and Trilogy Portfolio Company, LLC will be referred to as "MeehanCombs." Plaintiff Frederick Barton Danner, who brings his action on behalf of himself and a putative class, will be referred to as "Danner."

2 15 U.S.C. §§ 77aaa to 77bbbb.

3 I refer to the complaint filed in No. 14–cv–7091 as the "MeehanCombs Complaint" and the complaint filed in No. 14–cv–7973 as the "Danner Complaint." I refer to them together as the "Complaint."

4 On January 15, 2015, CEOC filed a voluntary chapter 11 petition in the United States Bankruptcy Court for the Northern District of Illinois.

5 *See In re South Side House, LLC,* 470 B.R. 659, 676 (Bankr.E.D.N.Y.2012) ("[T]he automatic stay does not prevent a creditor from proceeding against a non-debtor guarantor.").

6 Unless otherwise indicated, the facts are drawn from the Complaint. Well-pleaded factual allegations are presumed true for the purposes of this motion. *See Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). However, allegations in the Complaint that consist of conclusory statements or threadbare recitals of causes of action are not entitled to the presumption of truth. *See Kirkendall v. Halliburton,* 707 F.3d 173, 175 n. 1 (2d Cir.2013); *Bigio v. Coca–Cola Co.,* 675 F.3d 163, 173 (2d Cir.2012) (citing *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937).

7 *See* MeehanCombs Compl. ¶¶ 17–18.

8 *See* Danner Compl. ¶ 19.

9 *See* MeehanCombs Compl. ¶¶ 1, 12–16. Only plaintiffs SB 4 CF LLC and CFIP Ultra Master Fund, Ltd. own the 2017 Notes.

10 *See* Danner Compl. ¶ 16.

11 *See* MeehanCombs Compl. ¶¶ 22–23, 25–26.

12 *See id.* ¶¶ 2, 28.

13 *See id.* ¶ 43.

14 *See id.* ¶¶ 31–32.

15 *See id.* ¶ 44.

16 *See id.* ¶¶ 49–55.

17 *See id.* ¶¶ 57–58. As noted, an involuntary petition was filed by second-lien creditors against CEOC on January 13, 2015, and a voluntary petition was filed on January 15, 2015.

18 *See* MeehanCombs Compl. ¶¶ 4–5, 7.

19 *Id.* ¶¶ 5, 8, 72, 74.

20 *Simms v. City of New York,* 480 Fed.Appx. 627, 629 (2d Cir.2012) (citing *Goldstein v. Pataki,* 516 F.3d 50, 56 (2d Cir.2008)).

21 *Iqbal,* 556 U.S. at 679, 129 S.Ct. 1937. *Accord Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111, 124 (2d Cir.2010).

22 *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937 (quotation marks omitted).

23 *Id.* (quotation marks omitted).

24 *DiFolco v. MSNBC Cable L.L.C.,* 622 F.3d 104, 111 (2d Cir.2010). (citing *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir.2002)).

25 *Id.* (quoting *Mangiafico v. Blumenthal,* 471 F.3d 391, 398 (2d Cir.2006)).

26 *See Field v. Trump,* 850 F.2d 938, 949 (2d Cir.1988).

27 *See generally* 15 U.S.C. §§ 77eee–77ggg. "A 'trust indenture' is a contract entered into between a corporation issuing bonds or debentures and a trustee for the holders of the bonds or debentures, which, in general, delineates the rights of the holders and the issuer." *Upic & Co. v. Kinder–Care Learning Ctrs., Inc.,* 793 F.Supp. 448, 450 (S.D.N.Y.1992).

28 *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.,* 85 F.3d 970, 974 (2d Cir.1996) (explaining that the law was "enacted because previous abuses by indenture trustees had adversely affected 'the national public interest and the interest of investors in notes, bonds[, and] debentures ....' ") (quoting 15 U.S.C. § 77bbb(a)).

29 15 U.S.C. § 77ppp(a).

30 *Id.* § 77ppp(b). An indenture may also provide bondholders with rights in excess of those guaranteed by section 316(b). *See id.* § 77rrr(b) ("The indenture to be qualified may contain, in addition to provisions specifically authorized under this subchapter to be included therein, any other provisions the inclusion of which is not in contravention of any provision of this subchapter.").

31 *See Bank of New York v. First Millennium, Inc.,* 607 F.3d 905, 917 (2d Cir.2010) (describing section 316(b) as "a statutory provision requiring that bond indentures protect minority bondholders by prohibiting majority bondholders from collusively agreeing to modify the bond's payment terms"); *In re Board of Directors of Telecom Argentina, S.A.,* 528 F.3d 162, 172 (2d Cir.2008) (stating that section 316 "protects the holder of a bond issued under a qualified indenture from majority-imposed impairment of its rights."); *Upic & Co.,* 793 F.Supp. at 452 (noting that section 316(b) was motived by the SEC's concerns "about the motivation of insiders and quasi-insiders to destroy a bond issue through insider control"); *YRC Worldwide Inc. v. Deutsche Bank Trust Co. Americas,* No. 10 Civ. 2106, 2010 WL 2680336, at *4–5 (D.Kan. July 1, 2010) (holding on summary judgment that the attempt of a supermajority of holders to amend a trust over the opposition of a minority was barred by the Act); *In re Board of Directors of Multicanal S.A.,* 307 B.R. 384, 388, 391–92 (Bankr.S.D.N.Y.2004) ("One purpose of the statute was to regulate and reform prior practice whereby indentures contained provisions that permitted a group of bondholders, often controlled by insiders, to agree to amendments to the indenture that affected the rights of other holders—so-called 'majority' or 'collective' action clauses.") (citing SEC, Report on the Study and Investigation of Protective and Reorganization Committees, Parts I–VIII (1937–1940)); Mark J. Roe, *The Voting Prohibition in Bond Workouts,* 97 Yale L.J. 232, 251 (1987) ("Why did Congress enact this prohibition? Although the Trust Indenture Act's legislative history is sparse, the Securities and Exchange Commission's approximately 5000–page study of corporate reorganization, which provided the impetus for the Act, is not. Begun pursuant to the Securities and Exchange Act in 1934 under William O. Douglas' tutelage and completed in 1939, this study reflected the SEC's fear of insider control of bond issues and its concern about the poor quality of information that flowed to bondholders.").

32 *See, e.g., Board of Directors of Telecom Argentina,* 528 F.3d at 172 (" '[I]t is self-evident that Section 316(b) could not have been intended to impair the capacity of a debtor and its creditors to restructure debt in the context of bankruptcy,' and '[t]he cases have uniformly recognized that reorganization proceedings in Chapter 11 are not within the purview of TIA Section 316(b).' ") (quoting *In re Delta Air Lines, Inc.,* 370 B.R. 537, 550 (Bankr.S.D.N.Y.2007), *aff'd,* 374 B.R. 516 (S.D.N.Y.2007)).

33 *See Multicanal S.A.,* 307 B.R. at 388–89; Roe, *The Voting Prohibition,* 97 Yale L.J. at 251 ("Only two events should change a company's obligation to pay its bonds. Either *each* affected bondholder would consent to the alteration of the bond's terms, or a judge would value the company to determine that the firm was insolvent, eliminate the stockholders, and then reduce the express obligation to the bondholders.") (emphasis in original).

34 *Brady v. UBS Financial Services, Inc.,* 538 F.3d 1319, 1325 (10th Cir.2008) (citing S.Rep. No. 76–248, at 26 (1939)); *see also id.* ("In practice, the provision tends to force recapitalizations into bankruptcy court because of the difficulty of

completing a consensual workout."); George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings,* 14 Am. Bankr.Inst. L.Rev. 431, 433–37 (2006) ("Section 316(b) was adopted with a specific purpose in mind—to prevent out-of-court debt restructurings from being forced upon minority bondholders."); Roe, *The Voting Prohibition,* 97 Yale L.J. at 251 ("Congress and the SEC were aware that the holdout problem would frustrate some workouts, but the regulators wanted to impede workouts that took place outside of regulatory and judicial control. The SEC *wanted* trust indenture legislation that would bring contractual recapitalizations under the jurisdiction of the federal bankruptcy court.") (emphasis in original).

35 *Quadrant Structured Prods. Co., Ltd. v. Vertin,* 23 N.Y.3d 549, 565, 992 N.Y.S.2d 687, 16 N.E.3d 1165 (2014) (quotation marks, alterations, and citations omitted) (explaining that no-action clauses also protect against strike suits and individual bondholder suits that are unpopular with the majority). *Accord RBC Capital Mkts., LLC v. Education Loan Trust IV,* No. 6297–CS, 2011 WL 6152282, at *5 (Del.Ch. Dec. 6, 2011) (explaining that under New York law, the "essential purpose" of no-action clauses is "to strike the right balance between enabling the effective enforcement of noteholder rights and the avoidance of capital-taxing suits that do not have the support of most noteholders").

36 *Quadrant Structured Prods. Co.,* 23 N.Y.3d at 565, 992 N.Y.S.2d 687, 16 N.E.3d 1165 (quotation marks omitted).

37 *See McMahan & Co. v. Wherehouse Entm't, Inc.,* 65 F.3d 1044, 1050 (2d Cir.1995), *affirming,* 859 F.Supp. 743, 748 (S.D.N.Y.1994).

38 *See id.*

39 *See id.* at 1051. *See also Great Plains Trust Co. v. Union Pacific Railroad Co.,* 492 F.3d 986, 991 (8th Cir.2007) (holding that under section 316 plaintiff trust company had absolute right to sue for unpaid interest without having to first comply with indenture's no-action clause) (citing *UPIC & Co.,* 793 F.Supp. at 454–55 & n. 8; *In re Envirodyne Indus., Inc.,* 174 B.R. 986, 992–93 (Bankr.N.D.Ill.1994)). Another exception to compliance with the conditions precedent in a no-action clause is where the bondholders allege misconduct by the trustee. *See* 15 U.S.C. § 77*ooo*(d) (stating that the "indenture ... shall not contain any provisions relieving the indenture trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct"); *Cruden v. Bank of N.Y.,* 957 F.2d 961, 968 (2d Cir.1992) (finding no-action clause inapplicable where plaintiffs alleged breach of the TIA and the underlying indentures against indenture trustees).

40 *See Diesel Props S.r.l. v. Greystone Bus. Credit II LLC,* 631 F.3d 42, 52 (2d Cir.2011).

41 *Travellers Int'l, A.G. v. Trans World Airlines, Inc.,* 41 F.3d 1570, 1575 (2d Cir.1994) (citing *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ'g Co.,* 30 N.Y.2d 34, 45, 330 N.Y.S.2d 329, 281 N.E.2d 142 (1972)).

42 *Harris v. Provident Life & Accident Ins. Co.,* 310 F.3d 73, 80 (2d Cir.2002) (quotation marks omitted).

43 *District Lodge 26 v. United Techs. Corp.,* 610 F.3d 44, 54 (2d Cir.2010) (quoting *Hall v. EarthLink Network, Inc.,* 396 F.3d 500, 508 (2d Cir.2005)).

44 Memorandum of Law in Support of Defendants' Motion to Dismiss ("Def. Mem."), at 14 (emphasis in original) (citing *Retirement Bd. of the Policemen's Annuity and Benefit Fund of the City of Chicago v. Bank of New York Mellon,* 914 F.Supp.2d 422, 432 (S.D.N.Y.2012), *aff'd in part and rev'd in part,* 775 F.3d 154 (2d Cir.2014); *YRC Worldwide Inc.,* 2010 WL 2680336, at *7; *In re Northwestern Corp.,* 313 B.R. 595, 600 (Bankr.D.Del.2004)).

45 *Kuhne v. Cohen & Slamowitz, LLP,* 579 F.3d 189, 193 (2d Cir.2009) (quotation marks omitted).

46 *See generally Marblegate Asset Mgmt. v. Education Mgmt. Corp.,* 75 F.Supp.3d 592, No. 14 Civ. 8584, 2014 WL 7399041 (S.D.N.Y. Dec. 30, 2014); *Federated Strategic Income Fund v. Mechala Grp. Jam. Ltd.,* No. 99 Civ. 10517, 1999 WL 993648 (S.D.N.Y. Nov. 2, 1999).

47 *Marblegate Asset Mgmt.,* 75 F.Supp.3d at 611, 2014 WL 7399041, at *16.

48 *Federated Strategic Income Fund,* 1999 WL 993648, at *7.

49 *Marblegate Asset Mgmt.,* 75 F.Supp.3d at 612, 2014 WL 7399041, at *17.

50 1/8/15 Letter to the Court from Defendants' Counsel at 3 (quoting *Marblegate Asset Mgmt.,* 75 F.Supp.3d at 615–16, 2014 WL 7399041, at *20). As a general matter, counsel's stridency has been remarkable. For example, counsel declares that "[p]laintiffs' claims under the TIA are a transparent ruse to create federal jurisdiction where none exists." Def. Mem. at 2. Neither the conduct alleged in the Complaint nor the statute's plain language or its legislative history and purpose justify this statement. Furthermore, there is no controlling precedent here. To support its reading of section 316(b), CEC relies on a case from this District in which the court merely "deemed abandoned" a section 316(b) claim after the plaintiff failed to respond to a motion to dismiss. *Retirement Bd. of the Policemen's Annuity and Benefit Fund of the City of Chicago,* 914 F.Supp.2d at 432. CEC further relies on an unreported decision from the District of Kansas and a bankruptcy court decision from the Northern District of Illinois. *See YRC Worldwide Inc.,* 2010 WL 2680336, at *7; *Northwestern Corp.,* 313 B.R. at 600. *Northwestern Corp.* did not consider *Federated Strategic Income Fund. YRC Worldwide, Inc.,* a case involving *summary judgment,* distinguished *Federated Strategic Income Fund* on factual grounds. The court found that the trustee had neither shown the issuer was divesting itself of its assets "[n]or ... that holders would no longer have any recourse against the notes' guarantors" and reasoned that "there is no basis to conclude in this case, as the *Federated* court did in its case, that the amendments necessarily leave the holders with no practical ability to receive payments due under the notes." 2010 WL 2680336, at *7.

51 *See South Side House, LLC,* 470 B.R. at 673 ("While a bankruptcy case may result in the discharge of the debtor's obligations or impair the claim of a creditor, a non-debtor guarantor's liability is not modified by the bankruptcy process, and the creditor retains its rights against the non-debtor guarantor outside of the bankruptcy case.").

52 Danner does not assert a claim under section 316(a).

53 *See* MeehanCombs Compl. ¶¶ 35–36, 81(d)-(e), 87, 103–104, 107–116.

54 I note that the parties have not cited to case law governing a claim brought under section 316(a).

55 Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss, at 4.

56 CEC's motion does not demonstrate that a claim based on beneficial ownership or control is impossible, and without the benefit of more extensive briefing, it would be difficult to foreclose the right to assert a claim under section 316(a). I will therefore allow MeehanCombs the opportunity to amend its complaint to include allegations relating to beneficial ownership and control. *See Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 48 (2d Cir.1991) ("It is the usual practice upon granting a motion to dismiss to allow leave to replead.").

57 The no-action clauses are sections 507 of the 2016 Indenture and 6.7 of the 2017 Indenture.

58 The exception clauses are sections 508 of the 2016 Indenture and 6.8 of the 2017 Indenture.

59 Def. Mem. at 19 (emphasis in original).

60 *See, e.g., Continental Cas. Co. v. State of N.Y. Mortg. Agency,* No. 94 Civ. 8408, 1998 WL 513054, at *4 (S.D.N.Y. Aug. 18, 1998) (construing the following clause: "[N]othing in this Article VII shall affect or impair the right of any Bondowner to enforce the payment of the principal of and interest on his Bond, or the obligation of the Agency to pay the principal of and interest on each Bond to the owner thereof at the time and place in said Bond expressed."); *In re Cendant Corp. Sec. Litig.,* Nos. 98 Civ. 1664, 98 Civ. 381, 98 Civ. 759, 2005 WL 3500037, at *9 (D.N.J. Dec. 21, 2005) (applying New York law when construing the following provision: "Notwithstanding any other provision in this Indenture, the Holder of any security shall have the right, which is absolute and unconditional, to receive payment, as provided herein ... and in such Security, of the principal of (and premium, if any, on) and ... interest on, such Security or payment of such coupon on the respective Stated Maturities expressed in such Security or coupon (or, in the case of redemption, on the Redemption Date) and to institute suit for the enforcement of any such payment, and such rights shall not be impaired without the consent of such Holder.").

61 *See, e.g., Envirodyne Indus., Inc.,* 174 B.R. at 995–96.

62 *See Quadrant Structured Prods. Co.,* 23 N.Y.3d at 560, 992 N.Y.S.2d 687, 16 N.E.3d 1165 ("[I]f parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission. The maxim *expressio unius est exclusio alterius,* as used in the interpretation of contracts, supports precisely this conclusion.").

63 *See, e.g., Cruden,* 957 F.2d at 968 ("Notwithstanding any other provisions of this Indenture, however, the right of any holder of any Debenture to receive payment of the principal of (and premium, if any) and interest on such Debenture, on or after the respective due dates expressed in such Debenture, or to institute suit for the enforcement of any such payment on or after such respective [due] dates, shall not be impaired or affected without the consent of such holder"). CEC also cites to *McMahan & Co.,* 859 F.Supp. at 748, which simply interprets section 316(b).

64 37 Misc.3d 854, 951 N.Y.S.2d 846 (Sup.Ct.N.Y.Co.2012), *aff'd,* 114 A.D.3d 605, 980 N.Y.S.2d 762 (1st Dep't 2014). As noted in *Emmet & Co.,* "federal courts have held that, *under New York law,* in the absence of express language in the provision limiting it to 'unpaid' interest, the exception also allows suits for interest that has not yet accrued." *Id.* at 850 (emphasis in original) (citing *Continental Cas. Co.,* 1998 WL 513054, at *4; *Cendant Corp. Sec. Litig.,* 2005 WL 3500037, at *10).

65 The clause in *Emmet & Co.,* like that in *Continental Casualty Co.,* provided that: "Nothing in this Article contained shall, however, affect or impair the right of any [bondholder], which is absolute and unconditional, to enforce the payment of the principal of and interest on such owner's [bond] out of the moneys provided for such payment, or the obligation of [the issuer] to pay the same out of the sources pledged hereto, at the time and place expressed herein." *Id.* at 849.

66 *Id.* at 851.

67 114 A.D.3d at 606, 980 N.Y.S.2d 762 (citing *Bank of New York v. Battery Park City Auth.,* 251 A.D.2d 211, 211, 675 N.Y.S.2d 860 (1st Dep't 1998)).

68 951 N.Y.S.2d at 851.

69 *See id.* ("*Moreover,* policy considerations weigh against such a broad reading of the exception.") (emphasis added).

70 *See id.* at 847 ("This case involves three sets of tax-exempt municipal bonds ... issued between 1993 and 1996 to finance certain hospital systems in Florida, Georgia, and Pennsylvania.").

71 Plaintiff Frederick Barton Danner's Opposition to Defendants' Motion to Dismiss the Complaint at 18.

72 951 N.Y.S.2d at 851.

73 The Court has considered and rejects CEC's remaining arguments.

End of Document

TAB 13

In the Court of Appeal of Alberta

Citation: Alberta (Securities Commission) v. Workum, 2010 ABCA 405

Date: 20101220
Docket: 0901-0012-AC
Docket: 0901-0013-AC
Docket: 0901-0019-AC
Registry: Calgary

Between:

Docket: 0901-0012-AC

Alberta Securities Commission

Respondent (Applicant)

- and -

Peter J. Workum

Appellant (Respondent)

Theodor Hennig, Strategic Investment Fund, Cheshire Capital Inc., Lexington Capital Ltd., Ashland Holdings Corp. and Cofima Finanz AG

Not Parties to the Appeal

And Between:

Docket: 0901-0013-AC

Alberta Securities Commission

Respondent (Applicant)

- and -

Peter J. Workum

Appellant (Respondent)

Theodor Hennig, Strategic Investment Fund, Cheshire Capital Inc., Lexington Capital Ltd., Ashland Holdings Corp. and Cofima Finanz AG

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Docket: 0901-0019-AC

Alberta Securities Commission

Respondent (Applicant)

- and -

Theodor Hennig

Appellant (Respondent)

Peter J. Workum, Cheshire Capital Inc.
and Strategic Investments Fund

Not Parties to the Appeal

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice J.D. Bruce McDonald

Reasons for Judgment Reserved
of the Honourable Mr. Justice McDonald
Concurred in by the Honourable Madam Justice McFadyen

Reasons for Judgment Reserved of
the Honourable Mr. Justice O'Brien
Dissenting in Part

Appeal from the Decisions by
The Alberta Securities Commission
Dated the 29th day of August, 2005 (the Institutional Bias Ruling)
Dated the 7th day of June, 2008 (the Merits Decision)
and Dated the 18th day of December, 2008 (the Sanctions Decision)

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Reasons for Judgment Reserved
of the Honourable Mr. Justice McDonald

I. Introduction

[1] The appellants, Theodor Hennig (Hennig) and Peter Workum (Workum), were sanctioned by the Alberta Securities Commission (the Commission) for firstly, conduct contrary to the public interest or contraventions of Alberta securities laws arising from financial disclosures related to issuance of certain financial statements by Proprietary Industries Inc. (PPI) which were not prepared in accordance with Generally Accepted Accounting Principles (GAAP) and contained misrepresentations. Secondly, Workum and Hennig were sanctioned for receiving undisclosed financial benefits related to secret commissions, market manipulation, failure to report insider trades and misrepresentations to Alberta Securities Commission staff (ASC Staff). Neither Hennig nor Workum testified at the hearing.

[2] The appellants appeal pursuant to section 38 of the *Securities Act*, RSA 2000, c S-4 (the *Securities Act*) from three decisions of the Commission: the Decision dated the 29th day of August, 2005 (the Institutional Bias Ruling), the Decision dated the 7th day of June, 2008 (the Merits Decision) and the Decision dated the 18th day of December, 2008 (the Sanctions Decision).

[3] These decisions arise out of two Notices of Hearing, both subsequently amended, issued by the respondent. The first Notice of Hearing was issued on January 31, 2001 (the First Notice of Hearing) and the second was issued on August 21, 2002 (the Second Notice of Hearing). Both were amended on September 19, 2003 and copies of the Amended First Notice of Hearing and Amended Second Notice of Hearing are attached as Schedule “A” and “B” respectively to these reasons.

[4] The First Notice of Hearing named as respondents, PPI, Hennig and Workum and related, broadly speaking, to financial disclosure or more properly the lack of proper financial disclosure.

[5] The Second Notice of Hearing named as respondents in addition to Hennig and Workum, Chester Cheshire Capital Inc. (Cheshire), Lexington Capital Ltd. (Lexington), Strategic Investments Fund (Strategic) and Ashland Holdings Corp. (Ashland). The Second Notice of Hearing includes allegations of market manipulation, secret commissions, failure to file insider trading reports and misrepresentations. For the reasons set out herein, the appeals are dismissed.

II. Background

[6] The appellants were directors and the two most senior officers of PPI, a junior capital pool company which became a reporting issuer in Alberta in 1993. In 2001, PPI described itself as aiming to be a parent holding company and merchant bank for separate public companies with interests in natural resources, banking and real estate.

[7] The allegations covered the period 1998-2000. The Merits hearing ran for a total of 38 days, heard 24 witnesses and included a large volume of documentary evidence. As regards the Sanctions proceeding, the Commission received written submissions from each of ASC Staff, Workum and Hennig.

[8] Workum also brought forward a "Notice of Constitutional Question", stating his intention to question the constitutional validity of the application of section 199 of the *Securities Act*. The Attorney General of Alberta made written submissions as an intervener in that matter.

[9] The financial disclosure allegations involved three sets of purported transactions, the sales of shares of three companies or interests with gains reported in 1998, 1999 and 2000. The Commission concluded that PPI's financial statements for 1998, 1999 and 2000 were not prepared in accordance with GAAP and contained misrepresentations contrary to the public interest. Furthermore, misrepresentations were made when the statements were reported in other disclosures and the appellants were responsible for these as well.

[10] The sales in each year represented almost all of PPI's gains for that particular year. The shares sold in 1998 were reacquired in 2000, documentation was inconsistent and/or incomplete, and the Commission found that there was no expectation that the purchaser would pay PPI any money. In the second and third cases – which were complicated sales involving a number of parties and steps – payment included a promissory note given by the purchaser where that purchaser's ability to satisfy the same was in issue.

[11] When new management took over PPI in 2002, these gains were largely or wholly reversed on restated financial statements. Hennig and Workum severed their ties with PPI by the end of the summer of 2002.

[12] The Commission heard the expert testimony of its Chief Accountant on the application to the financial statements in question of GAAP and the Handbook of the Canadian Institute of Chartered Accountants. The Commission dismissed objections that the expert witness was in an inherent conflict of interest position as the witness was not a prosecutor and his evidence centered on fundamental principles and was not determinative of the issues. The appellants cross-examined the chief accountant and chose not to call their own expert.

[13] The Commission discussed the basis for and policy behind misrepresentations in financial statements and its approach to the contraventions in question. The Commission considered the motivation for the transactions in assessing whether they were bona fide. It concluded that while

there were some plausible bona fide motives, the primary motive was accounting, i.e., recording a gain. The Commission further concluded that the transactions lacked essential elements of a sale. It looked in detail at the transactions and found the transactions were misleading and intended to mislead. It concluded PPI's 1998, 1999 and 2000 financial statements were contrary to the public interest because they were not prepared in accordance with GAAP and contained misrepresentations. The Commission further found that the appellants were each responsible for the improper financial disclosures.

[14] The undisclosed financial benefits were commissions which were concealed and diverted to accounts of offshore companies. The appellants did not dispute the commissions paid by PPI were directed to accounts of the offshore companies but disclaimed ownership or that they instructed the disbursements. The allegation of ownership was not pursued by ASC Staff but changed to the allegation that the accounts were controlled and directed by the appellants.

[15] The Commission found that the appellants each obtained financial benefits, from or through the securities trading accounts of Strategic, Cheshire, Lexington and Ashland (sometimes collectively referred to as the Four Trading Accounts) and the Mandolin Inc. Offshore Bank Account, which were funded by commission payments made by PPI on private placements and other transactions. The Commission, based largely on documentary evidence, found that the appellants exercised control and direction over the securities trading accounts and through that control and direction benefitted personally from the money paid into those accounts. Although this was not in itself necessarily improper, the arrangement was not disclosed as required, and the Commission concluded this was contrary to the public interest. The Commission found some of the evidence indicated that ownership of the accounts was being concealed but held it did not need to determine ownership.

[16] The amounts involved were significant. PPI paid a total of at least $5,148,750 in commissions under this arrangement. The Commission concluded that the Mandolin Inc. Offshore Bank Account and the Four Trading Accounts "were operated to funnel money from PPI" to the appellants, (Merits Decision at para 1062), with at least $2 million passing from PPI to the benefit of the appellants.

[17] On the allegation of market manipulation, the appellants were found to have directly and indirectly traded and purchased Newmex Minerals Inc. shares knowing it would create an artificial price. The shares purchases were effected through one of the witnesses, Glenn Olnick (Olnick), whom the Commission agreed not to sanction in return for his permanent resignation as a registered investment dealer. The Commission found that the market was manipulated and the appellants enlisted Olnick to undertake the manipulation.

[18] The Commission also found that the appellants failed to report insider trades in companies which PPI owned shares and effected through the Four Trading Accounts. The appellants were found to have control and direction over those accounts.

[19] The Commission further found that the appellants made numerous misrepresentations to the Commission and ASC Staff orally and in writing. The Commission found this was “a pattern of conduct” and the appellants “repeatedly lied” to ASC Staff (Merits decision at para 1294).

[20] In the Sanctions Decision, the Commission ordered Workum to permanently cease trading in any securities or exchange contracts, resign all positions as a director and officer and permanently prohibited him from acting as a director or officer. He was also ordered to pay an administrative penalty of $750,000 and pay $200,000 of the costs of the investigation and hearing.

[21] Hennig was ordered to cease trading for 20 years from the date of the decision, resign all positions as director and officer and prohibited him from becoming a director or officer permanently, and to pay an administrative penalty of $400,000 and $175,000 in costs.

III. Grounds of Appeal

[22] Hennig’s grounds of appeal as argued in oral submissions before this court were that the Commission erred:

a) in allowing its Chief Accountant to give expert testimony and in so doing created a reasonable apprehension of bias;

b) its findings relating to the second notice of hearing (secret commissions, market manipulations, insider trading, and misrepresentations to the Commission) were based upon no evidence and as such resulted in an unreasonable finding against Hennig;

c) the reasons given by the Commission, although lengthy, were not adequate as they relate to Hennig and therefore the Commission breached procedural fairness (and can be judged in this regard on the standard of correctness); and

d) in retroactively applying the increased sanctions enacted by amendments to section 199 of the *Securities Act*, RSA 2000, c S-4 (the *Securities Act*) in 2005 when all the conduct complained of predated the date of that amendment.

[23] Workum’s grounds of appeal as argued in oral submissions before this court were that the Commission erred:

a) in relying upon the uncorroborated documentary evidence by or from Olnick;

b) in concluding that Workum and Hennig breached section 70.1(b) of the *Securities Act* as it existed at the time, based as it was largely on the testimony of Olnick;

c) in concluding that both Workum and Hennig breached section 144 of the ASC Rules (preparing financial statements in accordance with GAAP); and

d) the actions and the structure of the Commission created a reasonable apprehension of bias.

Counsel for both Workum and Hennig adopted each other's argument before this court.

[24] Additionally, both Workum and Hennig had argued that section 199 of the *Securities Act* violated section 1(a) of the *Alberta Bill of Rights*, RSA 2000, C A-14 [*Alberta Bill of Rights*]. The Attorney General of Alberta had intervened before the Commission to submit that there was no violation of the *Alberta Bill of Rights*. On appeal before this court, counsel for the appellants formally abandoned this particular argument.

[25] These will all be addressed in the course of these reasons although not necessarily in the order that they were raised by counsel.

IV. Standard of Review

[26] This court has already determined that the Commission is entitled to deference with respect to issues involving the interpretation of evidence, the interpretation of the Commission's enabling legislation and the imposition of sanctions: *Del Bianco v Alberta Securities Commission*, 2004 ABCA 344, 357 AR 361 at para 5, cited in *Anderson v Alberta Securities Commission*, 2008 ABCA 184, 437 AR 55 at para 29. Accordingly, the standard of review for most of the issues on appeal is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at paras 57 and 62.

[27] A court conducting a review for reasonableness enquires into the qualities that make a decision reasonable, referencing both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justifications, transparency and intelligibility within the decision-making process. "But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law", *Dunsmuir* at para 47.

[28] The analysis in *Dunsmuir*, does not apply to issues of procedural fairness or natural justice. The fairness of the proceedings is not measured based on whether they are "correct" or "reasonable" in the *Pushpanathan/Dunsmuir* sense. Rather these issues are reviewed based on whether the proceedings met the level of fairness required by law: *Moreau-Bérubé v New Brunswick (Judicial*

Council), 2002 SCC 11, [2002] 1 SCR 249 at para 74; *CUPE v Ontario (Minister of Labour)(Retired Judges Case)*, 2003 SCC 29; [2003] 1 SCR 539 at paras 100-103; *McLeod v Alberta Securities Commission*, 2006 ABCA 231, 391 AR 121 at para 31; *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 FCR 195 at paras 42-45. Because the court decides whether the fairness standard has been met without affording deference, in that sense fairness is reviewed for "correctness": *Boardwalk Reit LLP v Edmonton (City)*, 2008 ABCA 220, 91 Alta LR (4th) 1 at para 174.

[29] The issue regarding the Commission's retrospective application of penalty amendments also attracts the correctness standard. This appeal comes before this court pursuant to a statutory right of appeal and there is no privative clause in the *Securities Act*. Although the Commission has considerable expertise in securities matters, and the Commission has been given the responsibility (by the *Securities Act*) of administering Alberta securities law, the question of the applicability of the presumption against retrospectivity is a question of law that transcends the Commission's specialized expertise and is of central importance to the legal system. Taken together, these factors suggest that correctness is the appropriate standard on which to review the issue of the Commission's retrospective application of penalty amendments: *Dunsmuir* at para 55.

[30] The issue of the violation of the *Alberta Bill of Rights* was abandoned.

V. Analysis

1. Reasonable apprehension of bias

[31] The appellants advanced several discrete (but sometimes related) arguments in support of their contention that the Commission by virtue of its structure, composition and actions had created a reasonable apprehension of bias. Specifically there appear to be four branches to this argument, these being: institutional (or structural) bias, reasonable apprehension of bias created by the matter of an ongoing investigation regarding the conduct of certain members of the Commission (the Alleged Controversy); reasonable apprehension of bias created by the Commission calling its Chief Accountant to give expert testimony at the hearing; and, (in an argument raised for the first time during oral submissions before this court), the fact that the Commission under the terms of the *Securities Act* is entitled to retain the fines it levies.

A. Institutional bias

[32] The standard of review for the issue of institutional bias is correctness: *Ironside v Alberta (Securities Commission)*, 2009 ABCA 134 at para 102, 454 AR 285 [*Ironside*].

[33] Workum appealed the Institutional Bias Ruling of the Commission wherein it had dismissed his application brought by way of Notice of Application filed May 13th, 2005, and a Notice of Constitutional Question seeking an Order to Dismiss or Perpetually Stay the hearing into the allegations against the appellants on the grounds of institutional bias combined with the actions of

certain of its members and alleged breaches of the Canadian *Charter of Rights and Freedoms* (*Charter*) and the *Alberta Bill of Rights*. During the course of oral argument before this court, there was not much reference made to the institutional (or structural) bias argument however, in my view, it needs to be addressed.

[34] The Commission summarized the grounds of the Institutional Bias application as follows:

> - the Respondents "have not been, and will not in the future be, afforded a full and fair opportunity...to respond to the allegations", contrary to the principles of natural justice and the principles enunciated in the *Canadian Charter of Rights and Freedoms* (the *Charter*) and the *Alberta Bill of Rights*, RSA 2000, c A-14 (the *Bill of Rights*);
>
> - "the investigation leading up to and continuing throughout [these matters], has been irreparably harmed", thus depriving the Respondents of a fair and impartial hearing;
>
> - "the structure and form of the [Commission]…have vitiated the possibility that any respondents in hearings before the [Commission], including the [Respondents], will receive fair and impartial treatment…[and] have also irreparably harmed the possibility that the [Respondents] have had, or will ever have, a fair hearing …";
>
> - "a reasonable apprehension of institutional bias has arisen as a result of the structure and form of the [Commission] which has, *inter alia*, not restricted senior members of Staff of the [Commission] from improperly interfering in investigations and the operations of the [Commission]", again denying the Respondents a fair hearing;
>
> - the Respondents' rights to life, liberty and security of the person have been breached, contrary to the *Charter*, and such breaches are not saved by section 1 of the *Charter*; and
>
> - the Respondents' have been deprived of their rights to liberty, security of the person and enjoyment of property without due process of law, contrary to the *Bill of Rights*.

[35] The appellant Workum in his Institutional Bias Factum advances the following grounds of appeal:

> (a) the ASC erred in law in concluding that it could continue to proceed against Mr. Workum in the within proceeding, despite what is submitted to be the reasonable apprehension of institutional bias that arose from a combination of its structure, its significant and sweeping powers and the Members involvement in investigating complaints about enforcement activities and policies;
>
> (b) the ASC erred in law in concluding that it could continue to proceed against Mr. Workum in the within proceeding, despite what is submitted to be a breach of the *Alberta Bill of Rights* arising from the ASC's inability to, *inter alia*, provide a fair hearing in accordance with the principles of fundamental justice due to the combination of its structure, its significant and sweeping powers and the Members involvement in investigating complaints about enforcement activities and policies.

[36] In Workum's Institutional Bias Factum, this argument appears to be somewhat of a hybrid in that counsel seemed to be arguing that there is a reasonable apprehension of institutional bias as a result of a combination of the Commission's structure with its overlapping functions, "its significant and sweeping powers" and the Alleged Controversy.

[37] Workum argued that the Supreme Court of Canada's decision in *Brosseau v Alberta (Securities Commission)*, [1989] 1 SCR 301, 93 NR 1 [*Brosseau*], and cases following it are no longer relevant due to the passage of time. Workum went on to argue that at the time *Brosseau* was rendered, the Commission's investigative and adjudicatory structures were separated into an investigative agency and an adjudicatory board but have since been combined in such a way that the institution necessarily appears to be biassed. Moreover, he made much of the Commission's increased powers which he argued exacerbated the problem of bias.

[38] Overlaying this rather traditional argument, Workum raised a second argument, namely, that there is a reasonable apprehension of bias arising out of the Alleged Controversy which took place at the Commission. Specifically, Workum argued that there was an indication that the Commission did not enforce the provisions of the *Securities Act* in a fair manner, that the only individuals to be investigated were members of the Commission itself and the findings were never made public but only reported to the Minister. As a result, Workum argued it was an error for the members of the Commission to adjudicate the case against him while also investigating issues of enforcement.

[39] For its part the Commission argued that Workum has misunderstood the nature of the amendments to the Act and that separation of the adjudication and enforcement functions in the post

Brosseau era has actually been cemented and not reversed. The Commission argued that although the Board and Agency were recombined through a 1995 amendment, the most important effect of that amendment was to remove the powers of the adjudicators to order an investigation. The Commission argued that the power lies solely with the ASC staff (specifically the Executive Director) and not the Commission.

[40] The Commission also argued that there was insufficient evidence presented by Workum that the Alleged Controversy led to a biased hearing in this case, citing the decision of this court in *Ironside*.

[41] I will deal with these two arguments separately.

[42] However, firstly, a review of the legislative history is appropriate. In 1981, the Alberta Legislature passed the *Securities Act*, SA 1981, c S-6.1, which received royal assent on June 2, 1981. The 1981 *Securities Act* entrenched a tripartite structure whereby the Commission exercised investigative, prosecutorial and adjudicatory functions.

[43] In 1987, a committee was struck as a result of the concerns of the Minister of Consumer and Corporate Affairs that "the current structure of the Securities Commission may create a perception of conflict between its role as an investigator and prosecutor of various offences under the Act on the one hand, and as a judge in these very same matters on the other hand".

[44] The committee produced a report in 1987 (the McCoy Report) which recommended that the adjudicative function be split from the investigative and prosecutorial functions at the Commission because even though there may be no actual bias at the Commission, there was indeed a perception of bias.

[45] In response to the McCoy Report's recommendations, in 1988 the province passed the *Alberta Securities Commission Reorganization Act*, SA 1988, c-7, which amended the 1981 *Securities Act*, creating a Board of the Alberta Securities Commission and an Agency of the Alberta Securities Commission, separating the adjudicators from the investigators. The Agency was responsible for the enforcement and securities clearance functions and the Board was responsible for the adjudicative and policy-making functions.

[46] The effect of the amendments was to create a Board and an Agency within the Commission, and then remove from the Board (the adjudicative and policy arm of the Commission) the power to order an investigation and to review the results of an investigation. The Board still retained the authority under section 15 of the *Securities Act*, however, to conduct an investigation on its own initiative.

[47] Rather than reversing that separation of functions in 1995, the *Securities Amendment Act, 1995*, SA 1995, c-28, cemented it. The amendment reunited the Board and Agency into a single unit,

but it also placed the power to order an investigation solely into the hands of the Executive Director in section 17, and repealed sections 32 and 33 which had permitted the Minister of Consumer and Corporate Affairs to order an investigation.

[48] Most importantly, section 15 was also amended. Prior to the amendment, the Commission had the power to conduct a "hearing, review, inquiry, **investigation** or other proceedings..." [emphasis added]. The 1995 amendment removed the term "investigation" from the section, taking with it the last of the legislative powers the adjudicators once had at the Commission to initiate, participate in, review, or prosecute an investigation. The end result was the complete legislative separation of the adjudicative and investigatory functions at the Commission.

[49] This court would apply the standard of correctness to the question as to whether the institutional structure of the Commission creates a reasonable apprehension of bias.

[50] In *Brosseau*, the Supreme Court of Canada held that a reasonable apprehension of bias did not exist where, pursuant to its legislation, a securities commission performs policy, investigative, and adjudicatory functions.

[51] The issue in *Brosseau* was whether the Commission was guilty of institutional bias due to its members acting both as investigators and adjudicators. The Supreme Court of Canada affirmed an express exception to the principle of natural justice in the legal maxim, *nemo judex in causa sua debet esse* (no one ought to be judge in her own case), where the overlap of functions in a tribunal was authorized by legislation. The Court stated at 310 of the decision:

> In order to disqualify the Commission from hearing the matter in the present case, some act of the Commission going beyond its statutory duties must be found.
>
> Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. **If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*.** [emphasis added]

[52] This court recently considered allegations of institutional bias predicated upon the structure of the Commission in *Ironside*, concluding at paras 103 and 105:

> In light of the Legislature's decision to delegate to the Commission a broad adjudicative and policy function in service of the public interest, there should be no *a priori* presumption that the institutional structures of the Commission or its individual panels or appointees are tainted by bias merely due to their proximity to the superintended industry, as the test is not that of the "unduly suspicious observer"...
> ...
> The appellants make no headway by simply pointing to the Commission's operating circumstances or to the practical and legal requirements within which it functions under its legislative mandate.

[53] In his factum, counsel for Workum cites the views contained in certain academic reports that investigatory and adjudicative functions at securities commissions should be separated. These views, considered as they may be, however, are not the law in Canada.

[54] In my view, *Brosseau* clearly remains the law of Canada and indeed more recently the Supreme Court of Canada in *Oceanport Hotel Limited v British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52, [2001] 2 SCR 781, reiterated that the Legislature can create tribunals with overlapping functions as long as a single officer does not participate in the investigation only to sit later as an adjudicator. This of course is not the case here as only the Executive Director can initiate an investigation and that person does not sit on any panel deciding the case. In effect, this supports argument for counsel for the respondent that the investigative and adjudicative functions are now more separate than they were when the system that was considered by the Supreme Court of Canada in *Brosseau* existed.

[55] Counsel for Workum also argued that the Commission has grown more powerful since 1995 having regard to the amendments to the *Securities Act* in 1999, 2000, 2003 and 2005. He went on to argue that the cumulative result of these subsequent amendments has been to strengthen the Commission's enforcement and sanctioning capabilities and that this has had the effect of exacerbating the problem he argues was identified in 1987. I do not see as a matter of law how the fact that the Commission's powers of enforcement and its ability to impose greater sanctions in any way derogates from the authority and applicability of *Brosseau* and those cases from the Supreme Court of Canada following it.

[56] Accordingly, I find no merit to this aspect of the appeal.

B. Reasonable apprehension of bias created by the alleged controversy

[57] However, Counsel for Workum did not rest his argument of reasonable apprehension of institutional bias on this basis only. He went on to argue that the Alleged Controversy as described by the Commission in the Merits Decision is significant to this appeal. The basic facts were stated to be as follows:

> (a) Allegations were made about the Commission regarding improper conduct in relation to the Commission's enforcement activities;
>
> (b) The first allegations were apparently made by the former Director of Enforcement, Wayne Alford, to the Minister of Revenue in January 2004;
>
> (c) Subsequently, further complaints were made by "anonymous" sources;
>
> (d) In January 2005 the Members of the Commission retained counsel to conduct a privileged and confidential investigation into the complaints;
>
> (e) Counsel, Perry Mack, interviewed each complainant and the Chair and the Executive Director of the Commission;
>
> (f) The Members reported to the Minister of Finance on March 31, 2000; and
>
> (g) On April 4, 2005 the Minister of Finance confirmed that the information she had been provided was privileged and confidential but stated that "the report indicates that the enforcement policies of the Alberta Securities Commission have been applied and continue to be applied consistently and fairly and with an even hand".

[58] This court has held that it applies the standard of correctness to a discrete question of procedural fairness or to an error of law going directly to reasonable apprehension of bias on the part of the panel, because in each instance the "line of enquiry" invites that standard: *Ironside* at para 102.

[59] In his Institutional Bias Factum, counsel for Workum referred to the "uncontroverted evidence" in the Affidavits filed in support of the Institutional Bias application referred to in para 31 above. In almost all instances, the "uncontroverted evidence" represented personal opinion and speculation along with second or third hand opinion in the form of newspaper articles, legislative debates and the position papers attached to the Affidavits. Not a single witness was called to testify in support of the Institutional Bias application. The panel commented on the insufficiency of the "uncontroverted evidence" at paras 73-79 of its Institutional Bias decision:

> [73] Three types of exhibits to the Monopoli Affidavits touched on the Alleged Controversy. The largest category consisted of copies of

media reports or commentary that referred to the Commission, certain of its current or former personnel or its operations. Others were excerpts from Alberta Hansard of comments made in the legislature touching on the same topics. A third category consisted of statements by or on behalf of part-time Commission Members.

[74] As noted, the Respondents pointed to case law to support the admissibility of the news reports. That, though, was not in dispute. We allowed the Monopoli Affidavits (including the appended news reports and other material) into evidence. However, we find that this evidence lacks probity and utility for the following reasons.

[75] The first category of the exhibits to the Monopoli Affidavits involved, with varying degrees of editorial comment, second-or third-hand accounts of various sorts of claims – none proved – apparently levied against certain individuals associated with the Commission. The actual claims, assuming they existed and were reduced to writing, were not in evidence. No actual complainants gave evidence. What we have is, at best, hearsay evidence, sometimes more than once removed, of allegations and suppositions. At most, it is a mixture of speculation, subjective impression and an indication of media and political interest. To the extent this is evidence of anything, it is no more than evidence that various people have spoken of speculation or subjective belief. This is very different from the newspaper evidence in *Newfoundland Telephone*, where the reports contained actual quotations of statements by a hearing panel member specifically referring to the case before him.

[76] The second category of the exhibits to the Monopoli Affidavits involved comments made by legislators. At most we discern from them some questions and answers and expressions of opinion, none in our view demonstrating anything conclusive in support of the Respondents' contentions.

[77] Turning to the third category of the exhibits to the Monopoli Affidavits, the statements of part-time Commission members, those were first person statements made by individuals who did have some direct knowledge of the matters being discussed. In those statements they disavow some of the complaints apparently made. In other words, the Respondents' own evidence shows that the claims of impropriety had been publicly controverted.

> [78] Moreover, none of this evidence appended to the Monopoli Affidavits makes any mention whatsoever of the Hearing, the Proceedings, either Respondent or any of the companies with which they were involved or alleged to have been involved.
>
> [79] The Monopoli Affidavits thus demonstrate, at most, that various sorts of claims have been made; some individuals with knowledge have strongly disputed them; and a variety of sources and commentators further removed have disseminated some of these positions and in some cases added their own views. To the extent that the Monopoli Affidavits reflect the public record, that public record shows interest in and competing views about unproved claims, and no more than that.

[60] During his oral submissions, counsel for Workum acknowledged to the Court of Appeal that he did not allege that there was any actual bias on the part of the Commission or ASC Staff. Furthermore, he made it clear that he was not in any way arguing the merits of the Alleged Controversy. He further conceded that he had no specific knowledge that any of the hearings held by the Commission with respect to this matter were in any way referenced in the Mack Report. Nor was there anything raised in Wayne Alford's letter of complaint to Minister Greg Melchin, dated January 9, 2004, (which first broached the Alleged Controversy) that pointed to this particular investigation either.

[61] He did however make specific reference to the decision of the Ontario Court of Appeal in *EA Manning v Ontario Securities Commission* (1995), 23 OR (3d) 257, 80 OAC 321 [*Manning*]. Briefly stated, the facts in *Manning* were as follows. E.A. Manning Limited (Manning) was a registered securities dealer in Ontario that dealt in penny stocks during the early 1990s. The Ontario Securities Commission (OSC) was concerned at that time about the business practices of penny stock dealers, such as calling citizens at home to solicit sales and using high pressure sales tactics. The OSC created a policy to remedy these abuses. One month after the policy was issued, Manning and other securities dealers commenced an action against the OSC alleging that the policy was *ultra vires*. They were successful in the first instance and the decision was upheld on appeal.

[62] Approximately a year after the policy was struck down, the OSC issued notices of hearing against Manning on allegations that it had engaged in high-pressure sales tactics, failing to disclose that they were selling securities as principals instead of agents and failing to disclose that markups were included in the purchase price. Some of the OSC Commissioners set to hear the case had been involved in the adoption of the policy. Manning applied to court to prohibit the OSC from proceeding with the hearings on the basis that the Commissioners involved with the policy were likely to have prejudged the case against Manning.

[63] In the first instance before the Ontario Divisional Court, (reported at *EA Manning Ltd v Ontario Securities Commission* (1994), 18 OR (3d) 97, 72 OAC 34) Manning was partly successful. Montgomery J., speaking for the Divisional Court, found that there was a reasonable apprehension of bias on the part of the Commissioners who had taken part in the adoption of the policy, as they may have closed their minds to the issue of penny stock dealers engaging in unfair sales practices. In addition, the fact that the OSC had defended the policy on appeal was evidence of prejudgment because it had gone beyond merely defending its jurisdiction, to argue that Manning and others were guilty of unfair practices.

[64] However, Montgomery J. found that there was no reasonable apprehension of bias on the part of Commissioners appointed after the adoption of the policy. The application for prohibition was dismissed and the hearings were allowed to proceed before a panel of Commissioners appointed after the adoption of the policy. Manning appealed the dismissal of its application to the Ontario Court of Appeal.

[65] Dubin C.J.O., speaking for the Court, considered the statutory framework within which the OSC functioned. Within that framework, the OSC was the investigator, prosecutor and the judge. Absent statutory authority, this structure would normally be found to violate basic principles of fairness. However, quoting the decision of L'Heureux-Dubé J. in *Brosseau*, Dubin C.J.O. held that such overlapping functions did not give rise to a reasonable apprehension of bias where the overlap was authorized by statute. The prohibition sought by Manning could not be granted because the structure of the OSC alone did not give rise to a reasonable apprehension of bias.

[66] By contrast, the appellants have not pointed to anything in their arguments that the Commission had a particular interest in convicting either or both of them due to the Alleged Controversy. As this court stated in *Ironside* at para 103:

> A bias claimant must do more than make bald assertions of bias or apprehension of bias whether said to rest on (a) institutional concerns or (b) case-specific accusations. Either form of claim requires substance. It is not the perspective of the "very sensitive or scrupulous conscience" ...

The appellants have therefore not established a case of reasonable apprehension of bias arising from the Alleged Controversy. Accordingly, I dismiss this ground of appeal.

The Alberta Bill of Rights

[67] During oral submissions, counsel for Hennig rightly acknowledged this to be a weak argument and later went on to abandon it altogether. Therefore it need not be addressed in these reasons.

C. Reasonable apprehension of bias created by the Commission calling its Chief Accountant to give evidence

[68] An analysis of this ground of appeal also engages the standard of correctness.

[69] During the course of oral submissions, counsel for Hennig argued that in qualifying its own Chief Accountant Snell to testify as an expert on accounting principles, the Commission was biased in favour of his evidence because it was an "institutional impossibility" that the Commission would find against the evidence given by its own Chief Accountant. Counsel for Hennig went on to argue that the Commission took contradictory positions with respect to Snell's evidence. On the one hand, the Commission stated that it was fully capable of conducting its own analysis of the GAAP issues in this case. However, the Commission used Snell's evidence to confirm its findings on that point. The appellants went on to argue that if Snell's evidence was not necessary, it should not have been received by the Commission based upon the test for admissibility as set out by the Supreme Court of Canada in *R v Mohan*, [1994] 2 SCR 9, 166 NR 245 [*Mohan*]. Counsel further argued that due to Snell's superior position within the Commission structure, it was an impossibility that the Commission would find against his evidence.

[70] For its part the Commission argued that the appellants had not raised sufficient assertions of bias to meet the test of "the informed person, viewing the matter realistically and practically - and having thought the matter through". The Commission pointed out that Snell's testimony was anything but ready made as it had as its basis Snell's exchange of correspondence with the appellants back in 2001, at a time when Snell was already concerned about the gains that had been reported in PPI. Finally, counsel for the Commission argued that if it is impossible for it to find against Snell's evidence, it would be impossible for it to find against any of the evidence provided by any of its employees.

[71] Although the appellants have created a new phrase, their submissions really amount to an argument of reasonable apprehension of institutional bias. In another context, the fact that Snell was a superior official within the same body deciding the case might give rise to a reasonable apprehension of bias. However, in the administrative context, this is not the case. Where the statute creating a tribunal authorizes overlapping functions of this sort, the traditional rules regarding bias do not apply. The oft-quoted statement of L'Heureux-Dubé J. at 310 of *Brosseau*, governs in the administrative context:

> Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. **In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of**

> **functions which in normal judicial proceedings would be kept separate**. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. **If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias"** ***per se***. In this case, the appellant complains that the Chairman was both the investigator and adjudicator and that, therefore, the hearing should be prevented from continuing on the grounds of reasonable apprehension of bias. [emphasis added]

[72] In the same way that it cannot be said that it is impossible for the Commission to find against its own staff, the sole fact that the Chief Accountant is a senior official of the same tribunal does not give rise to a reasonable apprehension of bias. The only difference between Snell and the ASC Staff is seniority. The *Securities Act* has created a tribunal with various overlapping functions to which the reasonable apprehension of bias test does not apply. Section 16 of the *Securities Act* reads as follows:

> **Staff**
>
> 16 The Commission may
> (a) appoint
> (i) an Executive Director of the Commission,
> (ii) a Secretary of the Commission, and
> (iii) any other employees that it considers necessary,
>
> and
> (b) obtain the services of persons having technical or professional knowledge required by the Commission in connection with its business.

[73] Therefore the Commission is empowered to appoint a Chief Accountant such as Snell in the same manner as it is allowed to appoint ASC Staff to prosecute the cases before it. Hearing evidence from either employee does not give rise to a reasonable apprehension of bias because it is expressly authorized by statute.

[74] This court dealt with an allegation of bias in the context of expert evidence in *Re Public Utilities Board Act* (1985), 67 AR 251, 42 Alta LR (2d) 48. In that case, the Utilities Board had retained a Mr. Drazen as a consultant to prepare a report on streamlining its General Rate Application (GRA) processes. Around the time that Drazen submitted his report, Northwestern Utilities Ltd (NUL) submitted its GRA with the Board. A group of industrial interveners opposed NUL's GRA and hired Drazen as their expert to give evidence on their behalf. NUL applied to have Drazen's evidence struck from the record on the basis that Drazen had recently worked for the Board

and there was a reasonable apprehension of bias that the Board would favor his evidence. The Board held that it could not decide the case and referred it to this Court.

[75] Although this court found that it did not have sufficient evidence, such as Drazen's retainers with either the Board or the industrial group to decide the case, it rendered a judgment *dubitante*. At para 11 of the decision, Kerans J.A. stated that:

> We agree that a reasonably well-informed person could properly fear - based solely on the fact of the retainer - that the board has great confidence in Drazen and his skills. We do not accept that this fact *alone* permits a reasonable apprehension that the board thinks he is better than other experts; he may have been chosen over others for many reasons, as for example availability. Moreover, the respect shown by the retainer would not, of itself, raise an apprehension in the mind of a reasonable *and* well-informed person that the board would, as a result of its high opinion of Drazen, pre-judge a case by unthinkingly preferring his evidence. We test this thesis in this way: assume the retainer was completed before the hearing began. Would a reasonable apprehension of bias remain? We think not. **We liken the expression of respect involved in a hiring to the expression of respect involved in accepting his testimony - and relying on it - in a previous case. Past expressions of respect, whether by hiring or by acceptance of testimony, surely do not lead to a reasonable fear of a future unthinking (by which we mean based upon anything other than the merits of the case) reliance on later testimony by the same expert**. [emphasis added] [italics in original]

[76] However, he continued at para 13:

> The real thrust of Mr. Major's complaint, as he conceded during oral argument, is not so much the past engagement of Drazen as its result: his ongoing relationship with the board. This, we think, is a legitimate concern. It is a dangerous policy to put Mr. Drazen in the position where he is at once advisor and witness. Assume, for example, that he has met regularly and privately with a member of the panel while his testimony is under consideration by that member. No matter how much the member protests that the merits were never discussed, a well-informed person can reasonably fear that these private dealings might lead the trier to hesitate to cause himself – and Mr. Drazen – the awkwardness of rejection of his testimony. A professionalism which transcends such concerns is not only demanded of but possible for those who perform a judicial role; but

> one might reasonably fear failure to comply with that standard by one who exposes himself to avoidable pressure of this sort. Private dealings between an individual board member and a witness – unless shown to be totally innocuous – should not be permitted to occur while his evidence is under deliberation. [emphasis added]

[77] This latter paragraph suggests that hearing the testimony of an ongoing employee of the Board would give rise to a reasonable apprehension of bias. However, Drazen's appointment did not appear to have been authorized by any statute and he was not an ongoing employee in the same context as the Chief Accountant was in this case.

[78] A situation of bias in expert evidence was also addressed by this Court in *Syncrude Canada Ltd v Michetti* (1994), 162 AR 16, 120 DLR (4th) 118 [*Michetti*]. That case dealt with an Occupational Health and Safety/Workers' Compensation Board investigation into a workplace death. The Workers' Compensation Appeals Commission (WCAC) had received an expert report from Syncrude, and another expert report from a Dr. Cheng, who disagreed with Syncrude's report. At the same time however, Cheng had been hired by the WCAC as its "technical advisor" on the case, as it was customary for the WCAC to have advice from an expert. This court found that Mr. Cheng was too closely allied with the WCAC to give expert testimony.

[79] There are indeed cases from this court which suggest that there is a reasonable apprehension of bias when an expert called to testify is employed by the tribunal rendering the decision. However, none of these decisions were made in the context of a tribunal such as the Commission, where its operating statute authorizes it to hire and retain expert employees such as the Chief Accountant and ASC Staff to prosecute cases. In the cases referred to above, the experts had been hired on limited retainers. In the *Utilities Board* case, there was no statutory provision that would have allowed the Board to maintain an expert on an ongoing basis. If there had been an ongoing relationship between the Board and Drazen, this would have given rise to a reasonable apprehension of bias. In *Michetti*, the WCAC customarily retained an expert to assist it in its work, but again, no statutory provision was cited to authorize this.

[80] Although the appellants have raised an interesting argument, this situation is covered by the Supreme Court of Canada's decision in *Brosseau*. Section 16 of the *Securities Act* authorizes the Commission to retain an expert such as Snell, whereas the statutes at issue in *Utilities Board* and *Michetti* did not. This statutory authorization means that in the administrative context, the fact that the expert is part of the same tribunal as the Commission does not give rise to a reasonable apprehension of bias.

[81] This does not dispose of the issue entirely, however, in that the appellants have also argued that the Commission erred by using Snell's evidence to confirm its own findings even though the Commission had stated that Snell's evidence was not necessary to assist it. The appellants submit that this violates the rules of expert evidence set down in *Mohan*.

[82] Section 29(f) of the *Securities Act* states that "the laws of evidence applicable to judicial proceedings do not apply" to hearings before the Commission. The appellants did not provide a case to show that the *Mohan* criteria survive this particular provision.

[83] On the contrary, the decision of this court in *Alberta (Workers' Compensation Board) v Appeals Commission*, 2005 ABCA 276, 371 AR 318, suggests that *Mohan* has no application in administrative hearings. In that case, the WCB argued that the Appeals Commission failed to properly qualify an expert and therefore his evidence should not have been used in the decision. Even though the *Workers' Compensation Act*, RSA 2000, c W-15, did not have a specific provision excepting the rules of evidence, this court found that a rule of general application was that the rules of evidence do not apply in administrative proceedings.

[84] David Jones and Anne de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at 306, note that while the *Mohan* criteria do not apply in the administrative context, consideration of the criteria may lead a tribunal to accord more or less weight to the evidence. However, as noted at para 69 of *Alberta (Workers' Compensation Board) v Appeals Commission*, the standard of review does not permit this court to intervene in questions of weight. In the result, I dismiss this ground of appeal.

D. Is a reasonable apprehension of bias created by the fact that the Commission is entitled to keep the administrative penalties it levies under section 199?

[85] This ground of appeal also attracts the standard of correctness.

[86] During the course of his oral argument, counsel for Workum raised for the first time the argument that since the Commission is entitled to keep for itself the administrative penalties it levies (unlike the situation in Ontario where the money levied by the Ontario Securities Commission apparently goes to general revenue) this creates a reasonable apprehension of bias.

[87] The argument appeared to be that since the administrative penalty levied under section 199 of the *Securities Act* is paid to the Commission, the Commission has a pecuniary interest in finding market participants guilty and this therefore creates a reasonable apprehension of bias.

[88] Counsel acknowledged that earlier cases like *Brosseau* and *Re WD Latimer Co and Attorney-General for Ontario* (1973), 2 OR (2d) 391, 43 DLR (3d) 58, aff'd (*sub nom W D Latimer Co v Bray*) (1974), 6 OR (2d) 129, 52 DLR (3d) 161 [*Latimer*], were to the effect that where a statute authorizes a tribunal to collect on behalf of an administrative body, any resulting apprehension of bias is created by the statute and cannot be overturned.

[89] However, counsel for Workum added the gloss that this is only true where the administrative penalty is levied in the public interest and not levied on the basis of a violation of securities law. He argued that the administrative penalty assessed under section 199 of the *Securities Act* is based upon a violation of law, so the findings in *Brosseau* and *Latimer* do not apply.

[90] He went on to argue that the payment scheme contemplated by sections 19, 199 and 202 of the *Securities Act* gives rise to a reasonable apprehension of bias. At the time of the Commission's Sanctions Decision, those provisions read as follows:

> **Financial matters re Commission**
>
> 19(1) All fees, costs, administrative penalties under section 199, settlement money and other revenue arising with respect to the administration of Alberta securities laws or any other enactments administered by the Commission are the revenues of the Commission.
>
> (2) All money from any source that is received by and all money that is payable to the Commission belongs to the Commission.
>
> (3) Any income earned from the money of the Commission accrues to and belongs to the Commission.
>
> (4) The Commission
>
>> (a) shall open and operate bank accounts in its own name and shall deposit all money received by the Commission into those bank accounts;
>>
>> (b) shall from the money received by the Commission make disbursements and pay all of the expenditures, debts and liabilities incurred by the Commission;
>>
>> (c) may borrow money for the purposes of carrying out its business;
>>
>> (d) may invest money for the purposes of carrying out its business;
>>
>> (e) may be a participant under section 40 of the *Financial Administration Act*.

(5) Notwithstanding subsections (1) and (2), **money that is received by the Commission from administrative penalties under section 199 may be expended only for the purposes of educating investors and promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets**. [emphasis added]

Administrative penalty
199(1) If the Commission, after a hearing,

(a) determines that

(i) a person or company has contravened or failed to comply with any provision of Alberta securities laws, or

(ii) a director or officer of a person or company or a person other than an individual authorized, permitted or acquiesced in a contravention or failure to comply with any provision of Alberta securities laws by the person or company,

and

(b) considers it to be in the public interest to make the order,

the Commission may order the person or company to pay an administrative penalty of not more than $1,000,000 for each contravention or failure to comply.

(2) The Commission may make an order pursuant to this section notwithstanding the imposition of any other penalty or sanction on the person or company or the making of any other order by the Commission related to the same matter.

Payment of costs

202(1) If, in respect of a person or company whose affairs were the subject of an investigation, the Commission or the Executive Director

> (a) is satisfied that the person or company has not complied with, or is not complying with, any provision of Alberta securities laws, or
>
> (b) considers that the person or company has not acted in the public interest,

the Commission or the Executive Director, as the case may be, may, after conducting a hearing, order the person or company to pay, subject to the regulations, the costs of the investigation, including any costs incurred in respect of services provided by persons appointed or engaged under section 28, 41 or 43 or the appearance of any witnesses under this Act.

(2) If, in respect of a person or company whose affairs were the subject of a hearing, the Commission or the Executive Director, as the case may be, after conducting the hearing

> (a) is satisfied that the person or company has not complied with, or is not complying with, any provision of Alberta securities laws, or
>
> (b) considers that the person or company has not acted in the public interest,

the Commission or the Executive Director, as the case may be, may order the person or company to pay, subject to the regulations, the costs of or related to the hearing that are incurred by or on behalf of the Commission or the Executive Director, including any costs incurred in respect of services provided by persons appointed or engaged under section 28, 41 or 43 or the appearance of any witnesses under this Act.

(3) Where a person or company is guilty of an offence under Alberta securities laws, the Executive Director may order the person or company to pay, subject to the regulations, the costs of any investigation carried out in respect of that offence, including any costs incurred in respect of services provided by persons appointed

> or engaged under section 28, 41 or 43 and the appearance of any witnesses under this Act.
>
> (4) The Executive Director may prepare and file with the clerk of the Court of Queen's Bench a certificate certifying the amount of the costs that the person or company is required to pay under subsection (1), (2) or (3).
>
> (5) A certificate filed under subsection (4) with the clerk of the Court of Queen's Bench has the same force and effect as if it were a judgment of the Court of Queen's Bench for the recovery of debt in the amount specified in the certificate together with costs of filing.
>
> (6) The *Alberta Rules of Court* with respect to costs and the taxation of costs do not apply to costs referred to in this section.

[91] Bias at an institutional level can only be shown if a fully informed person would have a reasonable apprehension of bias in a substantial number of cases decided by the tribunal: Sara Blake, *Administrative Law in Canada*, 4th ed (Markham: LexisNexis, 2006) at 102; citing *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at paras 71 and 76, 177 NR 325 [*Matsqui*].

[92] In the case of pecuniary bias, the mere existence of an actual financial stake in the outcome of a case is sufficient to disqualify the decision maker: David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 325. No further inquiry beyond the directness of the stake is necessary to satisfy the *Matsqui* test and the size of the interest is treated as irrelevant. However, to have a stake in the outcome involves the existence of tangible, incontrovertible links: Mullan at 325.

[93] The issue of directness of interest and how tribunals dispose of the fines that they collect was incidentally discussed by Wilson J. in her decision in *R v Wigglesworth*, [1987] 2 SCR 541, 45 DLR (4th) 235 [*Wigglesworth*]. The issue in *Wigglesworth* was whether or not a conviction for a "major service offence" under the *Royal Canadian Mounted Police Act*, RSC 1970, c R-9 (the *RCMP Act*), resulted in a true penal consequence so as to attract the protection against double jeopardy contained in section 11(h) of the *Charter*. An officer had been found guilty of a major service offence when he assaulted a prisoner during questioning. He argued that he should not also be liable to punishment under the *Criminal Code*, RSC 1970, c C-34.

[94] In her discussion of the kinds of penalties that would result in true penal consequences, Wilson J. also addressed the issue of monetary penalties assessed by administrative tribunals. At 561 of her judgment, she stated that:

> ...the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere

> of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. **One indicium of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the Royal Canadian Mounted Police Act, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the Force, it is more likely that the fines are purely an internal or private matter of discipline** ... [emphasis added]

[95] Since disciplinary matters intended to regulate conduct within a private sphere of activity did not attract the protection afforded by section 11(h) of the *Charter*, the fine levied under the *RCMP Act* was not a true penal consequence. The officer was accordingly also liable to a charge under the *Criminal Code*.

[96] The beginnings of the test for directness of pecuniary interest can be seen in the words of Wilson J. Although her judgment focussed on fines in relation to section 11 of the *Charter*, which she had found did not apply, the importance of where fines were paid was subsequently argued in relation to section 7 of the *Charter*, which guarantees impartial tribunals for certain proceedings.

[97] In *Pearlman v Law Society (Manitoba)*, [1991] 2 SCR 869, 84 DLR (4th) 105, [*Pearlman*] the Supreme Court of Canada considered whether or not there was a sufficiently direct link between the outcome of the case and the pecuniary interest of the tribunal that would violate the guarantee of impartiality contained in section 7 of the *Charter*. The contention was that the mere perception that a pecuniary interest could possibly exist is enough to taint a tribunal's eventual decision.

[98] The *Pearlman* case concerned the power of the Benchers of the Law Society of Manitoba to levy costs from a lawyer found guilty of professional misconduct. The lawyer owned real estate in the City of Winnipeg and had taken issue with the way building inspectors had been dealing with his property. He wrote several letters to the City indicating his position and the remedies he intended to pursue against them, including remedies under the *Criminal Code* with a view to having a charge laid against one inspector in particular. While attempting to serve his statement of claim against the inspector, a physical altercation took place. When the Crown refused to lay charges, the lawyer commenced a private prosecution but was ordered to pay $1,500 to the inspector. The lawyer refused to pay.

[99] The Law Society instigated disciplinary proceedings against the lawyer and cited him on three counts of conduct unbecoming a barrister and solicitor. The Judicial Committee of the Law Society determined the preliminary point that the Law Society had jurisdiction to proceed with the

charges. The lawyer objected to the jurisdiction of the Law Society and appealed all the way to the Supreme Court of Canada. He argued that the power of the Benchers to award costs of the disciplinary proceedings against him created a built-in apprehension of bias. Since the Benchers had a pecuniary interest in the outcome of the proceedings, the tribunal was not an impartial one and therefore, there was a violation of section 7 of the *Charter*.

[100] Iacobucci J., speaking for the Court, gave three reasons why the impugned costs provision did not create a perception of pecuniary interest sufficient to give rise to a reasonable apprehension of bias. Firstly, at 891-92, Iacobucci J. noted that the costs levied did not constitute a profit or gain for the Law Society because it was used to defray investigation costs that the Law Society had incurred to uncover legitimate grounds for disciplinary sanctions.

[101] Secondly, at 891-92, he noted that any pecuniary interest that the Benchers might have had in seeking costs was too attenuated and remote to give rise to an apprehension of bias. Iacobucci J. found:

> Costs recouped pursuant to s. 52(4) become the property of the Law Society as a whole, and **in no way do they accrue to the individual members of the committee who determined that the charge of misconduct was in fact well-founded**. As such, there is no personal and distinct interest on the part of the Judicial Committee members. Just as it is speculation to suggest that a disciplinary committee deciding that a lawyer should be disbarred is tainted because it is thereby marginally reducing the competition for the committee's members, it is also speculation to suggest that the Law Society would apply these recouped costs in such a manner as to reduce the practicing or non-practicing fees of Law Society members by some small amount. **These recouped costs, which are after all just reimbursements for expenses already incurred, might equally well be allocated by the Executive and Finance Committee to any other of the numerous educational or promotional endeavors of the Law Society**. [emphasis added]

[102] Lastly, Iacobucci J. noted that even if the costs recovered were used to reduce the bar fees of members of the Law Society, including the Benchers themselves, the overall reduction would be far too small to give rise to an apprehension of bias. He found that the average level of costs assessed in a given year could only reduce bar fees by a couple of dollars for each member. At 892 he found it would be “unreasonable to suggest that this minuscule indirect benefit might predispose members of the Judicial Committee towards a finding of guilt.”

[103] An argument of pecuniary interest outside of the *Charter* context can be found in *Matsqui*. In that case, Canadian Pacific Railway (CP Rail) challenged the jurisdiction of the Matsqui Indian

Band (Band) to tax railway land running through their reserve. The power to tax had recently been granted to First Nations. The assessment system set up by the Band had a court of revision for initial appeals of the amount, an assessment review committee to hear appeals from the courts of revision and a final appeal on questions of law to the Federal Court, Trial Division.

[104] When CP Rail was given its notice of assessment, it immediately commenced a judicial review application in the Federal Court, requesting that the assessment be set aside entirely. The Band brought a motion to strike the judicial review application, in part because CP Rail had not exhausted all of its adequate alternative appeals. CP Rail countered that the appeal mechanisms did not constitute adequate alternatives because they gave rise to a reasonable apprehension of bias. Since members of the Band sat on the appeal bodies, CP Rail argued that the bodies had a pecuniary interest in maximizing the amount of tax paid to the Band.

[105] The Supreme Court of Canada split over the issue of whether the assessment boards had jurisdiction to determine whether or not lands formed part of the reserve, and would therefore be liable to tax. However, none of the justices expressed disagreement with Lamer C.J.'s decision on pecuniary interest. He began by noting in paragraphs 70 and 71 that the alleged interest in higher tax-payments was purely speculative. He pointed out that the Band members might just as easily have had an interest in minimizing taxes to attract outside investment in the community. Next, he cited the decision of Iacobucci J. in *Pearlman* for the proposition that there is no directness of pecuniary interest where monies paid accrued to the community as a whole and not to individual members. At para 72 he stated that:

> The concern that these members might be inclined to increase taxes in order to maximize the income flowing to the band is simply too remote to constitute a reasonable apprehension of bias at a structural level. More to the point, the income raised through the tax assessment scheme does not accrue to any individual, but rather to the community as a whole. There is, as Iacobucci J. stated at p. 892, "no personal and distinct interest on the part of" tribunal members. In my view, the potential for conflict between the interests of members of the tribunal and those of parties appearing before them is, at this stage, speculative. Therefore, it cannot be said that a reasonable apprehension of bias would exist in the mind of a fully informed person in a **substantial number** of cases. [emphasis in original]

[106] The issue of fines accruing to a securities commission in particular was considered by the OSC in *Re Rowan*, 2009 LNONOSC 941, (2010), 33 OSCB 91 [*Re Rowan*]. There, Rowan, a securities broker, had been found guilty of a number of violations of the Ontario *Securities Act*, RSO 1990, c S.5 [*OSA*] and challenged the power of the OSC to impose an amended $1,000,000 fine. On the basis of the decision in *Wigglesworth*, counsel argued on behalf of Rowan that because the fines

were designated to go to the Consolidated Revenue Fund, they were more likely to be a penal consequence that the OSC did not have the power to impose under the *Charter*.

[107] The OSC found at paragraphs 57-59 that the indicia of a true penal consequence were not present even though the *OSA* directed the monies to be paid into the Consolidated Revenue Fund absent a specific designation otherwise. It found that because all of the penalties that had been collected to date had been designated to go to the benefit of third parties, and not to the Fund, the fine was not a true penal consequence.

[108] In the present case, section 19(5) of the *Securities Act* makes it explicitly clear that monies received by the Commission from administrative penalties under section 199 may only be expended for the purposes of educating investors and promoting or otherwise enhancing knowledge of the securities and financial markets.

[109] Under the circumstances there can be no reasonable apprehension of bias created by virtue of the fact that the administrative penalties are paid to the Commission for the use as stipulated in section 19(5) of the *Securities Act*. Accordingly, I dismiss this ground of appeal.

2. The *Securities Act* does not allow for the retrospective application of the increased penalties to the appellants in this case.

[110] Counsel for the respondent agreed with counsel for the appellants that the retrospective effect of the increase in penalty attracts the standard of correctness.

[111] Section 199 of the *Act*, which sets out the maximum administrative penalty that may be imposed, was amended in 2005 and had the effect, *inter alia*, of increasing the administrative penalty to a maximum of $1,000,000 for each contravention or failure to comply. Prior to that amendment in 2005, the maximum administrative penalty was $100,000 per contravention.

[112] This court previously ruled in *Alberta Securities Commission v Brost*, 2008 ABCA 326, 440 AR 7 at paras 56-57, that the presumption against retroactive application of the 2005 amendment to the maximum administrative penalty in section 199 of the *Securities Act* does not apply because such penalties are not punitive but are instead designed to protect the public.

[113] However, counsel for Workum sought to distinguish *Brost* from the facts of this case. Specifically, in *Brost*, the acts underlying the contraventions began before but continued through the date of the amendment to the *Securities Act*, whereas all the conduct alleged in the matters heard by the Commission in this case occurred and were completed prior to the date of the amendment.

[114] Furthermore, counsel for Hennig specifically referred this court to the decision of the Supreme Court of Canada in *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473 [*Imperial Tobacco*], and in particular paras 69 through 71. In *Imperial Tobacco*,

the Supreme Court of Canada dealt with the validity of the *Tobacco Damages and Health Care Costs Recovery Act* (Act) that had been passed by the British Columbia Legislature. That legislation authorized an action by the province against tobacco manufacturers for the recovery of health care expenditures incurred by the government in treating tobacco-related illness. Liability hinged on those individuals having been exposed to tobacco products due to the manufacturer's tort in British Columbia or breach of a duty owed to persons in the province, and on the provincial government having incurred health care expenditures in treating diseases in those individuals. The Act specifically stated it operated retroactively to allow the government to recover for past expenditures[1].

[115] The Act also gave to the government a reverse burden of proof for certain elements of certain claims. There were a number of issues considered by the Supreme Court of Canada in that case, one of them being the issue of retrospectivity and retroactivity.

[116] The legislation in *Imperial Tobacco* in effect created a new cause of action in favour of the government of British Columbia and had retroactive effect as mandated by section 10 of the Act. However, such explicit language of retroactivity or retrospectivity is absent in this case.

[117] Recently, the British Columbia Court of Appeal in *Thow v British Columbia (Securities Commission)*, 2009 BCCA 46, 90 BCLR (4th) 36 [*Thow*], considered whether an amended administrative penalty in British Columbia could be applied to past conduct. Thow argued that the maximum penalty at the time of the infractions was $250,000. The administrative penalty imposed on him under the amended provisions was $6 million. The British Columbia Securities Commission conceded that all of the alleged infractions on which the administrative penalty was based pre-dated the amendment to a higher penalty.

[118] After citing Driedger's framework for distinguishing between retroactive and retrospective laws, Groberman J.A. for the Court stated at paras 14-16 that:

> 14 The parties to this appeal have spent some time arguing as to whether the application of the new legislation by the Securities Commission in this case is properly described as "retroactive" or "retrospective". Arguments can be made in favour of either

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[1] Specifically, section 10 of the Act read as follows:

> When brought into force under section 12, a provision of this Act has the retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under section 2 (1) arising from a tobacco related wrong, whenever the tobacco related wrong occurred.

> characterization. **On the face of it, attaching a new penalty to a completed act is simply attaching new consequences, for the future, to an event that has already taken place; it fits within the description of "retrospective" application of a statute**.
>
> 15 **It can be argued, however, that the penalty attached to an infraction is an inherent part of the definition of the infraction, and that a change in the maximum penalty attached to a completed act is a "retroactive" application of legislation**. This latter characterization appears to be the one adopted by Professor Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths Canada Ltd., 2002) at p. 559:
>
>> **Under the definition of retroactivity accepted by Canadian courts, a provision increasing the fine or term of imprisonment attaching to an offence would be considered retroactive if applied to offences committed before commencement of the provision**.
>
> 16 While the distinction between "retroactive" and "retrospective" application of legislation can be useful in some contexts, it is not, in my view, particularly helpful in resolving the case at bar. [emphasis added]

[119] While Groberman J.A. found that the application in *Thow* was retrospective, he stated that the result would be the same if he had considered it to have been retroactive. This is because he concluded that the amendment was not designed with protection of the public in mind, but rather, to punish Thow. The exception for public protection statutes therefore could not apply and the presumption against retrospectivity could not be rebutted. Even if he had concluded that the application was retroactive, there was no express provision in the amendment to allow retroactive application. Whether the application was retrospective or retroactive, the result would have been the same - only the pre-amendment penalty could be applied.

[120] This reasoning has been recently followed by the OSC in *Re Rowan*. In that case, the OSC considered whether their new power to levy administrative penalties could apply to conduct that pre-dated the amendment that granted such power. The OSC followed the reasoning in *Thow* and found that the administrative penalty was punitive and not designed to protect the public, so the presumption against retrospectivity applied. The OSC did not undertake a thorough analysis of whether the application was retroactive or retrospective – it took for granted that it was retrospective.

[121] The reasoning in *Thow*, that an administrative penalty is not designed to protect the public, has been explicitly rejected by this court. In *Lavallee v Alberta (Securities Commission)*, 2010 ABCA 48, 474 AR 295 [*Lavallee*], the appellant argued that the maximum amount under the revised administrative penalty provision in Alberta amounted to a true penal consequence, which would trigger certain *Charter* protections. In rejecting this argument, Paperny, J.A. stated at para 25:

> I prefer the reasoning of LeBel J. in *Cartaway Resources Corp.*, 2004 SCC 26, [2004] 1 S.C.R. 672 at para. 60, ("Cartaway"") where he found that general deterrence is "an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative". He agreed with Ryan J.A., the dissenting judge in the appeal court in that case [2002 BCCA 563], when she wrote that **"[t]he notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others". As the Supreme Court concluded in *Cartaway*, general deterrence is a relevant factor when the Commission imposes sanctions designed to carry out the public protection purposes of securities regulation**. To the extent that *Thow* reaches a different conclusion, I decline to follow it. [emphasis added]

[122] Given this court's prior decisions in *Brost* and *Lavallee*, I hold that the Commission was correct to conclude that the presumption against retrospective application does not apply in this case because the administrative penalties under the *Securities Act* are not punitive but rather are designed to protect the public: *Brost* at para 57. Therefore, I dismiss this ground of appeal.

3. By imposing administrative penalties in the amount that it did, did the Commission create a reasonable apprehension of bias?

[123] In oral argument, counsel for Workum had suggested that the amount of the administrative penalty and costs imposed by the Commission create a reasonable apprehension of bias. This court has already determined that the Commission is entitled to deference with respect to the imposition of sanctions: *Del Bianco* at para 5. Accordingly, reasonableness is the applicable standard of review.

[124] It is undoubtedly true as argued by counsel for the appellants that the amount of the administrative penalties was large, but provided the balance of the Commission's decision is unassailable, there is no basis whatsoever for this court to intervene with respect to the amount of the sanctions imposed. Given my disposition of the balance of the appeal, this ground of appeal fails.

4. Did the Commission err in imposing liability upon Workum and Hennig for the misstatements contained in the financial statements of PPI for the years 1998, 1999, and 2000?

[125] The Commission's findings of fact upon which it based its ruling that the appellants were legally liable for the misstatments contained in PPI's financial statements for the years 1998, 1999 and 2000 attracts the standard of reasonableness. The Commission's conclusion of legal liability based upon infractions of the *Securities Act* or its Rules also attracts the standard of reasonableness: *Brost* at para 28.

[126] The First Notice of Hearing stated in part as follows:

> ***Summary of Breaches***
>
> 1. Staff alleges that Proprietary Industries Inc.'s ("PPI") consolidated financial statements for the years ended September 30, 1998, September 30, 1999 and September 30, 2000, were not prepared in accordance with generally accepted accounting principles ("GAAP"), in contravention of section 144 of the rules made pursuant to the Act (the "Rules") and contained misrepresentations contrary to subsection 194(1)(b) of the Act, both of which are contrary to the public interest.
>
> 2. Further, Staff also alleges that PPI made misrepresentations in respect of material submitted or given to the Commission contrary to subsection 194(1)(a) of the Act and the public interest.
>
> ***Parties***
>
> 3. PPI, formerly known as Proprietary Energy Industries Inc. is an Alberta corporation with its head office in Calgary.
>
> 4. At all material times, PPI was a reporting issuer in Alberta. It was listed on the Toronto Stock Exchange ("TSE") on April 12, 1999, and became a component company of the TSE 300 composite index as of December 14, 2000.
>
> 5. At all material times, Peter Jay Workum ("Workum") was a director and president of PPI. Theodor Hennig ("Hennig") was the chief financial officer, secretary and treasurer of PPI.

[127] On September 19, 2003, the Amended First Notice of Hearing was issued and it changed *inter alia*, the wording of paragraph 5 to read as follows:

> At all material times, Peter Jay Workum ("Workum") was a director and president of PPI. Theodor Hennig ("Hennig") was the chief financial officer, secretary and treasurer of PPI. **Any acts by PPI**

> **referred to herein were carried out by Workum and/or Hennig and as such, Workum and Hennig are responsible for those acts**.
> [emphasis in original]

The Commission's claim against PPI was resolved in September 2003 and PPI was then dropped from the proceedings.

[128] The matter did however proceed to hearing against Hennig and Workum and in due course the Commission ruled that they were both personally liable for the misrepresentations contained in PPI's financial statements for the years 1998, 1999 and 2000.

[129] During oral submissions before this court, counsel for the appellants did not seriously argue that there were not misrepresentations and other improprieties contained in the PPI financial statements. Rather, the focus of their argument was that as a matter of law, neither individual appellant was liable for those misrepresentations or improprieties.

[130] Criticism was also levelled as to the wording of the Amended First Notice of Hearing and its lack of precision. Counsel for the respondent however replied that the nature of the allegations against the appellants in this regard were known and that they were not misled.

[131] As this court stated in *Del Bianco* at para 11:

> Notices of hearing are reviewed on a standard of adequacy, not one of perfection. As there is no specific statutory requirements for the notice, "the general rule is that an administrator must give adequate notice to permit affected persons to know how they might be affected and to prepare themselves adequately to make representations": David P. Jones and Anne S. de Villars, *Principles of Administrative Law* (Toronto: Carswell, 1999) at 258. Although this notice does not track the precise wording of the *Securities Act*, it meets that standard.

Although the amended First Notice of Hearing does not track the precise wording of the *Securities Act*, it meets the standard enunciated by this court in *Del Bianco*.

[132] In his factum, counsel for Workum pointedly compared the wording used by the Commission in paragraph 5 of its Amended First Notice of Hearing to the wording utilized in the Notice of Hearing it had issued in June 2001 in the matter *Re Ironside*. Specifically, in *Re Ironside*, the Commission was proceeding against two individuals who had been associated with Blue Range Resources Corporation and were alleged to have breached, *inter alia*, sections 161(1) and (c.1) and section 161(4) of the *Securities Act* by:

> authorizing, permitting or acquiescing in Blue Range Resource Corporation (Blue Range) filing Financial Statements for the year ending March 31, 1998, that failed, contrary to s. 161(1)(c.1) of the SA, to accord with GAAP

[133] Both sections 194(1) (a) and (b) and section 144 of the Rules were expressly referenced in both the First Notice of Hearing and the Amended First Notice of Hearing. Section 194(1)(a) and (b) of the *Securities Act* at the time relevant to these proceedings read as follows:

> 194(1) Any person or company that does one or more of the following commits an offence:
>
> > (a) makes a misrepresentation in respect of any material submitted or given under the Alberta securities laws to the Commission, its representative, the Executive Director or any person appointed to make an investigation or audit under this Act;
> >
> > (b) makes a misrepresentation in any document required to be filed or furnished under the Alberta securities laws;

Rule 144 at the operative time read, in part, as follows:

> **144. Preparation of financial statements** - (1) The financial statements permitted or required by the Act or these Rules shall be prepared in accordance with
>
> > (a) generally accepted accounting principles, and
> >
> > (b) any applicable provision of the Act or these Rules.

[134] Regarding section 194(1), Fruman J.A. for this court indicated in *Del Bianco* at para 12:

> Offences pursuant to this section, other than section 194(1)(a) and (b), are typically undertaken through criminal prosecutions in provincial court.

However, to sustain a conviction under section 194(1)(a) or (b), it was necessary for ASC Staff to prove pursuant to section 194(4) that the officer or director “authorized, permitted or acquiesced” in the misrepresentation. This provision has not been construed as one of strict liability, but rather, one that incorporates a subjective *mens rea*. As noted by Fruman J.A., at para 12 of *Del Bianco*, to enforce a penalty under section 194(4) “the Commission would have to find knowledge or intent and consider such defences as mistake of fact and due diligence.”

[135] The second method of imposing liability on directors or officers for misrepresentation would be pursuant to sections 198, 199 or 202 of the *Securities Act*. In the past, the Commission has noted that section 198 differs in that it does not require finding a contravention of Alberta securities laws before an order can be made in the public interest: *Re Ironside*, 2006 ABASC 1930 at para 23. Indeed, this is clear from the wording of the section. In such a case, the *mens rea* that would go to prove an offence under section 194 would merely be taken into account in the determination of the public interest.

[136] However, to levy an administrative penalty under section 199 requires a preliminary finding of a contravention of Alberta securities laws before a determination of the public interest can be made. Under this section, knowledge or intent is required to ground the contravention: *Del Bianco* at para 12. An order in the public interest cannot be used as a means to circumvent the requirement of knowledge or intent.

[137] In this case, the Commission used its power under section 199 to levy an administrative penalty for, *inter alia*, the misrepresentations that the appellants were held to be responsible for in PPI’s financial statements for 1998, 1999 and 2000. The Commission discussed a great deal of evidence to support its finding in this regard.

[138] Arguably, the Commission properly analyzed potential defenses and concluded that they had no application to this case. The appellants alleged that imposing liability on them personally for misrepresentations in financial statements was an improper piercing of the corporate veil. The Commission examined this defense at paragraphs 683 and 684. It concluded at paragraph 684 that the appellants themselves had orchestrated the misrepresentations to suit their needs of showing large profits to investors, rather than to suit the requirements of GAAP.

[139] The appellants also alleged that the Commission should adhere to the business judgment rule and not intervene in business decisions. The Commission analyzed this defense between paragraphs 685 and 687. Based on the decision of the Supreme Court in *Kerr v Danier Leather Inc,* 2007 SCC 44, [2007] 3 SCR 331, the Commission found that the business judgment rule only applied to decisions within a reasonable range of business alternatives. In this case, the construction of the financial statements was not chosen from an array of reasonable alternatives, but instead, was aimed at the deception of investors. The Commission found that the defense of the business judgment rule did not apply.

[140] Finally, the appellants raised the defense of due diligence, which was analyzed between paragraphs 688 and 691. The Commission found that the appellants were the ones who withheld much of the pertinent information from their auditors, allowing them to operate on the basis of

partial or misleading information, which skewed the financial statements. The Commission found that the appellants knew that they could not legally rely on the resulting opinions of the auditor. The due diligence defense was found not to apply.

[141] With regard to the necessary knowledge or intent, the Commission made a number of findings in its judgment which show that the appellants had personal knowledge of the misrepresentations in the financial statements. Below, I briefly reiterate the structure of the transactions that gave rise to the misrepresentations, and the findings of the Commission that the appellants were personally involved.

[142] Hennig was primarily involved with the Newmex Transaction. PPI held 4,282,875 Newmex shares, the majority of those outstanding. Of those, 1,700,000 were subject to a hold period that would expire on May 5, 1999 and 2,582,875 were subject to escrow conditions. The transaction had two principal parts: Pensionskasse de ASCOOP (ASCOOP) and SPIDA Ausgleichskasse (SPIDA) each purchased 750,000 non-escrowed Newmex shares and LynChris purchased all of the escrowed shares. The problem with the Newmex Transaction was that it was not a true sale, but the appellants recorded it as such in 1998 to show a large profit.

[143] The Commission found that ASCOOP and SPIDA were given the right to compel PPI to take back the Newmex shares for “the market price at the time of the transaction”. The Commission concluded that the arrangement gave both sides to the purported sale the right to be restored to their original pretransaction positions but with ASCOOP and SPIDA entitled to receive a ten percent annual premium or profit (para 546).

[144] There were a number of reasons why the LynChris portion was not a true sale: (1) the promissory note that LynChris used to pay for the shares could simply be cancelled by a return of the shares to PPI; (2) the security for the promissory note was provided by Hennig and PPI Director, Douglas Street in the form of PPI shares; (3) the escrow conditions required LynChris to invest in mining operations, but PPI indemnified LynChris for all of these outlays; and (4) PPI also indemnified LynChris for all tax consequences arising out of the transaction before the Newmex Shares were repurchased by PPI.

[145] The Commission found that during the year 2000 PPI reacquired all of its purportedly sold Newmex shares from the above three buyers (para 141).

[146] The Commission found that Hennig was personally involved at numerous points during the life of the “sale”. To begin, the basis of the transaction was the personal relationship and trust between Hennig and Faithfull, the President of LynChris (para 159). Hennig attended the meeting between Faithfull and his lawyer and convinced Faithfull to enter the agreement even though the lawyer opined that the agreement was illegal (paras 160 and 166). Faithfull testified that he was advised by Hennig personally that ASCOOP and SPIDA would indemnify LynChris for any outlays paid (paras 170 and 217). Hennig only gave partial information regarding the transaction to KPMG,

which approved the inclusion of the sale in PPI's 1998 financial statements (paras 185 and 187). To comply with GAAP, LynChris had to put up 20 per cent of the value of the promissory note as security, but Hennig arranged to provide this security himself in the form of PPI shares registered to him (paras 189, 196 and 218). Hennig was also the one to personally ensure Faithfull that PPI would indemnify him for any tax implications (paras 220, 222 and 223).

[147] Furthermore, Andrew Mackenzie, a former Director of PPI, testified that either Workum or Hennig told him personally not to worry about losing Newmex, which had great potential, because "it wasn't going far" (para 510). This statement shows that either Workum or Hennig knew that the sale was not a true sale.

[148] Workum was more involved in the Orion and Azterra transactions, with assistance from Hennig. The Commission found that the Orion transaction was not a simple arrangement but rather it involved several parties and several steps. However, at its core was the sale of Swiss Plastering (owned by PPI's subsidiary EnerGCorp) to Orion. In exchange for its shares in Swiss Plastering, EnerGCorp was to receive shares in Orion and a promissory note. Orion at the time was controlled by PPI Director Douglas Street (para 240, 241).

[149] In the Orion transaction, Hennig was personally involved with the auditor, KPMG, in an attempt to find a structure that would qualify as a gain to be recognized in 1999. The Commission found that Hennig withheld certain information from KPMG (paras 261 and 262). The Commission found that KPMG's auditing opinion was based on the assumption that the transaction was arm's length, that PPI would not have any continuing control and that the promissory note would be guaranteed by a substantial and independent financial institution all of which were not true (para 263). The author of the KPMG opinion testified as to how he was misled by Hennig's information (para 264).

[150] The Commission also found that it was Workum who personally approached ASCOOP, to guarantee the Orion transaction (para 287). Workum was also the one to assure that the guarantees would never be called upon (para 287). The Commission further found that Orion's financial statements for its 1999 financial year did not account for the Orion transaction in the body of those statements but rather discussed it as a "Subsequent Event" in the notes. This stands in contrast to PPI's financial statements for 1999 which showed this to be a completed sale.

[151] The Azterra transaction was another transaction for which PPI reported again in its financial statements in this case for the financial year 2000. The Commission found that although this too was a complicated transaction, its essence could be distilled to three key parts, those being:

(i) Azterra was to convey the Polo Club project to PPI's subsidiary EnerGCorp;

(ii) Azterra would be recapitalized through a share consolidation, with PPI assuming the burden of existing Azterra debt and injecting additional money in return for an Azterra promissory note; and

(iii) Azterra would buy from PPI and EnerGCorp their respective subsidiaries Willow Creek and Creative Classics.

The consideration payable for the third part of the transaction (which the Commission found to be most relevant to the proceedings) was to consist of shares in Azterra and promissory notes. (para 341)

[152] With regard to the Azterra transaction, Workum was again the one who organized Cofima to provide a guarantee for Azterra's promissory note and assured Cofima that the guarantee would not be called upon (para 369). Workum was also personally involved in getting the Azterra directors to sign the promissory notes (paras 359 and 360).

[153] A problem particular to the Azterra transaction was that the properties being transferred were never valued and the appellants had to attempt to get a valuation after they considered the "sale" to have closed. Workum instructed Mackenzie to continue getting valuations until one fit with the gain that they had already recognized in their financial statements (para 397).

[154] In its financial statements for 2000, PPI showed a gain on the sale of business in the amount of $5,612,779 relating the disposition of Creative Classics and Willow Creek Homes to Azterra. For its part however Azterra in its audited financial statements for the relevant year listed the Willow Creek and Creative Classics transactions not in the body of the financial statements but rather in a note headed "Pending Transactions" (para 387).

[155] With respect to the 1998 financial statements, Workum "signed off" on those statements in his capacity as a director of PPI. With respect to the financial statements for 1999, again Workum "signed off" on those statements in his capacity both as a Director and President of PPI. Finally, with respect to the financial statements for 2000, Workum and Hennig each "signed off" on the Management's Report in their capacity as President and Chairman, and Chief Financial Officer, respectively, and Workum again "signed off" on the financial statements in his capacity as President and Chairman. In the Management's Report signed by both Workum and Hennig, the following statement is contained: "All information in this Annual Report is the responsibility of Management." [2]

[156] These actions must be taken into account in assessing Workum's culpability for the misrepresentations contained in those financial statements and Hennig's for at least the financial

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[2] Exhibit 1, Tab 5B, Exhibit 3, Tab B1, and Exhibit 5, Tab 1B respectively.

statements for the year 2000. The Commission expressly made this finding as regards Workum's liability (para 714).

[157] Given its detailed findings of fact, the Commission found more than enough evidence that the appellants were involved with, and responsible for the financial misrepresentations contained in PPI's financial statements for the years 1998, 1999 and 2000 to hold them personally liable. The wording of the Amended Notice of First Hearing (see paras 127 - 134 *supra*) was adequate to convey to Workum and Hennig the gravamen of the complaint being advanced against them by the Commission, namely that, as the principals of and driving force behind PPI, they were the ones responsible for the very existence of the three transactions in question and the resultant misrepresentations contained in the 1998, 1999 and 2000 financial statements of PPI. In a very real sense, Workum and Hennig **were** PPI and the doctrine of the corporate veil ought not to be utilized to protect individuals who are actively managing the affairs of a corporation when they are causing that corporation to act fraudulently or improperly.

[158] Indeed, it bears repeating that much of the evidence as found by the Commission was uncontroverted as neither Hennig nor Workum testified before that body. Specifically, the Commission found that both Workum and Hennig were aware that PPI's financial statements for 1998, 1999 and 2000 were not prepared in accordance with GAAP and that that was contrary to Alberta securities law and the public interest. It also further held that the disclosure contained misrepresentations contrary to the public interest and that further these representations were repeated in other documentation also contrary to the public interest.

[159] Section 38(6) of the *Securities Act* provides in part as follows:

> (6) The Court of Appeal may
> ...
>> (c) make any decision that the Commission could have made and substitute its decision for that of the Commission.

[160] On the facts as found by the Commission, there is more than an adequate basis to hold Workum and Hennig personally liable for the misstatements contained in the 1998, 1999 and 2000 PPI financial statements. Accordingly I find them so liable on the basis that the evidence disclosed that Workum and Hennig orchestrated the various transactions in question which led directly to the resultant misrepresentations contained in the financial statements (which included knowing non-compliance with GAPP). Accordingly, this ground of appeal is dismissed and the liability of Workum and Hennig is affirmed.

5. Did the Commission err in allowing Olnick to testify and then to accord no weight to his evidence?

[161] The manner in which the Commission analyzed and dealt with the evidence before it attracts the standard of reasonableness.

[162] Counsel for the appellant Workum commenced his submissions to this court by stating that the Commission had gotten itself into a problem when it moved away from its "core expertise" and in effect allowed Olnick to "highjack" the hearing. Counsel then went on to argue that in light of Olnick being an "incredibly" bad witness, the proper course of action would have been for the Commission to have withdrawn that hearing and started all over again. For his part, counsel for the appellant Hennig made reference to this court's recent decision in *Lavallee* at para 13. He said those comments applied to the witness Olnick.

[163] It is clear that Olnick was a totally unreliable witness and his testimony was completely rejected by the Commission. In its Merits Decision, the Commission stated this regarding Olnick at paras 57-60:

> [57] Olnick testified in the Hearing as a witness for Staff, and he was the source of some documentary evidence tendered by Staff. Staff clearly considered him an important witness. The Individual Respondents, however, strenuously challenged Olnick's motivations, his credibility as a witness and the reliability of the documentary evidence prepared by or obtained through him.
>
> [58] We found Olnick a thoroughly unsatisfactory witness. His claimed failures of recollection went beyond what could reasonably be ascribed to mere lapse of time. He was anything but "forthright, candid and honest" before us. He deliberately avoided answering questions put to him and, when he did answer, frequently did so in a manner that was difficult to believe and, in our view, was designed to obfuscate or mislead. Indeed, he himself admitted that some of his testimony was untruthful - he lied, and admitted to having lied, while testifying under oath in the Hearing.
>
> [59] Olnick was such a difficult and devious witness that we were unable to determine - and considered it inappropriate to try to guess - when he was testifying truthfully and when not. Although we rejected Workum's August 2006 application to have the allegations in the Second Notice of Hearing dismissed (our ruling is cited as *Re Workum*, 2006 ABASC 1737) - a non-suit application predicated in large measure on claimed deficiencies in Olnick's evidence that Workum contended left Staff with not even a prima facie case in respect of those allegations - we ultimately agreed with the Individual

> Respondents that Olnick was too unreliable a witness for us to use any os his testimony.
>
> [60] In the result, we assigned no weight to Olnick's testimony and (as discussed in more detail below) we approached documentary evidence prepared by or obtained through him with utmost caution.

[164] This matter is not equivalent to the situation that arises in criminal proceedings where the testimony of an unsavoury witness for the prosecution will often require the issuance of a *Vetrovec* caution by the trial judge to the jury. In this particular case, the Commission rejected the entirety of Olnick's testimony.

[165] As indicated previously, counsel for Workum argued that in light of Olnick being such an "incredibly" bad witness, the proper course of action would have been for the Commission to have simply withdrawn the hearing and then commenced a new one all over again. It is not entirely clear from his oral submissions whether he was referring to the Commission or to ASC Staff. If counsel was referring to the former, and had the Commission done as suggested, it would have breached its duty of procedural fairness by, in effect, prejudging the case being presented by ASC Staff before the completion of that case.

[166] The decision *Greater Sudbury (City) Police Service v Greater Sudbury (City) Police Service*, 2010 ONSC 270, 259 OAC 226, was a police disciplinary commission appeal. The complainant alleged that the appellant police officer had slapped and kicked him. The credibility of the complainant was raised when the appellant sought to have him identify the police officer working with the appellant. The hearing officer declined a request to show a photo of the appellant to the complainant for identification purposes. The appeal commission affirmed the decision because it found that the hearing officer had concluded that the complainant was an unreliable witness and his testimony would be an exercise in futility. On further appeal, the Ontario Superior Court of Justice, Divisional Court, held the duty of procedural fairness was breached. It stated at para 80:

> A fair reading of the ruling of the Hearing Officer is that, before [the complainant's] testimony was finished, he concluded that the witness was sufficiently unreliable that any positive identification of [the appellant police officer] as the assailant would be irrelevant. The Commission expressed its view that such a pre-judgment of lack of credibility of the witness was a reasonable basis upon which to exclude otherwise relevant questioning. This approach fundamentally misconstrues the requirements of procedural fairness. [The complainant's] testimony was not yet complete. It was not certain that further evidence would not be called in the hearing. The parties' closing submissions were yet to be heard and evaluated. In these circumstances, prejudgment of the quality of [complainant's]

> evidence, and employ of that negative prejudgment to exclude relevant evidence, even if of modest weight only, was not only a denial of procedural fairness but also would lead a reasonable person fully informed of all the circumstances to believe that the Hearing Officer had prematurely determined the value of the evidence of the independent witness who was providing evidence exculpating the appellant.

[167] I can find no fault on the part of the Commission in allowing ASC Staff to have called Olnick as a witness as part of its case and thereafter to have rejected that testimony. The Supreme Court of Canada has stated that credibility is a question of fact and that deference is owed to an administrative tribunal in that regard. McLachlin C.J., speaking for the unanimous court in *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226 at para 38 stated:

> Finally, however, the need for deference is greatly heightened by the nature of the problem – a finding of credibility. Assessments of credibility are quintessentially questions of fact. The relative advantage enjoyed by the Committee, who heard the *viva voce* evidence, must be respected.

[168] If, on the other hand, counsel for Workum was arguing that ASC Staff should have "thrown in the towel" either part way through or at the conclusion of Olnick's evidence, I cannot accede to that suggestion either. The Commission acted reasonably in allowing ASC Staff to present its case and after having an opportunity to review all of it, to completely reject Olnick's testimony. I find no merit in this argument and therefore dismiss this ground of appeal.

6. Did the Commission err in finding there was sufficient evidence - absent the rejected testimony of Olnick - to establish market manipulation, and if so, whether it was done by or at the behest of the appellants, either or both of them?

[169] Whether there was market manipulation or not is a matter within the core expertise of the Commission. This requires deference to be given to the Commission's findings and therefore attracts the standard of reasonableness.

[170] It was the position of ASC Staff that one or other (or both) of the appellants along with Strategic and Cheshire directly and indirectly traded and purchased Newmex shares while knowing (or when they ought to have reasonably known) that the purchases created or may have resulted in an artificial price for the Newmex shares contrary to section 70.1 (b) of the *Securities Act* and contrary to the public interest[3].

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[3] In 2000, when the alleged events occurred, section 70.1 (b) of the *Securities Act* was in force and read as follows:

[171] In his oral submissions, counsel for Workum criticized ASC Staff for not calling any expert witness to testify on the issue of market manipulation. He went on to point out that the appellants had called an expert witness, Michael Horgan, to testify before the Commission regarding market manipulation, or more properly, the lack thereof in his view.

[172] In its Merits Decision, the Commission (at para 1103) specifically noted that it questioned the depth of Horgan's experience in trading techniques and their effects on market prices of publicly traded securities. The Commission went on to state that considering the totality of Horgan's evidence, that while portions of it were useful, overall its focus was too narrow to be persuasive on the issues before it.

[173] In the Merits Decision regarding the issue of market manipulation, the Commission expressly stated that it did not rely on Olnick's testimony in making its findings that market manipulation occurred (para 1104).

[174] ASC Staff's contention was that there had been improper trades/market manipulation with respect to the trading in the shares of Newmex (para 1107) and in particular during the key time intervals of February 25-29, 2000 and September 26-29, 2000.

[175] The Commission's findings with respect to the volume and range of closing prices for the monthly trades in Newmax shares for 2000 were as follows:

Month	**Volume**	**Range of Closing Prices**	**Month-End Closing Prices**
January	67 963	$0.35 to $0.65	$0.40
February	**136 250**	**$0.35 to $1.00**	**$1.00**
March	50 600	$0.90 to 0.47	$0.47
April	14 350	$0.36 to $0.59	$0.50
May	28 639	$0.36 to $0.45	$0.36

70.1 No person or company shall, directly or indirectly, trade in or purchase a security or an exchange contract if the person or company knows or ought reasonably to know that the trade or purchase does one or more of the following: ...

(b) creates or may result in an artificial price for a security or an exchange contract: ...

The section was subsequently slightly reworded and renumbered as section 93(a)(ii)

June	28 400	$0.35 to $0.65	$0.65
July	26 260	$0.52 to $0.75	$0.60
August	38 480	$0.55 to $0.62	$0.55
September	**146 660**	**$0.55 to $1.20**	**$1.20**
October	39 840	$0.65 to $1.00	$1.00
November	42 874	$1.00 to $1.05	$1.04
December	27 526	$1.00 to $0.65	$0.65

[176] Counsel for the Commission in his factum argued (at paras 41-43) of other evidence corroborating the testimony of Olnick. In light of the Commission's express disavowal of reliance upon any of Olnick's testimony, this is beside the point. The only way that the Commission's finding of market manipulation could be found to be reasonable and further, that it was directed by the respondents, either or both of them, was if there was other evidence upon which it could reasonably have come to that conclusion.

[177] The Commission extensively reviewed the market manipulation allegations over the course of some 169 paragraphs in the Merits Decision. The Commission itemized the documentary evidence it reviewed in assessing the allegations, noting that many of the documents were introduced into evidence through counsel for the appellant Workum. Brokerage account statements for the off-shore companies, provided by Olnick, were determined earlier in the Merits Decision to be reliable information.

[178] The Commission analyzed and commented upon the "hallmarks of market manipulation" by examining Olnick's trading which included: market domination, wash trade or match orders, closing trades and " high closes", upticks, and uneconomic purchasing. (paras 1149-80 of Merits Decision). The Commission also noted that cases of alleged market manipulation often involve circumstantial evidence and concluded that such was the case here.

[179] I agree with submissions for counsel for the respondent that the Commission was entitled to consider the evidence of alleged market manipulation, not in a vacuum, but in light of the Commission's extensive consideration of other evidence, and in particular the need for Newmax shares to be trading at one dollar by February 29, 2000 to justify a reacquisition price PPI paid to LynChris for the Newmax shares. In light of the evidence examined by the Commission, I find that its finding there was market manipulation with respect to the shares of Newmax was reasonable.

[180] I now turn my attention to whether it was reasonable for the Commission to find that market manipulation was done by or at the behest of the appellants. The Commission at para 1237 of the Merits Decision made the following observation:

> The evidence supports no plausible explanation or motive - including a market-making motive - for Olnick to act as he did but for the desire to achieve the price results PPI wanted. We found striking - indeed difficult to credit on any other account - the coincidence between the end-of-February market price and the price at which PPI had agreed to reacquire Newmex Shares from LynChris, and the coincidence between the profit realized by ASCOOP and SPIDA from their resale of Newmex Shares at the end-of-September market price and the return they were promised in their original agreement with PPI.

[181] In light of the evidence before the Commission and in light of its findings, I hold that the Commission acted reasonably in coming to the conclusion that there was indeed market manipulation as alleged and that it was done at the behest of both appellants as the senior officers and orchestrators of the actions of PPI.

7. Did the Commission fail to give adequate reasons for holding Hennig liable for market manipulation, secret commissions, failure to file insider trading reports and misrepresentations?

[182] This ground of appeal raises the Commission's analysis and weighing of the evidence and therefore engages the reasonableness standard of review: *Brost* at para 28.

[183] In the Second Notice of Hearing ASC Staff alleged:

> Throughout **Workum's** employment with PPI, and in numerous documents filed with the Commission and provided to its shareholders, **Workum** maintained that **he** did not receive any salary or remuneration from PPI. **Hennig disclosed some remuneration from PPI**. Staff's investigation, however, has revealed that Workum and Hennig have received, directly or indirectly, substantial fees **or monies** from PPI and related companies **that were not disclosed**. [emphasis in original]

In its Merits Decision, the Commission devoted over 350 paragraphs (paras 733-1085) to this issue.

[184] The Commission concluded that the appellants were the "orchestrators and beneficiaries" of an arrangement whereby PPI failed to disclose the compensation arrangement it had with the appellants. The evidence before the Commission was overwhelming that Workum had received the benefit of these undisclosed financial arrangements but the evidence was much skimpier as regards Hennig.

[185] During the course of oral argument and in response to a question posed to him by a member of the panel, counsel for Workum acknowledged that most of the trading was carried out in the off-shore accounts that were controlled by the appellants.

[186] There was also evidence before the Commission that Hennig had informed ASC Staff in an under oath interview that International Investment Club was a bank account at CIBC over which Hennig had sole signing authority, and that he (Hennig) used the International Investment Club account to pay for personal expenses on behalf of Workum[4].

[187] I have already dealt with the Commission's findings with respect to Hennig's involvement with market manipulation and his responsibility for the misrepresentations contained in the PPI financial statements for 1998, 1999 and 2000. With respect to the matter of receiving personal benefits (as opposed to directing those to Workum), there was at least some evidence on that as found by the Commission.

[188] Specifically, the Commission, in its Merits Decision at paras 1046-47, made the following findings with respect to Hennig:

> [1046] Between September 2000 and June 2001 Hennig sent several facsimilies to Olnick directing wire transfers totalling $860 000 from the Mandolin Offshore Bank Account to the IIC Bank Account. We noted above that all of the cheques in evidence written from the IIC Bank Account in and after 2000 were payable to Hennig, PE Holdings or for the established benefit of Workum, and we concluded that payments from the IIC Bank Account were for the benefit of Hennig and Workum.
>
> [1047] Among the cheques in evidence written on the IIC Bank Account in and after 2000, all signed by Hennig, was one in the amount of $307 000 payable to "Macleod Dixon in Trust"; it bore handwritten notations of a residential address, the word "acquisition" and the name "K Hennig". Another cheque issued during that period from the account was in the amount of $38 112.18 and payable to a Calgary car dealer with the notation "2002 Subaru [-] Peter J. Workum". We find that Hennig directed Olnick to make these payments totalling $860 000 to the IIC Bank Account, and that both Individual Respondents benefited from payments from the account.

[189] Having regard to the evidence before the Commission, I hold that its finding in this regard was reasonable and therefore, this ground of appeal is dismissed.

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[4] Exhibit 113

VI. Conclusion

[190] For the reasons set out above, I hereby dismiss the appellants' appeals herein.

Appeal heard on March 9, 2010

Reasons filed at Calgary, Alberta
this 20th day of December, 2010

McDonald J.A.

I concur:

Authorized to sign for: McFadyen J.A

Reasons for Judgment Reserved of
the Honourable Mr. Justice O'Brien
Dissenting in Part

I. Introduction

[191] I concur with the judgment of McDonald J.A. on all points, save one, with respect to which I respectfully dissent. In my view, the personal liability imposed upon Workum and Hennig for the failure of Proprietary Industries Inc. (PPI) to prepare financial statements in accordance with Generally Accepted Accounting Principles (GAAP) and for PPI's misrepresentations therein, cannot be sustained, and their appeals should be allowed to that extent only.

II. Allegations and Findings Relating to Personal Liability

[192] The first Amended Notice of Hearing alleged, as follows:

> ***Summary of Breaches***
>
> 1 Staff alleges that Proprietary Industries Inc.'s ("PPI") consolidated financial statements for the years ended September 30, 1998, September 30, 1999 and September 30, 2000, were not prepared in accordance with generally accepted accounting principles ("GAAP"), in contravention of section 144 of the rules made pursuant to the Act (the "Rules") and contained misrepresentations contrary to subsection 194(1)(b) of the Act, both of which are contrary to the public interest.
>
> 2 Further, Staff also alleges that PPI made misrepresentations in respect of material submitted or given to the Commission contrary to subsection 194(1)(a) of the Act and the public interest.
>
> . . .
>
> ***Parties***
>
> 5. At all material times, Peter Jay Workum ("Workum") was a director and president of PPI. Theodor Hennig ("Hennig") was the chief financial officer, secretary and treasurer of PPI. <u>Any acts by PPI referred to herein were carried out by</u>

Workum and/or Hennig and as such, Workum and Hennig are responsible for those acts.
. . .

Misrepresentations

77. In or about June 2001, in response to an application brought by Ventra, PPI provide Staff of the Ontario Securities Commission with a copy of the Orion Promissory Note containing Hennig's signature. PPI knew or ought to have known that the document was not authentic.

78. Further, in or about July 2001, PPI advised Staff that the Orion Promissory Note had been issued as of September 30, 1999. Staff alleges that Orion had not issued the Orion Promissory Note as of September 30, 1999.

78.1 Workum and Hennig represented to Staff that the TAC Promissory Note was executed June 30, 2000, when in fact it was not executed until August 2001.

78.2 Workum and Hennig represented that Cofima was an independent financial institution when in fact Cofima was not independent of PPI, Workum and Hennig.

78.3 Hennig represented that the risks and rewards of ownership had been transferred in the Newmex transaction when this in fact was not accurate.

78.4 Hennig represented that the Newmex share certificates had been issued in the name of LynChris when in fact they had not.

78.5 Hennig represented that all parties to the Newmex transaction had conducted themselves in accordance with the purchase and sale agreements but in fact all parties conducted themselves in accordance with agreements not disclosed.

78.6 Hennig represented the KPMG had supported PPI"s accounting treatment of the three transactions when in fact KPMG did not support PPI's treatment of the Orion or TAC transactions, nor did it have full knowledge of the agreements in the Newmex transaction.

> 79. In addition, in or about August 2001, Hennig advised Staff that LynChris had posted security for the LynChris Promissory Note when he knew that this was not accurate.
>
> 80. Finally, PPI advised Staff that as of the date of the Swiss Plastering and TAC transactions, the Cofima guarantees were reinsured by an affiliated company Gruppo Triad-FCC, SPA, an entity located in Panama City, Panama. Staff alleges that the reinsurance did not take place until the summer of 2001, <u>if at all</u>.
>
> 81. Further, the reinsurance was not disclosed in the 1999 Financial Statements or the 2000 Financial Statements.
>
> 82. Staff submits the above misrepresentations were contrary to subsection 194(1)(a) of the Act and contrary to the public interest. [emphasis in original indicating amendments]

[193] The Commission held that Workum and Hennig were personally liable for PPI's failure to prepare financial statements in accordance with GAAP, and for PPI's misrepresentations contained therein. The Commission summarized its conclusions in that regard at paras 731-2 of the Merits Decision:

> VI. Conclusion on Financial Disclosure Allegations
>
> In summary, we have found that PPI's 1998, 1999 and 1999 [sic] Financial Statements, in their reporting of gains on the Newmex, Orion and Azterra Transactions respectively, were not prepared in accordance with GAAP. This was contrary to Alberta securities laws and the public interest. We have also found that the disclosure contained misrepresentations, contrary to the public interest. Further, we have found that further misrepresentations were made when the improper financial statement disclosure was repeated in other PPI disclosure, contrary to the public interest.
>
> We have concluded that Workum and Hennig each bore responsibility for this, and we therefore found that they each contravened Alberta securities laws and acted contrary to the public interest. The Financial Disclosure Allegations were thus proved.

[194] In its Sanctions Decision, the Commission expanded upon the basis for its imposition of personal liability for PPI's faulty financial statements. It rejected the respondents' submission that they could not be held personally liable for PPI's failure to conform with GAAP, as follows at paras 52-55:

Workum presented an interesting argument to the effect that Workum (and by extension Hennig), whatever their role in PPI's financial statement disclosure, could not be said themselves to have contravened the relevant provision of Alberta securities laws (the section 144 of the *Alberta Securities Commission Rules* (the "Rules"); an equivalent provision is now found in National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* at section 3.1(1). Workum's argument was that the provision:

> . . . required PPI to prepare its financial statements in accordance with GAAP. It is clear that PPI could and it was found to have breached Alberta securities law. ...However, it is not apparent how a director or officer could breach [the provision] and it is submitted that a director or officer could not breach [it] . . .

This argument was not persuasive. The provisions does not so clearly impose responsibility on one actor or class of actors that others cannot be found to have breached the provision. Before its repeal in 2006, section 144(1) of the Rules stated that "[t]he financial statements permitted or required by the Act or these Rules shall be prepared in accordance with [GAAP]". In context, that provision should be read in conjunction with section 149 of the Act which stated (before its 2006 repeal): "A reporting issuer shall file financial statements (a) prepared, reviewed and approved as provided for under the regulations, . . .".

Workum's argument is flawed in two respects. First, the obligation under section 144 of the Rules is a clear requirement, but contains neither clear attribution nor exclusion of responsibility for any class of actors. Any person or company to whom the preparation of non-GAAP-compliant financial statement sis attributable might on a plain reading of the provision be found to have contravened it. This can certainly be said of directors and officers, as here.

Second, even related section 149 of the Act – which does clearly impose a duty on a reporting issuer – cannot reasonably be read as shielding all others from responsibility. A company, after all, acts through individuals. Among such individuals, the authority and responsibility of officers and directors in respect of financial statements is obvious and has long been an integral part of Alberta securities laws. It is clear to us that individuals, not solely a reporting

> issuer, can be found to have contravened section 149 or the Act (and by extension section 144 of the Rules) when those individuals bear responsibility for the reporting issuer's own breach of those provisions. To conclude otherwise would have a perverse effect, clearly not intended by the Legislature.

[195] The Commission found that Workum and Hennig made misrepresentations to the Staff, stating at para 1307 of the Merits Decision:

> We found that the Individual Respondents each made misrepresentations to Staff, so numerous as to constitute a pattern of conduct. We found that, in so doing, they each acted <u>contrary to the public interest</u>. [emphasis added]

[196] In its analysis of the misrepresentations made by Workum and Hennig, the Commission made it clear that the misrepresentations related, at least in part, to matters that were the subject of the Financial Disclosure allegations, and further, that the Commission did not rely upon section 194 in reaching its findings either with respect to the misrepresentations or with respect to the disclosures made in the financial statements. For sake of completeness, it is necessary to recite further portions of the Merits Decision dealing with the allegations of misrepresentations by the individuals:

> **I. The Allegations**
>
> [1275] In the First Notice of Hearing Staff alleged that "PPI made misrepresentations in respect of material submitted or given to the Commission contrary to [section] 194(1)(a) of the Act and the public interest". In the Second Notice of Hearing Staff alleged that, throughout the investigation, the Individual Respondents made numerous misrepresentations to Staff by concealing information from Staff, lying to Staff and otherwise misleading Staff. Both groups of allegations were clearly directed at communications between the Individual Respondents and Staff. We refer to these allegations in both Notices of Hearing collectively as the "Misrepresentation Allegations".
>
> **II. Position of the Parties**
> **A. Position of Staff**
>
> [1276] Staff argued that the evidence adduced proved the Misrepresentation Allegations set out in the First Notice of Hearing, <u>including misrepresentations made to Staff in the</u>

course of exchanges about PPI's financial disclosure of the Newmex, Orion and Azterra Transactions. Staff did not proceed with their allegation in the Second Notice of Hearing that disclosure in respect of related parties in PPI's 2001 Financial Statements involved misrepresentation, but argued that the evidence proved the other alleged misrepresentations to Staff set out in that Notice of Hearing.

[1277] Staff contended that the alleged misrepresentations to Staff addressed in the First Notice of Hearing (essentially, those that pertained to communications between the Individual Respondents and Staff in respect of matters that were the subject of the Financial Disclosure Allegations) fell within the classes of offences enumerated in the Act, specifically in section 194(1)(a). Staff acknowledged that this is not, in fact, a proceeding under section 194 (those offences may be prosecuted in a court, not before a Commission hearing panel) but that conduct that is an offence is also contrary to the public interest. [emphasis added]

. . .

Analysis

Preliminary Matters

1. Essence of the Misrepresentation Allegations: Untruthfulness

[1280] The fact that the Misrepresentation Allegations stem from two Notices of Hearing dealing predominantly with quite different sets of allegations added a degree of complexity that was reflected, to an extent, in the arguments of the parties. Nonetheless, we believe that the Misrepresentation Allegations in essence amounted simply to a complaint by Staff that the Individual Respondents had been untruthful in their dealings with Staff, and that this was contrary to the public interest. We think that this essence was clear to all parties.

. . .

3. Section 194(1)(a) of the Act Not Relevant

[1284] The parties differed as to the relevance of section 194(1)(a) of the Act to the Misrepresentation Allegations. As noted, the provision was cited in the First Notice of Hearing. The relevant portions of section 194 (section 161 for most of the Relevant Period), as it read during the Relevant Period, stated:

> Any person or company that does one or more of the following commits an offence:
>
> > (a) makes a misrepresentation in respect of any material submitted or given under this Act or the regulations [changes to "under the Alberta securities laws" in June 2000] to the Commission, its representatives, the Executive Director or any person appointed to make an investigation or audit under this Act;

. . .

[1285] <u>We did not rely on section 194 in our analysis of the Financial Disclosure Allegations, and we do not do so here</u>. As discussed, the public interest is not determined by whether conduct has been expressed to be an offence, but rather by a panel's application of its knowledge and understanding of the capital market and the purposes of Alberta securities laws to the facts before it in a given situation. [emphasis added]

. . .

6. Conclusion on Preliminary Matters

[1291] We therefore conclude that the merits of the Misrepresentation Allegations must be assessed on the basis of whether one or other, or both, of the Individual Respondents communicated to Staff in a manner that he knew, or ought reasonably to have known, conveyed a false impression as to facts that were known (or ought reasonably to have been known) by him.

[197] The Commission's analysis of the misrepresentations made by the individuals then deals with specific communications, including those dealing with financial disclosure, as discussed at para 1293:

> [1293] These examples suffice, in our view, to demonstrate that both Individual Respondents made misrepresentations to Staff on matters about which the Individual Respondents were in fact well informed. <u>They did so in a [sic] effort to deflect Staff concerns about (in the examples cited) PPI's financial disclosure of certain transactions or its nondisclosure of certain financial benefits</u>. The Individual Respondents ought to have known that what they were communicating to Staff (positively or by omission) was untrue. Moreover, we are in no doubt – and we find – that they did know this and indeed acted deliberately in that knowledge. As discussed, the fact that this conduct was itself the subject of other allegations does not demonstrate any unfairness to the Individual Respondents. [emphasis added]

[198] The Sanctions Decision discloses that Workum's and Henning's misrepresentations, which were held to be contrary to the public interest, were taken into account when assessing the sanctions to be imposed upon them. These misrepresentations produced, amongst other things, "a misleading picture of PPI's financial position and result": see paras 63-65 of Sanctions Decision.

III. Ground of Appeal Relating to these Findings

[199] Workum's factum (adopted on this point by Hennig) alleged that the Commission erred by imposing liability for breach of Rule 144. The gist of his argument is set out, as follows, at para 81 of the factum:

> The ASC's reasoning for its conclusion that Mr. Workum breached s. 144 of the ASC Rules would have, it is submitted, a perverse effect and it shows the finding to be one that is not justified and does not fall within the realm of defensible outcomes. If the ASC's reasoning mentioned in the Sanction Decision was correct, then there would be no need for mention of "authorize, permit or acquiesce" anywhere in the *Act*. It is submitted that the inclusion of this language and the additional amendments proclaimed in force in July 2006 demonstrate quite clearly that the Legislature intended secondary liability for a breach of Alberta securities laws to be applicable to directors and officers when they authorized, permitted or acquiesced in a breach, not based on a finding that they "bore responsibility."

IV. The Relevant Statutory Provisions and Commentary Thereon

[200] The Commission relied upon section 149 of the *Securities Act*, RSA 2000 c S-4 (*Act*) together with Rule 144 of the Commission's Rules (then in effect). The *Act* stated:

> 149(1) Every reporting issuer shall within 140 days from the end of its last financial year file annually with the Executive Director comparative financial statements relating separately to
>
> > (a) the period that commenced on the date of incorporation or organization and ended as of the close of the first financial year or, if the reporting issuer has completed a financial year, as the case may be, and
> >
> > (b) the period covered by the financial year next preceding the last financial year, if any,
>
> made up and certified as required by the regulations.
>
> (2) Every financial statement referred to in subsection (1) shall be accompanied with a report of the auditor of the reporting issuer prepared in accordance with the regulations.
>
> (3) In this section "auditor", when used in relation to a company, includes the auditor of the company or an independent accountant acceptable to the Executive Director.

The Rule provided:

> 144. Preparation of financial statements – (1) The financial statements permitted or required by the Act or these Rules shall be prepared in accordance with
>
> > (a) generally accepted accounting principles, and
> > (b) any applicable provision of the Act or these Rules.

[201] The Amended Notice of Hearing cited and relied upon subsections (194)(1)(a) and 194(1)(b) of the *Act* with respect to misrepresentations alleged to have been made by each of PPI, Workum and Hennig. Those subsections read, at the relevant time:

> 194(1) Any person or company that does one or more of the following commits an offence:

> (a) makes a misrepresentation in respect of any material submitted or given under the Alberta securities laws to the Commission, its representative, the Executive Director or any person appointed to make an investigation or audit under this Act;
>
> (b) makes a misrepresentation in any document required to be filed or furnished under the Alberta securities laws;

[202] As both Workum and Hennig were officers of PPI, subsection 194(4) is relevant to the issue of their personal liability for the company's offences. At the relevant time, it read:

> (4)If a company commits an offence under this section, whether or not in respect of that offence a charge has been laid, a finding of guilt has been made or a plea of guilty has been entered with respect to that company,
>
> (a) every director and every senior officer of the company who authorized, permitted or acquiesced in the offence, and
>
> (b) every person, other than a director or senior officer of the company who authorized or permitted the offence,
>
> also commits the offence and is liable to a fine of not more than $1 000 000 or to imprisonment for a term of not more than 5 years less one day or to both fine and imprisonment.

[203] It is significant to note that subsection (4) was neither cited in the Amended Notice of Hennig nor referred to either in the Merits or Sanctions Decisions. Nor is there any finding that any of the parties breached section 194. This presumably flows from the Commission's statement that it did not rely upon section 194 in its analysis (see para 1285 of Merits Decision quoted above).

[204] In 2006, section 199 of the *Act* was amended to provide for an administrative penalty in situations where the Commission determined that a director or officer "authorized, permitted or acquiesced", as follows:

> 199(1) If the Commission, after a hearing,
>
> (a) determines that

> (i) a person or company has contravened or failed to comply with any provision of Alberta securities laws, or
>
> (ii) a director or officer of a person or company or a person other than an individual authorized, permitted or acquiesced in a contravention or failure to comply with any provision of Alberta securities laws by the person or company,
>
> and
>
> (b) considers it to be in the public interest to make the order,
>
> the Commission may order the person or company to pay an administrative penalty of not more than $1 000 000 for each contravention or failure to comply.

V. Analysis

[205] The obligation to file financial statements pursuant to section 149 of the *Act* falls upon the reporting issuer, in this case PPI. Rule 144 required that the corporation's financial statements be prepared in accordance with GAAP. In short, the obligation to file financial statements to meet the required standard is cast upon the company, as distinct from its officer and directors.

[206] A fundamental principle of corporate law is that a registered corporation is an entity separate and distinct from its officers and members. The concept is one of limited liability. A corporation acts through its officers and directors, but they are not personally liable. The corporate veil will only be pierced if a statute clearly imposes personal liability, or in certain other situations, such as a sham company – neither alleged nor applicable in this case. Here, the *Act*, through section 194(4) as well as other provisions, provides a means of imposing personal liability for corporate acts. The corporate veil otherwise remains in place.

[207] It is not sufficient, therefore, merely to allege that directors and officers are responsible for a corporation's financial statements to make them liable for the corporation's failure to file them in accordance with GAAP. Here, the *Act* set out specific circumstances for imposing personal liability for a corporation's defaults. Section 194(4) of the *Act* required the Commission to establish that the officer or director "authorized, permitted or acquiesced in the offence". Furthermore, as Workum submitted, the 2006 amendment to section 199 demonstrates clearly that the Legislature intended secondary liability for the corporation's breach to be applicable to directors and officers only when their involvement amounted to having authorized, permitted or acquiesced in a breach, not merely that they "bore responsibility". The mere allegation that the individuals acted contrary to the public interest is not a basis for imposing individual liability for a corporate act.

[208] In some respects, of course, these concepts may overlap; but in others, they are quite different. It cannot, however, be reasonably suggested that the terms are synonymous. Indeed, if the Commission reasons that liability arises with mere responsibility, it is difficult to understand the necessity either for section 194(4) or the 2006 amendment. These sections are superfluous if liability for corporate acts falls upon any person having responsibility for a corporate act.

[209] Further, it appears that the Commission itself has recognized this distinction in other cases. In *Re Ironside*, 2009 ABCA 134, the Staff of the Commission alleged in its notice of hearing issued in June 2001 that Ironside and Ruff breached, *inter alia*, the predecessor section to section 194 "by authorizing , permitting or acquiescing in Blue Range Resource Corporation filing annual financial statements required under the *Act* that were not in accordance with GAAP", (see para 8). This court upheld the personal liability of the individuals. Like this case, *Ironside* was an administrative and not a criminal proceeding. It was not explained on this appeal why the Commission chose not to proceed in the same fashion with respect to Workum and Hennig.

[210] In my view, therefore, the Commission's reasons for imposing personal liability upon Workum and Hennig, based upon their responsibility for the financial statements, cannot be sustained. The Commission disavowed any reliance upon section 194 so that the mere reference to section 194(1)(a) and (b) in the notice of hearing did not serve as any basis for its decision. I wish to emphasize that my decision is not based merely upon the language of the notice of hearing being inadequate by not expressly referring to section 194(4). It simply was never any part of the Commission's theory of the case, nor its basis for imposition of liability, that it was required to establish that the individuals authorized, permitted or acquiesced in the offence. To the contrary, the allegation and decision against Workum and Hennig were based simply on a finding that they bore responsibility. Likewise, the Commission was steadfast in this position on the appeal, with no alternative basis for liability being put forward. As earlier noted, the Commission made a deliberate decision not to invoke section 194.

[211] The Commission's reason for imposing liability upon the individuals for the corporate wrongs, based solely upon bearing responsibility, is wrong in law and not a reasonable interpretation of the requirements of the *Act*. Notwithstanding the deficiency in the reasons of the Commission, should this court uphold the result reached by the Commission on the basis that the evidence before it showed that Workum and Hennig in fact authorized, permitted or acquiesced in PPI's filing of financial statements that were not in accordance with GAAP or otherwise offended the *Act*? The evidence in that regard is thoroughly reviewed in the judgment of McDonald J.A., and discloses a pattern of dishonest conduct on the parts of Workum and Hennig, whether carried out as individuals or as senior officers of PPI.

[212] With some hesitation and reluctance, having regard to the substantial evidence of their active participation, I have concluded that it would not be fair to Workum and Hennig to fix personal liability now upon them for PPI's breaches on a basis different from that of the Commission, and under a section of the *Act* that it deliberately chose not to invoke.

[213] In *Re Anderson,* 2008 ABCA 184, this court allowed an appeal from the Commission's decision which was based on a different basis than that alleged in the notice and during the course of the hearing. The following portions from *Anderson* are apposite, at paras 47-48:

> In *Dunsmuir*, the majority judgment of Bastarache and Lebel, JJ., stated at para. 79:
>
> > Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; Baker, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).
>
> This Court in an analogous situation directed the re-trial of an issue. In *P. (M.N.) (Next Friend of) v. Whitecourt General Hospital,* 2006 ABCA 245, 397 A.R. 333 (Alta. C.A.) , the trial judge had decided the case on a point not raised by the parties. This Court observed at paras. 7-8:
>
> > . . . the Appellant could not have known the case against him. Neither the Respondents nor the trial judge suggested this alternate causation theory during the course of the trial preceding the liability judgment. In the result, the Appellant was effectively precluded from tailoring his evidence to meet this theory of causation...
> >
> > In the result, the Appellant was denied the opportunity to test on cross-examination or rebut with evidence the proposition advanced by the trial judge . . .

[214] I am unable to say with assurance that the defence of Workum and Hennig to the citations would not have been different if the Commission had advanced its case under section 194 or otherwise on the basis that they had authorized, permitted or acquiesced in the offences committed by PPI in its financial disclosure. They have, of course, been sanctioned for the misrepresentations

made by them in their personal capacities to the Commission, including misrepresentations with respect to PPI's financial disclosures.

VI. Conclusion

[215] I would allow the appeals of Workum and Hennig only to the extent that I would set aside the finding that they are personally liable for the breaches in question by PPI. As the penalties assessed against them related to their cumulative breaches, I would remit the matter to the Commission to adjust the sanctions made against Workum and Hennig having regard to my finding.

Appeal heard on March 9, 2010

Reasons filed at Calgary, Alberta
this 20th day of December, 2010

O'Brien J.A.

Appearances:

D.A. Young/D.M. Volk
for the Respondent Alberta Securities Commission

J. Groia
for the Appellant Workum

J.K. Phillips
for the Appellant Hennig

R.J. Normey
for the Intervener Alberta Justice

Schedule A

E00229 I01716

ALBERTA SECURITIES COMMISSION

IN THE MATTER OF the *Securities Act*
R.S.A. 2000, c. S-4 ("Act")

and

Proprietary Industries Inc., Theodor Hennig and Peter Jay Workum (the "Respondents")

AMENDED NOTICE OF HEARING

TAKE NOTICE THAT, pursuant to subsection 198(3) of the Act, the Alberta Securities Commission ("Commission") will convene at its hearing room, 4th Floor, 300 5 Avenue SW, Calgary, Alberta, on Friday, February 22, 2002, at 9:30 a.m., to set a date for a hearing of the allegations in this Notice of Hearing and to deal with any other preliminary matters. At the hearing the Commission will consider whether to make an order against the above Respondents pursuant to sections 198, 199 and 202 of the Act, or such further order as the Commission considers appropriate.

ALLEGATIONS

Summary of Breaches

1 Staff alleges that Proprietary Industries Inc.'s ("PPI") consolidated financial statements for the years ended September 30, 1998, September 30, 1999 and September 30, 2000, were not prepared in accordance with generally accepted accounting principles ("GAAP"), in contravention of section 144 of the rules made pursuant to the Act (the "Rules") and contained

misrepresentations contrary to subsection 194(1)(b) of the Act, both of which are contrary to the public interest.

2 Further, Staff also alleges that PPI made misrepresentations in respect of material submitted or given to the Commission contrary to subsection 194(1)(a) of the Act and the public interest.

Parties

3 PPI, formerly known as Proprietary Energy Industries Inc., is an Alberta corporation with its head office in Calgary.

3 At all material times, PPI was a reporting issuer in Alberta. It was listed on the Toronto Stock Exchange ("TSE") on April 12, 1999, and became a component company of the TSE 300 composite index as of December 14, 2000.

5 At all material times, Peter Jay Workum ("Workum") was a director and president of PPI. Theodor Hennig ("Hennig") was the chief financial officer, secretary and treasurer of PPI. Any acts by PPI referred to herein were carried out by Workum and/or Hennig and as such, Workum and Hennig are responsible for those acts.

1998 Financial Statements – Gain on sale of Newmex shares

6 On February 19, 1999, PPI filed with the Commission its audited consolidated financial statements for the year ended September 30, 1998 ("1998 Financial Statements"). The 1998 Financial Statements were approved by PPI's board of directors and signed by Workum and Andrew Mackenzie, another director of PPI.

7 The consolidated statement of earnings and retained earnings included in the 1998 Financial Statements reported a "gain on [the] sale of mining properties" in the amount of $3,878,486.

8 The gain arose as result of PPI's purported sale of its entire interest in Newmex Minerals Inc. ("Newmex") for $4,082,875 ("Newmex transaction").

9 Newmex was listed on the Alberta Stock Exchange ("ASE"), and subsequently Canadian Venture Exchange ("CDNX").

10 PPI owned approximately 72% of the outstanding common shares of Newmex. At all material times, Workum was a director and also the president of Newmex. Hennig was a director and also the vice-president of finance of Newmex. Newmex and PPI shared the same offices.

11 There were three purchasers of PPI's interest in Newmex: Pensionskasse der ASCOOP ("ASCOOP") and SPIDA Ausgleichskasse ("SPIDA"), both incorporated in Switzerland and an Alberta holding company, LynChris Holdings Inc. ("LynChris").

12 Two different agreements of purchase and sale were entered into: one between PPI and ASCOOP and SPIDA, dated September 8, 1998 ("ASCOOP/SPIDA Agreement") and the other between PPI and LynChris, dated September 30, 1998 ("LynChris Agreement").

Sale of Newmex to ASCOOP and SPIDA

13 The ASCOOP/SPIDA Agreement included, among others, the following terms:

PPI would sell 750,000 shares of Newmex to each of ASCOOP and SPIDA at $1.00 per share, for total consideration of $1,500,000;

1 PPI would have the option to re-purchase the Newmex shares for the original consideration, plus a premium of 0.8333% for each month [10% per annum]; the option remained outstanding for 24 months following the transaction;

2 after 24 months, ASCOOP and SPIDA would have the right to sell the Newmex shares back to PPI for the original consideration plus a 10% premium; and

3 ASCOOP and SPIDA would vote the Newmex shares in concert with PPI for the duration of the agreement.

14 In November 1998, the ASE requested that PPI remove the repurchase terms in the ASCOOP/SPIDA Agreement. As a result, and without the first agreement being rescinded, a new agreement was signed and dated as of September 8, 1998. The new agreement did not contain the terms found in subparagraphs 13.2, 13.3, & 13.4 herein.

15 Despite the new agreement, the parties conducted themselves in accordance with the original agreement. In or about October 2000, PPI repurchased the shares of Newmex from ASCOOP and SPIDA for the original consideration plus a premium (which amounted to 10% per annum).

Sale of Newmex to LynChris

16 The LynChris Agreement included, among others, the following terms:

1 PPI would sell 2,582,875 shares of Newmex to LynChris at $1.00 per share, for total consideration of $2,582,875 (the "LynChris shares");

2 the entire purchase price would be paid by a two year promissory note with a stated interest rate of 7% with interest and principal due at the end of two years ("LynChris Promissory Note");

the LynChris shares were subject to an escrow agreement;

PPI would pay a commission of 200,000 [freely trading] Newmex shares to Cheshire Capital Inc. ("Cheshire"); and

the agreement was subject to shareholder, regulatory and board of directors' approval.

17 The escrow agreement to which the LynChris shares were subject was dated April 22, 1998. Among other terms, it provided that:

the securities would remain in escrow and only be released in accordance with the terms of the escrow agreement and on written consent of the ASE;

the consent of the ASE would be required to transfer the securities within escrow;

the ASE would generally consent to the release from escrow of one share for each eighty-six ($.86) cents of deferred expenditures incurred on the property and in any event no more than one third per calendar year; and

any securities not released from escrow within 5 years would be cancelled.

18 As an inducement for entering into the Newmex transaction, Hennig, who approached LynChris about the transaction, promised LynChris 40,000 shares of PPI.

19 In November 1998, while reviewing the Newmex transaction, the ASE requested further information from PPI including the names of the beneficiaries of Cheshire. PPI did not provide that information to the ASE.

20 In addition, the ASE advised PPI that it did not consent to the proposed payment of the LynChris shares being deferred for two years. The ASE stated that the proceeds from the share disposition must be received by PPI at the time of closing of the transaction.

21 As a result, PPI and LynChris added an addendum to the LynChris Agreement, back-dating the addendum to September 30, 1998. Pursuant to the addendum, the parties agreed that the transfer of the LynChris shares would not take place until the LynChris Promissory Note was paid in full.

22 Notwithstanding that it was an express term of the LynChris Promissory Note to pledge security for the debt in an amount not to exceed 20%, in late 1998, LynChris refused to do so.

23 In or about February 1999, PPI and Hennig pledged the requested 20% security on behalf of LynChris. They did so by forwarding 133,334 PPI shares to PPI's solicitors.

24 The 1998 Financial Statements, in note 5, reported that the LynChris Promissory Note was secured by marketable securities. It was not disclosed, however, that PPI and Hennig, and not LynChris, had posted the shares as the security.

25 During 1999, LynChris demanded that PPI repurchase the LynChris shares for the original consideration plus interest paid.

26 As a result, on February 29, 2000, PPI purported to reacquire the LynChris shares for the return of the LynChris Promissory Note, plus cash in the amount of $213,876.62. At the time, freely tradable Newmex shares were typically trading below $1.00 per share.

27 PPI's reported earnings for its 1998 fiscal year were $2,977,781. Without recognizing the gain on the Newmex transaction, PPI's reported earnings for 1998 would have been less than $250,000.

Newmex transaction - not bona fide

28 Staff alleges that the Newmex transaction was not a *bona fide* commercial transaction and that the primary or dominant purpose of both arrangements was to enable PPI to report a gain of approximately $3.8 million in the 1998 Financial Statements. In support of its contention, Staff relies on the following:

> 1 following the Newmex transaction, Workum and Hennig continued in their positions with Newmex;
>
> 2 Newmex and PPI continued to share the same offices;
>
> 3 despite the purchase of substantially all of the issued and outstanding shares of Newmex, none of ASCOOP, SPIDA or LynChris sought any representation on its board of directors or management;
>
> 4 at the time of the sale, ASCOOP was both a significant shareholder of PPI and its President (Jean-Claude Dueby) was the chairman of PPI;
>
> 5 despite an express requirement in the LynChris Promissory Note, LynChris refused to provide any security (on a debt in the amount of approximately $2.5 million);
>
> 6 PPI and Hennig posted the security on behalf of LynChris, using PPI shares as collateral;

7 PPI failed to disclose both the source and the specific nature of the security, referring to it only as marketable securities in the 1998 Financial Statements;

8 the LynChris Agreement and the LynChris Promissory Note both provided that interest was due at the end of the two year term. Despite this, at the request of Hennig, LynChris made two interest payments to PPI prior to the end of the two year term; and

9 PPI reimbursed LynChris for the escrowed shares for a price of $1.00 plus interest, when freely trading shares were typically trading below $1.00 per share. In the end, and as a result of the 40,000 shares provided to LynChris or its sole director as inducement for entering into the Newmex transaction, LynChris or its sole director made a profit of approximately $80,000.

Newmex transaction – not recorded in accordance with GAAP

29 Staff further alleges that PPI's recognition of a gain from the Newmex transaction was contrary to GAAP and constituted a misrepresentation of its financial position as reported in the 1998 Financial Statements in that:

1 the Newmex transaction had not occurred as of September 30, 1998, or anytime shortly thereafter;

2 neither ASCOOP nor SPIDA assumed the risks or rewards of ownership of the Newmex shares. ASCOOP and SPIDA were assured a return of their original consideration plus 10% per annum, no more and no less, regardless of the share price at the time of the sale; and

3 LynChris did not assume the risks or rewards of ownership. PPI neither gave up control of the Newmex shares nor intended to and in fact the Newmex shares were never transferred to LynChris.

Newmex sale - further misrepresentations

30 On October 16, 1998, PPI issued a press release disclosing that it had completed the disposition of all of its 4,282,875 shares of Newmex for gross proceeds of $4,282,875. The press release also stated that the purchasers had the ability to fund the planned capital projects that Newmex had budgeted for the coming year. The press release invited the public to contact Workum or Hennig for further information.

31 Staff alleges that the above referenced press release was inaccurate and misleading, and therefore contrary to the public interest, in that:

1 PPI had not disposed of its shares as represented;

2 the gross proceeds of the Newmex transaction was only $4,082,875 as 200,000 Newmex shares were paid to Cheshire as a commission;

3 the sale of Newmex was structured primarily for the purpose of recording a gain in its 1998 Financial Statements; and

4 ASCOOP, SPIDA and LynChris had no intention of funding the planned capital projects of Newmex.

32 On or about March 12, 1999 and July 9, 1999, PPI made bids to acquire units in The Lodge at Kananaskis Limited Partnership. Attached to the March 12, 1999 offer were the 1998 Financial Statements. The July 9, 1999 offer contained extracts from the 1998 Financial Statements. The offers were filed with the Commission and provided to the unit holders. The certificates of the offeror were signed by Hennig and Workum.

33 On or about March 12, 1999 and July 13, 1999, PPI made bids to acquire units of The Mountain Inn at Ribbon Creek Limited Partnership. Attached to the March 12, 1999 were the 1998 Financial Statements. The July 13, 1999 offer contained extracts from the 1998 Financial Statements. The offers were filed with the Commission and provided to the unit holders. The certificates of the offeror were signed by Hennig and Workum.

34 Staff alleges that the distribution of the 1998 Financial Statements and extracts therefrom, to the above unit holders, with the intention, express or implied, that they could rely upon them, constituted a further misrepresentation by PPI contrary to the public interest.

1999 Financial Statements - Gain on sale of Swiss Plastering

35 On February 17th 2000, PPI filed with the Commission its audited consolidated financial statements for the year ended September 30, 1999 (“1999 Financial Statements”). The 1999 Financial Statements were approved by PPI’s board of directors and signed by Workum and Jean-Claude Dueby, Chairman of PPI as well as president of ASCOOP.

36 The consolidated statement of earnings and retained earnings included in the 1999 Financial Statements reported a “gain on [the] sale of businesses” in the amount $6,263,594 (“Swiss Plastering transaction”).

37 The gain arose as a result of PPI purportedly selling its entire interest in Swiss Plastering and Interiors, Inc. (“Swiss Plastering”) to Orion Resource Corporation (“Orion”) for $7,982,656.

38 Swiss Plastering was owned by EnerGCorpInc. (“EnerGCorp”), a 94% owned subsidiary of PPI.

39 As of April 1996, Orion was listed on the ASE and subsequently CDNX.

40 As of March 1999, Workum, Hennig and PPI director, Douglas Street ("Street") were directors of Orion. Street owned or controlled at least 51% of the outstanding common shares of Orion. Orion and PPI shared the same auditor and offices.

41 The sale of Swiss Plastering was agreed to in March 1999. It was anticipated that all of the existing assets of Orion would be transferred to Orion's creditors and Swiss Plastering would then be vended into Orion. In exchange, Orion would issue to EnerGCorp approximately either 1,000,000 or 4,000,000 common shares from treasury at a post consolidation price of $1.00 per share.

42 Subsequently, the terms of the Swiss Plastering transaction were amended such that the purchase and sale agreement dated September 30, 1999 provided that:

1 the purchase price would be $8,160,000;

2 the purchase price would be payable by the issuance of 966,500 common shares of Orion valued at $1.00 per share and representing approximately 48% of the issued and outstanding shares of Orion. In addition, Orion was to issue a secured 2 year promissory note for $7,193,500 bearing interest at a rate of 10% per annum; and

3 it was subject to the completion of a formal purchase and sale agreement as well as shareholder, regulatory and board of directors' approval.

43 The 1999 Financial Statements refer to a promissory note being received from Orion in the amount of $7,016,156 ("Orion Promissory Note").

44 The Orion Promissory Note was secured by a loan guarantee from Cofima Finanz AG ("Cofima"), identified in the 1999 Financial Statements as an independent financial institution ("Cofima guarantee").

45 EnerGCorp paid Cofima approximately $240,000 for guaranteeing the Orion Promissory Note.

46 By its terms, the Cofima guarantee expired two years and 30 days from September 29, 1999.

47 Orion was:

1 suspended by CDNX on January 24, 2000, pending regulatory approval of a number of proposed corporate changes and transactions, including the

purchase of Swiss Plastering;

2 cease traded by the Commission on February 4, 2000, for its failure to file its financial statements; and

3 delisted from CDNX as of July 4, 2001.

48 Orion has never issued the 966,500 shares nor did it make any interest payments on the Orion Promissory Note.

49 PPI's reported earnings for its 1999 fiscal year were $6,628,943. Without recognizing the gain on the Swiss Plastering transaction, PPI's reported earnings for 1999 would have been less than $500,000.

Swiss Plastering transaction - not bona fide

50 Staff alleges that the Swiss Plastering transaction was not a *bona fide* commercial transaction and that the primary or dominant purpose of the arrangement was to enable PPI to report a gain of approximately $6.2 million in the 1999 Financial Statements. In support of its contention, Staff relies on the following:

1 at all material times, Orion was controlled by Street, a director of PPI;

2 as of March, 1999, Workum and Hennig were directors of Orion;

3 Orion and PPI shared the same offices;

4 the sale price of Swiss Plastering was substantially increased by the inclusion of the Orion Promissory Note;

5 as of September 30, 1999, there was no duly authorized and executed Orion Promissory Note for examination by either PPI's auditors or Staff. Ultimately two different versions were produced for Staff, at least one of which was a false promissory note created by an employee of PPI;

6 if it existed, servicing the interest on the Orion Promissory Note would utilize substantially all of Swiss Plastering's free cash flow and there would be insufficient funds to repay the principal within 2 years;

7 as a result, it was virtually certain that Orion would default on the Orion Promissory Note and that the Cofima guarantee could be called upon; and

8 the Cofima guarantee was not called upon until the involvement of Staff and then only approximately one month before the Cofima guarantee was to expire.

Swiss Plastering transaction - not in accordance with GAAP

51 Staff further alleges that PPI's recognition of a gain from the Swiss Plastering transaction was contrary to GAAP and constituted a misrepresentation of its financial position as reported in the 1999 Financial Statements in that:

1 the Swiss Plastering transaction had not taken place as of September 30, 1999 or anytime shortly thereafter as:

51.1.1 the conditions of the agreement of purchase of sale were not met, including the receipt of regulatory approval; and

51.1.2 neither EnerGCorp nor PPI had received the Orion Promissory Note or the Orion shares;

2 if, in fact, the Orion Promissory Note provided for monthly interest payments, by the time the 1999 Financial Statements were filed, Orion was already in default;

3 even if the transaction was *bona fide* and had taken place as anticipated, in order to recognize a gain under GAAP, PPI would have to demonstrate that:

51.3.1 it did not control Orion by virtue of its 48% ownership of the common shares, the holding of the Orion Promissory Note and the involvement of Workum, Hennig and Street; and

51.3.2 it was probable that the Orion Promissory Note or the Cofima guarantee was realizable.

4 PPI did not have nor maintain in its offices documentation to support its position that the Orion Promissory Note or the Cofima guarantee could be honoured. In any event, neither Orion nor Cofima could honour the Orion Promissory Note or the guarantee;

5 the maximum gain that PPI could recognize in the 1999 Financial Statements would be approximately 52% of the gain reported as that is the percentage of Swiss Plastering that PPI had in effect disposed of.

Continued Reporting of the LynChris Promissory Note in 1999

52 In its subsequent fiscal year, PPI continued to report the LynChris Promissory Note. The consolidated balance sheets and note 6, included in the 1999 Financial Statements reported the LynChris Promissory Note as an asset.

53 Staff alleges that the continued recognition of the LynChris Promissory Note represents a further breach of GAAP and a further misrepresentation for the reasons outlined above.

Swiss Plastering - further misrepresentations

54 On or about July 12, 2000, PPI made a bid to acquire up to 5,000,000 common shares of Prism Petroleum Inc. ("Prism"). Attached to the offer to purchase were the 1999 Financial Statements with comparative 1998 Financial Statements. The certificate of the offeror was signed by Hennig and Workum.

55 Staff alleges that the distribution to the Prism shareholders of the 1999 Financial Statements with comparative 1998 Financial Statements, with the intention, express or implied, that they could rely upon them, constituted a misrepresentation by PPI contrary to the public interest.

2000 Financial Statements - Gain on sale of Creative Classics and Willow Creek

56 On February 19, 2001, PPI filed with the Commission its audited consolidated financial statements for the year ended September 30, 2000 ("2000 Financial Statements"). The 2000 Financial Statements were approved by PPI's board of directors and signed by Workum and Jean-Claude Dueby.

57 The consolidated statement of earnings and retained earnings included in the 2000 Financial Statements reported a "gain on [the] sale of businesses" in the amount of $5,612,779.

58 The gain arose from the alleged sale of PPI's interest (through EnerGCorp) in The Creative Classics Company ("Creative Classics") and Willow Creek Homes Inc. ("Willow Creek") to The Azterra Corporation ("TAC") for $7,250,000 ("TAC transaction").

59 As of February 26, 1998, TAC was listed on the ASE and subsequently on CDNX.

60 PPI and TAC entered into a letter of intent regarding both companies on June 29, 2000 ("TAC letter of intent"). Among other terms, it provided that:

1 as consideration for the purchase of Willow Creek, TAC would issue 2,484,000 common shares at a deemed subscription price of $0.03 per share, and provide a promissory note for $425,480 with interest payable annually in the amount of 8%;

2 as consideration for the purchase of Creative Classics, TAC would issue 33,516,000 common shares at a deemed subscription price of $0.03 per share and a promissory note for $5,744,520, with interest payable annually in

the amount of 8% ("TAC Promissory Note");

3 the parties would enter into a mutually satisfactory formal purchase and sale agreement;

4 TAC would complete a satisfactory appraisal and review of Creative Classics and Willow Creek;

5 PPI would pay Strategic Investments Fund a fee of 7% of the gross value of the shares of Willow Creek and Creative Classics;

6 the parties would obtain all applicable governmental, regulatory, shareholder, board of directors and contractual approvals to complete the transaction, including the approval of CDNX and the TSE; and

7 on closing, the issuance of TAC common shares would not be subject to consent, notice or other approval of any party for which the vendor or the subsidiaries have not obtained such consent, notice or approval.

61 Upon completion of the TAC transaction, TAC's only assets would be Creative Classics and Willow Creek and PPI would own approximately 49% of the issued and outstanding shares of TAC.

62 PPI represented that the TAC Promissory Note was executed on June 30, 2000 and provided that interest was payable annually, with the principal due on June 30, 2010. In fact, the TAC Promissory Note was not executed until August 2001.

63 Cofima also guaranteed the TAC Promissory Note. Although the TAC Promissory Note was due on June 30, 2010, and contrary to representations included in note 7 of the 2000 Financial Statements, the guarantee provided by Cofima was allegedly executed on September 30, 2000, and only valid for 25 months from June 30, 2000.

64 EnerGCorp paid Cofima approximately $172,328 for guaranteeing the TAC Promissory Note.

65 The TAC letter of intent was amended on December 29, 2000 and again on August 27, 2001.

66 The second amendment, which among other things purported to waive the conditions on closing, took place one day after four out of five directors of TAC resigned, on August 26, 2001.

67 TAC was:

1 halted by CDNX on September 12, 2000;

2 suspended by CDNX on November 26, 2001; and

3 cease traded by the Commission as of December 7, 2001.

68 The shares of TAC have never been issued to PPI.

69 The ASE did not give its consent to the TAC transaction.

70 PPI's reported earnings for its 2000 fiscal year were $9,524,063. Without recognizing the gain on the sale of Creative Classics and Willow Creek, PPI's entire reported earnings for 2000 would have been less than $5 million.

TAC transaction - not bona fide

71 Staff alleges that the TAC transaction was not a *bona fide* commercial transaction and that the primary or dominant purpose of the TAC transaction was to enable PPI to report a gain of approximately $9.5 million in the 2000 Financial Statements. In support of its contention, Staff relies on the following:

1 the interest rate on the TAC Promissory Note was not reflective of market rates of interest for such notes;

2 neither Creative Classics nor Willow Creek had the financial capacity to service the interest payments on the TAC Promissory Note;

3 the guarantee was valid for only 2 years even though the TAC Promissory Note was not due for 10 years; and

4 Cofima paid out on the Cofima guarantee when it was not clear that it was obligated to do so.

TAC transaction - not recorded in accordance with GAAP

72 Staff further alleges that PPI's recognition of a gain from the alleged sale of Creative Classics and Willow Creek was contrary to GAAP and constituted a misrepresentation in its financial position in that:

1 the TAC transaction had not taken place as of September 30, 2000 or anytime thereafter as:

72.1.1 the conditions of the sale were not met including the receipt of regulatory approval; and

72.1.2 neither EnerGCorp nor PPI received the TAC shares;

2 even if the TAC transaction was *bona fide* and had taken place September 30,

2000 or shortly thereafter, in order to recognize a gain under GAAP, PPI would have to demonstrate that:

72.2.1 it did not control TAC by virtue of its 49% ownership of the common shares and the holding of the TAC Promissory Note; and

72.2.2 that it was probable that the TAC Promissory Note or the Cofima guarantee was realizable;

72.2(a) In fact, neither Azterra nor Cofima could honour the TAC Promissory Note or guarantee;

3 In any event, the maximum gain that PPI could recognize in the 2000 Financial Statements would be approximately 51% of the gain reported as that is the percentage of Creative Classics and Willow Creek that PPI would have in effect disposed of; and

4 Finally, TAC reported that the Creative Classics and Willow Creek transactions were pending and had not yet closed in note 17 of its audited financial statements for the year ending December 31, 2000 and in its interim financial statements for the quarter ending March 31, 2001.

Continued Reporting on the Orion Promissory Note in 2000

73 In its subsequent fiscal year, PPI continued to report the Orion Promissory Note. The consolidated balance sheets and note 7 included in the 2000 Financial Statements reported the Orion Promissory Note as an asset for the 2000 fiscal year.

74 Staff alleges that the continued recognition of the Orion Promissory Note represents a further breach of GAAP and misrepresentation in the 2000 Financial Statements.

TAC transaction - further misrepresentations

75 On or about May 14, 2001, PPI made a bid to acquire the outstanding common shares of Ventra Group Inc. ("Ventra") Incorporated by reference in PPI's take over bid circular were the 2000 Financial Statements with comparative statements for 1999. The circular was provided to the Ventra shareholders and the certificate of the offeror was signed by Hennig and Workum.

76 Staff alleges that the distribution of the circular to the shareholders, with the intention, express or implied, that they could rely upon them constituted a misrepresentation by PPI contrary to the public interest.

Misrepresentations

77 In or about June 2001, in response to an application brought by Ventra, PPI provided Staff of the Ontario Securities Commission with a copy of the Orion Promissory Note containing Hennig's signature. PPI knew or ought to have known that the document was not authentic.

78 Further, in or about July 2001, PPI advised Staff that the Orion Promissory Note had been issued as of September 30, 1999. Staff alleges that Orion had not issued the Orion Promissory Note as of September 30, 1999.

1 <u>Workum and Hennig represented to Staff that the TAC Promissory Note was executed June 30, 2000, when in fact it was not executed until August 2001.</u>

2 <u>Workum and Hennig represented that Cofima was an independent financial institution when in fact Cofima was not independent of PPI, Workum and Hennig.</u>

3 <u>Hennig represented that the risks and rewards of ownership had been transferred in the Newmex transaction when this in fact was not accurate.</u>

4 <u>Hennig represented that the Newmex share certificates had been issued in the name of LynChris when in fact they had not.</u>

5 <u>Hennig represented that all parties to the Newmex transaction had conducted themselves in accordance with the purchase and sale agreements but in fact all parties conducted themselves in accordance with agreements not disclosed.</u>

6 <u>Hennig represented that KPMG had supported PPI's accounting treatment of the three transactions when in fact KPMG did not support PPI's treatment of the Orion or TAC transactions, nor did it have full knowledge of the agreements in the Newmex transaction.</u>

79 In addition, in or about August 2001, Hennig advised Staff that LynChris had posted security for the LynChris Promissory Note when he knew that this was not accurate.

80 Finally, PPI advised Staff that as of the date of the Swiss Plastering and TAC transactions, the Cofima guarantees were reinsured by an affiliated company Gruppo Triad-FCC, SPA, an entity located in Panama City, Panama. Staff alleges that the reinsurance did not take place until the summer of 2001, <u>if at all</u>.

81 Further, the reinsurance was not disclosed in the 1999 Financial Statements or the 2000 Financial Statements.

82 Staff submits the above misrepresentations were contrary to subsection 194(1)(a) of the Act and contrary to the public interest.

ADMINISTRATION

83 At the hearing the Commission will follow the rules and procedure provided for in section 29 of the Act including the rights of the Respondents to be represented by legal counsel.

84 At the hearing Staff may apply for an order pursuant to section 202 of the Act that the Respondents pay the costs of the investigation by Staff into the affairs of the Respondents which were the subject of the hearing or related to the hearing incurred by or on behalf of the Commission.

85 Pursuant to section 29 of the Act, the laws of evidence applicable to judicial proceedings do not apply to the hearing.

86 The hearing may be adjourned from time to time by the Commission and, if the hearing is not concluded on the date set out above, the Commission may grant an interim order pursuant to section 33 of the Act.

87 The Respondents may obtain disclosure and further particulars of the facts and allegations in this Notice of Hearing prior to the hearing by contacting Charlene Anderson, Senior Enforcement Counsel, c/o Staff of the Alberta Securities Commission, 4th Floor, 300 - 5 Avenue SW, Calgary, Alberta, T2P 3C4.

88 Upon failure of the Respondents to attend at the time and place specified herein and upon proof satisfactory to the Commission of service of this Notice of Hearing upon the Respondents, the hearing may proceed in the absence of the Respondents and without further notice to them and the Commission may grant any order it considers to be in the public interest.

DATED at Calgary,	) ALBERTA SECURITIES
Alberta this 19th day of September,	) COMMISSION
2003.	) "Original Signed By"
	) David Linder
	) Executive Director

Schedule B

E00229 I01716

ALBERTA SECURITIES COMMISSION
IN THE MATTER OF the Securities Act
R.S.A. 2000, c. S-4 (“Act”)

-and

THEODOR HENNIG ("Hennig"), PETER J. WORKUM ("Workum"), CHESHIRE CAPITAL INC. ("Cheshire"), LEXINGTON CAPITAL LTD. ("Lexington"), STRATEGIC INVESTMENTS FUND ("Strategic") and ASHLAND HOLDINGS CORP. ("Ashland")
(the "Respondents")

AMENDED NOTICE OF HEARING

TAKE NOTICE THAT, pursuant to subsection 198(3) of the Act, the Alberta Securities Commission ("Commission") will convene at its hearing room, 4th Floor, 300 5 Avenue SW, Calgary, Alberta, on Wednesday, the 21st day of August, 2002, at 9:30 a.m., to set a date for a hearing of the allegations in this Notice of Hearing and to deal with any other preliminary matters. At the hearing, the Commission will consider whether to make an order against the above Respondents pursuant to sections 198, 199 and 202 of the Act, or such further order as the Commission considers appropriate.

Allegations

1 At all material times, Workum and Hennig were the Chief Executive Officer (CEO) and Chief Financial Officer (CFO) respectively of Proprietary Industries Inc. ("PPI"). As of July 29, 2002, Workum and Hennig took leaves of absence as CEO and CFO respectively.

2 Workum and/or Hennig are also the beneficial owners of Cheshire, Lexington, Strategic and Ashland.

3 Cheshire, Strategic and Ashland are incorporated in the Turks and Caicos Islands of British West Indies. Lexington is incorporated in Belize City, Belize ("off-shore companies").

4 Each of the four offshore companies had a brokerage account with the same brokerage firm in Vancouver, British Columbia.

5 Newmex Minerals Inc. ("Newmex") was an Alberta Stock Exchange ("ASE") listed company. PPI owned 72% of Newmex until September 30, 1998, at which time, PPI purported to sell its interest.

Market Manipulation

6 In September, 1998, Workum and Hennig were looking for ways to increase PPI's earnings for the 1998 fiscal year. They devised a scheme that resulted in PPI purporting to sell its interest in Newmex at a significant gain.

7 PPI purported to sell its interest in Newmex to Pensionskasse der ASCOOP ("ASCOOP") and SPIDA Ausgleichskasse ("SPIDA"), both incorporated in Switzerland, and an Alberta holding company, LynChris Holdings Inc. ("LynChris") for $1.00 per share, the then market value.

8 LynChris entered into an agreement to buy some of PPI's interest in Newmex in order to facilitate the transaction; however LynChris did so on the understanding that there was no risk to LynChris and that LynChris could at any time request the return of its original purchase price plus interest.

9 By February 2000, LynChris requested the return of its original purchase price from PPI.

10 In order not to reveal the scheme and in order to reimburse LynChris as agreed, PPI would have to repurchase the shares at market value. However, by February 2000, the market price of Newmex had declined substantially. If PPI purchased the Newmex shares at that market price, LynChris would have incurred a substantial loss and would not have received back its original purchase price as agreed.

11 As a result, Workum and/or Hennig directed a broker with a brokerage firm in Vancouver, British Columbia (the "Broker") to purchase shares of Newmex on the open market in order to increase the share price of Newmex to between $1.00 and $1.20.

12 In accordance with these instructions, the Broker proceeded to purchase Newmex shares through the brokerage accounts of Cheshire and Strategic in order to increase the share price of Newmex ("February Market Manipulation").

13 The February Market Manipulation was intended to conceal the fact that the LynChris/Newmex transaction was not bona fide, that PPI never intended to dispose of its interest in Newmex and that it was structured solely for the purpose of allowing PPI to record a gain which inflated its earnings for the 1998 fiscal year.

14 As the result of the above, Workum, Hennig, Cheshire and Strategic directly and indirectly traded and purchased securities of Newmex in order to artificially increase Newmex's share price, contrary to subsection 93(b) of the Act and the public interest.

15 In addition to LynChris purchasing PPI's shares of Newmex, also in September, 1998, PPI purported to sell to ASCOOP and SPIDA its remaining shares of Newmex for $1.00 per share.

16 ASCOOP and SPIDA entered into an agreement to buy PPI's remaining interest in Newmex. In order to facilitate the transaction, ASCOOP and SPIDA understood that there was no risk to them and that at the end of two years they could request the return of their original investment plus interest regardless of the market value of the Newmex shares.

17 PPI's original agreement with ASCOOP and SPIDA contained a clause that specifically set out this understanding. The ASE rejected the agreement on the basis that any repurchase of the Newmex shares would have to take place at market value. The agreement was revised, removing the repurchase clause, implying that the share repurchase would take place at market value.

18 At the end of two years, in September 2000, Newmex was trading consistently below 60¢ per share.

19 In September 2000, Workum and/or Hennig directed the Broker to purchase shares of Newmex on the open market in order to increase the share price of Newmex to between $1.00 and $1.20.

20 In accordance with these instructions, the Broker proceeded to purchase shares of Newmex through the brokerage accounts of Cheshire, Lexington and Strategic in order to increase share price of Newmex ("October Market Manipulation").

21 The October Market Manipulation was carried out in order to justify PPI's repurchase of the Newmex shares from ASCOOP and SPIDA at the original price plus interest in accordance with the original ASCOOP/SPIDA agreement (that the ASE had rejected).

22 During the investigation of Staff of the Commission ("Staff") the Newmex transaction, Workum advised Staff that PPI had repurchased the Newmex shares from ASCOOP and SPIDA at market value, which was in excess of $1.00 per share.

Secret Commissions

23 Throughout Workum's employment with PPI, and in numerous documents filed with the Commission and provided to its shareholders, Workum maintained that he did not receive any salary or remuneration from PPI. Hennig disclosed some remuneration from PPI. Staff's investigation, however, has revealed that Workum and Hennig have received, directly or indirectly, substantial fees or monies from PPI and related companies that were not disclosed.

24 The LynChris/Newmex transaction provided that PPI would pay a commission of 200,000 freely trading shares of Newmex to Cheshire.

25 PPI, Workum and Hennig failed to disclose that Cheshire was a company owned and controlled by Workum.

26 In or about December 1998, Cheshire received the 200,000 Newmex shares from PPI with an approximate value of $225,000.

27 In the Azterra transaction (referred to in the January 31, 2002, Notice of Hearing), Workum and Hennig structured the transaction such that PPI would pay Strategic a fee of 7% of the gross value of the shares of Willow Creek and Creative Classics which were purportedly sold to Azterra. Such value was significantly inflated and exaggerated for the purposes of the transaction and calculation of the fee.

28 PPI, Workum and Hennig failed to disclose that Strategic was a company owned and controlled by Workum.

29 In November 2000, PPI purchased a 70% interest in Sulphur Corp. of Canada ("Sulphur Corp."). PPI structured the transaction such that Lexington would receive a 5% interest in Sulphur Corp.

30 PPI, Workum, and Hennig failed to disclose that Lexington was a company owned and controlled by Workum.

31 In or about June 2000, Workum requested that the Broker set up or find an offshore bank account for his benefit. The Broker proceeded to do so and arranged for Workum and Hennig to

use and have access to Mandolin Inc.'s ("Mandolin") bank account in the Turks and Caicos Islands.

32 On about July 4, 2000, PPI deposited into Mandolin's bank account the amount of $2,756,250 as payment of a commission on monies raised by PPI through a Swiss private placement of its common shares.

33 PPI, Hennig and Workum failed to disclose and, indeed, Workum and Hennig took active steps to conceal the fact that these commissions were payable to Workum and Hennig.

34 On or about April 13, 2001, PPI deposited into Mandolin's bank account the amount of $1,173,000 as payment of a commission on monies raised by PPI through a Swiss private placement of its common shares.

35 PPI, Hennig and Workum failed to disclose and, indeed, Workum and Hennig took active steps to conceal that these commissions were payable to Workum and Hennig.

36 In addition, PPI paid commissions to Workum and Hennig as follows:

October 21, 1999	Ashland	$36,000
October 25, 1999	Ashland	$15,000
November 9, 1999	Ashland	$210,311
November 9, 1999	Cheshire	$105,511
November 9, 1999	Strategic	$23,231
January 13, 2000	Strategic	$202,500
January 13, 2000	Cheshire	$100,000
January 13, 2000	Ashland	$100,000
August 2, 2000	Ashland	$350,031

37 PPI, Hennig and Workum failed to disclose and, indeed, Workum and Hennig took active steps to conceal that these commissions were payable to Workum and Hennig.

37.1 Hennig and Workum failed to disclose that Workum was a shareholder of Hippocampus Corporate Development AG, a Swiss company that received commissions of approximately $400,000 from one of PPI's private placements.

Failure to File Insider Trading Reports

38 From October 31, 1995 to present, Workum and Hennig, through Strategic, actively traded in securities of PPI and other companies related to PPI, without filing insider-trading reports, contrary to subsection 182(2) of the Act.

39 From November 1997 to present, Workum and Hennig, through Cheshire, actively traded in securities of PPI and other companies related to PPI, without filing insider-trading reports, contrary to subsection 182(2) of the Act.

40 From July 1999 to present, Workum and Hennig, through Ashland, traded in securities of PPI and other companies related to PPI, without filing insider-trading reports, contrary to subsection 182(2) of the Act.

41 From July 2000 to present, Workum and or Hennig, through Lexington, traded in securities of PPI and other companies related to PPI, without filing insider-trading reports, contrary to subsection 182(2) of the Act.

Misrepresentations

42 Throughout the Staff's investigation, and, in particular, in Hennig's examination under oath on July 10, 2002, and Workum's examination under oath on July 12 and 15, 2002, Workum and Hennig concealed, lied and misled Staff in their evidence, the particulars of which include the following:

42.1 Workum and Hennig denied any interest or knowledge as to the beneficial owners or principals of Strategic, Lexington, Ashland, Mandolin and Cheshire;

42.2 Workum denied any involvement in setting up Cheshire or Lexington;

42.3 Workum testified that Lexington, Cheshire and Strategic were owned by Swiss persons who raised money on behalf of PPI;

42.4 Workum testified that Lexington, being owned by Swiss brokers, was to receive a 5% interest in Sulphur Corp. in order to ensure that these brokers would remain interested in and encourage further investment in Sulphur Corp.;

42.5 Workum testified that he had lines of credit with Lexington, Cheshire and Strategic. In fact, Workum had concocted the idea of lines of credit with the offshore companies in order to mislead Staff as to the reason Workum was receiving monies from the offshore companies;

42.6 Workum and Hennig failed to disclose that CommCept AG, a Swiss brokerage firm allegedly responsible for raising large amounts of private placement monies for PPI, was forwarding a percentage of its commissions for these private placements to Workum and Hennig through the off-shore companies;

42.7 Hennig represented and Workum testified that PPI had repurchased the Newmex shares from LynChris, ASCOOP and SPIDA at market value, which was in excess of $1 per share. In fact, however, this market value was artificially increased at the direction of Workum and/or Hennig; and

42.8 Hennig and Workum failed to disclose in PPI's 2001 financial statements that Tuscana Management Corp. and Finspeed GmbH were parties related to PPI.

43 In addition, Workum instructed the Broker to draft and send letters to Staff in which false beneficial owners of Strategic, Lexington and Cheshire would be disclosed.

Administrative

44 At the hearing, the Commission will follow the rules and procedures provided for in section 29 of the Act, including the right of the Respondents to be represented by legal counsel.

45 The hearing may be adjourned from time to time by the Commission and, if the hearing is not concluded on the date set out above, the Commission may grant an interim order pursuant to section 33 of the Act.

46 The Respondents may obtain disclosure and further particulars of the facts and allegations in this Notice of Hearing prior to the hearing by contacting Charlene Anderson, Senior Enforcement Counsel, c/o Staff of the Alberta Securities Commission, 4th Floor, 300 - 5 Avenue SW, Calgary, Alberta, T2P 3C4.

47 Upon the failure of the Respondents to attend at the above time and place, and upon proof to the Commission of service of this Notice of Hearing on the Respondent, the hearing may proceed in their absence and without further notice to them, and the Commission may grant any order it considers to be in the public interest.

DATED at Calgary,	) ALBERTA SECURITIES
Alberta this 19th day of September,	) COMMISSION
2003.	) "Original Signed By"
	) David Linder
	) Executive Director

TAB 14

Court of Queen's Bench of Alberta

Citation: Carlson Family Trust v. MPL Communications Inc., 2009 ABQB 77

Date: 20090218
Docket: 0301 08503
Registry: Calgary

Between:

Carlson Family Trust, Sarah Caroline James and David Faler Carlson

Applicants

- and -

MPL Communications Inc., Stephen D. Pepper, Barrie Martland, Marpep Publishing Limited and Inventory Depot, Inc.

Respondents

Reasons for Judgment
of the
Honourable Madam Justice R.E. Nation

Introduction

[1] The board of MPL Communications Inc. (MPL) proudly and publically never adopted a written code of business conduct and ethics for its directors, officers and employees on the belief that the small number of directors, officers and employees made adoption of a code unnecessary. The skill and knowledge of the board members as well as reliance on advice from counsel were stated as the method the company would use to ensure that directors exercised independent judgement in considering transactions and agreements in respect of which a director or executive officer had a material interest.

[2] This is an action brought by a group of minority shareholders who challenge that statement. The applicants claim that several actions taken by two directors were self dealing and

resulted in board action or inaction which was oppressive to the minority shareholders. The dispute revolves around the roles of Messrs. Martland and Pepper, the two senior executive managers of MPL, their direct marketing talents in building the subscriptions for MPL, and how they, and their related company, Marpep, should have been compensated for management and marketing services provided after public funds were raised in 2000.

[3] The minority shareholders ask for various relief, including an order that Messrs. Pepper and Martland and Marpep be required to repay substantial sums taken from MPL since 2001, failing which their shares be surrendered to treasury, as well as an order for the appointment of Mintz & Partners Ltd. (Mintz) as a monitor or inspector of the company, to oversee the replacement of the outside directors and also to ensure that inappropriate self dealing does not reoccur.

Issues

[4] A series of court orders have already dealt with various issues raised by the applicants. A court order directed a trial of various issues, the exact wording of the order is as follows:

> Have the business and affairs of MPL been carried on and conducted in a manner, or have certain acts and omissions of MPL effected a result, that is oppressive and unfairly prejudicial to, or that unfairly disregards the interest of, the applicants and other security holders of MPL, in respect of the following matters:
>
> 1. The payment by MPL to Marpep and IDI of management fees totalling approximately $3,000,000 over the years 2001 through 2004, beyond amounts paid by MPL to Messrs. Pepper, Martland and Oille pursuant to employment contracts with MPL.
>
> 2. The increase in amount since 1999 of the amount of the Marpep loan, and the failure of MPL to put in place in 1999 or at any time reasonably soon thereafter any commercial arrangement for the payment of interest thereon or for specific terms of repayment thereof.
>
> 3. The remuneration paid to Messrs. Pepper and Martland since 2004.
>
> 4. If the acts are oppressive, what relief, if any, should be granted.

[5] A determination of these issues requires a consideration of the facts and the law. A discussion of the general factors to be looked at in determining the reasonable expectations of the shareholders follows. This involves some detailed examination of the historical context of this dispute as well as the workings of the independent committee. Then the reasonable expectations in relation to each of these issues will be determined, and a decision will be made on whether there was oppressive conduct in relation to each issue. Remedies are then examined.

[6] For the benefit of those reading this judgment for certain content only, the following is the index on a subject basis:

Facts

[7] The following background facts were not in contention at the trial, and are relevant to the discussion of the issues before the court. A historical understanding of the evolution of the relationship between MPL and the insider directors and Marpep is essential to understand and then adjudicate upon the issues in dispute.

1. The defendant Marpep is a private corporation, with Messrs. Pepper and Martland each effectively owning a 50% interest. Starting in 1972, Marpep bought various financial advisory newsletters and ran a business publishing and selling them through direct marketing by mail.

2. In 1988, those publications were vended into the respondent MPL, a public company on the Alberta Stock Exchange, in a Junior Capital Pool transaction (the JCV). Messrs. Pepper and Martland controlled, either directly or through Marpep, 92% of the shares in MPL. The rest of the shares were held by related parties.

3. MPL's by-law No. 1 allowed contracts between MPL and an officer or director, as long as the director or officer had complied with the provisions of the *Alberta Business Corporations Act*, R.S.A. 2000 c. B-9 (*BCA*).

4. Messrs. Pepper and Martland (the two "inside directors") held the titles of chief executive officer and president, respectively. They viewed these descriptors only as titles, they described themselves as "joined at the hip" in terms of their business, and they ran a very collaborative venture. Clearly Mr. Pepper took the lead in financial matters and governance, while Mr. Martland took responsibility for the editing and the direct marketing program. Four outside directors were appointed to the board, Messrs. Ash, Winger, Scott and Goth. Three of these directors had attended university with the inside directors, the fourth was a friend. All four remained directors to the current time, with the exception of Mr. Winger

who resigned effective December 1, 2004 under pressure from the Ontario Securities Commission, due to a court order issued against him in the United States, which restricted his right to sit as a director.

5. At the time of the JCV, MPL and Marpep entered into a written agreement (the first Marpep agreement) whereby Marpep provided all editorial, production and circulation services in connection with the ten publications, including all production, advice and services of the printing, collating and mailing of the direct mail and publications. The remuneration to be paid by MPL to Marpep was set out in a detailed schedule of cost per page and per subscriber. The contract was for two years, ending December 1990. It was contemplated, and in fact happened that by December 1990, all the equipment and the leased premises would transfer from Marpep to MPL, which would then have the physical plant to print the publications and send out all marketing material.

6. After 1990, large amounts of money flowed annually from MPL to Marpep. These were described as management fees, which in 1996, 1997 and 1998 ranged from 1.18 to 1.76 million dollars a year. In addition to the management fees, marketing and promotion fees were paid to Marpep Publishing Services (MPS), a partnership formed by Messrs. Pepper and Martland from 1995 to 1999. These amounts ranged from a low of $722,547 to a high of $2.463 million per year. It was the practice during these years for MPL to advance sums to Marpep, directly to Messrs. Martland and Pepper or to other related parties at their request, and keep track of those amounts on a ledger. At the end of MPL's fiscal year, these amounts were tallied and reflected on the draft financial statements which were prepared by the accountants, presented to the board and approved.

7. After the expiry of the first Marpep agreement, no further written agreement was negotiated between Marpep and MPL. Messrs. Pepper and Martland and the one outside director who testified, Mr. Scott, indicated there was an oral agreement whereby Messrs. Martland and Pepper, through Marpep, provided management and direct marketing services to MPL.

8. A written agreement was signed effective November, 1994 between MPL and MPS. The written terms indicated that MPS was to perform the direct marketing campaigns of MPL and provide all the goods and services to produce the campaigns.

9. After 1990, a loan from MPL to Marpep appeared on the MPL financial statements, for money advanced to or for the benefit of Messrs. Martland and Pepper and Marpep. This loan fluctuated from a low of $160,297 at year end 1992, to a high of $1,972,675 at year end 1998.

10. The above loan to Marpep was queried by the Alberta Securities Commission (ASC). As a result of an exchange of correspondence, specific disclosure on the financial statements was required, identifying it as prepayment of management fees to be incurred by MPL for future periods. The rationale for the loan was that it allowed tax flexibility which was to the benefit of MPL.

11. In 1999, Yorkton Securities Inc. (Yorkton) was retained by MPL to raise capital of around $1 million through the sale of over 3 million warrants that were convertible to common shares. As part of Yorkton's involvement, Messrs. Pepper and Martland agreed to enter into formal, written employment contracts with MPL at market terms. Any contractual arrangement between Marpep or MPS to provide services to MPL was to cease. Yorkton had the right to appoint two directors of its choice to MPL's board. In conjunction with the warrant sales, Yorkton arranged for the sale of 4 million MPL shares held by Marpep for $5 million. Out of these funds, the outstanding loan from MPL to Marpep was reduced by one-half to $836,337.

12. Messrs. Martland and Pepper signed employment contracts that commenced July 1, 1999 which allowed an annual base salary of $175,000 with provisions for the possibility of a bonus, pension plan, benefits, club memberships, car allowance and stock options. These were signed after input from Hewitt Associates (an outside consulting firm) about the appropriate level of their executive remuneration.

13. The business and publically communicated rationale behind Yorkton's involvement to raise capital was to assist MPL to develop an internet presence. To further that objective, MPL bought an on line financial information service called Carlson-On-Line from the applicants, for cash of $700,000 and 1.5 million MPL common shares, which were subject to escrow requirements.

14. As a result of the above described transactions, the ownership of shares in MPL controlled by Messrs. Martland and Pepper directly or indirectly was reduced to approximately 57% from the 92% they had previously controlled.

15. MPL anticipated that building a presence on the internet would ultimately mean it would not require the direct marketing campaigns, which in the past were required to sustain subscriptions and thus revenue. Rather, there was a "build it and they will come" expectation. Substantial funds and resources were spent on the internet presence. Despite this, the experience of MPL was that subscriptions did not sell through the website, and it still had to continue direct marketing to get subscribers. When the dot.com bubble burst in 2001, MPL laid off staff, including Mr. Carlson, but it continued to build and work on an internet presence. There was a general recognition that direct marketing by mail would not be replaced by internet selling anytime soon.

16. In 2000, Messrs. Martland and Pepper continued the practice of having MPL write cheques or provide cash to them or for their benefit, as had been done previously. This was despite the fact that any contract between MPL or MPS, on the one side, and Marpep on the other, had been cancelled. Mr. Pepper testified that the inside directors thought that these benefits would be credited towards any annual bonus. The amount on the ledger of approximately $125,980 at the December 31, 2000 year end was treated by the accountant as an increase to the Marpep loan, and reported as such on the financial statements. It was later recognized after the commencement of this action that it was improper, and the $125,980 without interest was paid back to MPL by Marpep in 2004.

17. In 2001, MPL commenced paying Marpep a management fee in addition to the salary contract amounts paid to Messrs. Pepper and Martland. This was explained by the respondents as a "return" to the oral contract in place before Yorkton's involvement. When it became apparent that the new internet paradigm would not generate significant sales, and that direct sales were still very much needed, Messrs. Pepper and Martland testified that they were not willing to return to the "old paradigm" and receive only the compensation which their employment contracts provided. They wanted to and did revert to the pre-2000 manner of providing services through Marpep.

18. In each of the years 2001 through 2004, management fees of between $733,000 to $755,000 (rounded figures) were paid to Marpep, and totalled $2,977,799 in those four years.

19. In response to this litigation, which was commenced in May 2003, the board of directors of MPL established an Independent Committee (IC) comprised of Messrs. Ash and Scott to review the status of the litigation, examine the company's business model and financial operating plans presented by management, and make recommendations to the full board of directors as to how MPL should proceed on the matters arising from the IC's review. The IC was charged specifically with making recommendations on the business model for MPL to adopt, and on the appropriate levels of compensation for Messrs. Martland and Pepper. If a direct marketing program was approved, and the IC determined a need for specialized marketing services, it was to recommend who should provide them: Marpep, Messrs. Martland and Pepper, or outside specialists. The IC was also directed to look at when and how the Marpep loan should be repaid.

20. On the eve of the first scheduled court hearing, a settlement agreement dated April 1, 2004 was signed. Its terms included an agreement that the IC would include an assessment of the current management structure, and that the IC would retain an independent expert to assist in its deliberations. It was agreed that the Marpep loan would not be used in the future, and would be repaid in full on terms

to be fixed by the board of MPL. In addition, MPL would consent to the release of the applicant's shares held in escrow. Solicitor client costs and disbursements for the applicants were paid by MPL and the application adjourned, on the understanding that no party was precluded from returning to the Court and taking issue with any decision made by the board, after the IC reported.

21. The IC commenced its work, and retained Deloitte and Touche LLP (Deloitte) to assist with information gathering, and provide input into the proper remuneration of Messrs. Pepper and Martland. Deloitte provided two reports, which were entered by agreement into the court record.

22. The IC reported December 2, 2004. The report made various recommendations for MPL: to mitigate its dependence on Messrs. Martland and Pepper, to improve the forecast and budget process and to change the corporate governance. In relation to the issues in this lawsuit, it recommended that the Marpep loan be repaid over eight years in eight equal installments with an interest rate of prime plus one percent, with the first principal payment to be due July 1, 2005. It recommended a revised compensation package for Messrs. Pepper and Martland from January 1, 2005 of a base salary of $275,000 per annum, with an additional variable compensation component of a bonus up to 100% of base salary, with 50% based on achievement of pre-established goals.

23. On December 7, 2004, the board of directors of MPL passed resolutions to terminate any existing services arrangement with Marpep and to negotiate the repayment of the Marpep loan as recommended by the IC, but using a Canadian LIBOR 30 day interest rate (the LIBOR rate) plus 1%, rather than the rate of prime plus 1% suggested by the IC. The board voted not to seek a repayment of some or all of the total compensation paid to Messrs. Pepper and Martland (directly or through Marpep) in 2001 through 2004 and decided that MPL would defend that aspect of this application if necessary.

24. Marpep has made annual payments of $101,072 since 2004 to pay down the Marpep loan, which stood at a total of $808,567 at the 2004 year end, so that its current balance at the 2008 year end is $404,280.

25. This action was returned to the trial list and then adjourned, pending a time for the exploration of the possibility of an offer being assembled to buy out the minority shareholders, so that MPL could be converted to a private company. This did not materialize. An offer was made by Messrs. Martland and Pepper and Marpep to buy all the minority shares in MPL at 8 cents a share immediately prior to trial, but the offer was not accepted.

26. Gross revenue for MPL has declined from $9.1 million in 1998 to $6.6 million in 2007. Net losses were experienced in the company from 1999 to 2001, the largest

being in 2000 and 2001, when extra expenses and large write-offs occurred in conjunction with the on line business. In round figures, the MPL balance sheet indicated the following before tax numbers: in 2001, a net loss of 3.4 million dollars; in 2002, a net income of $1 million; in 2003, a net income of $16,000; and for 2004, a net loss of $900,000. MPL shares traded for a low of $1.05 in 1998 to a high of $1.78 in 1999, but between 2001 and this trial in 2008, the share price has fluctuated from low of $0.05 to a high of $0.45.

The Law

[8] The applicable law is not in dispute between the parties, rather they disagree on how legal principles should be applied to the specific facts of this case. Accordingly, I will briefly summarize the guiding legal principles, and then deal with the application of the law to the facts.

1. Statutory Sections

[9] There are two provisions of the *BCA* which are relevant.

[10] Section 242 establishes the oppression remedy, and allows the Court to impose remedies if it is satisfied that: (1) any act or omission of a corporation effects a result, (2) the business of the corporation has been carried on in a manner to, or (3) the powers of the directors have been exercised in a manner, that is oppressive or unfairly prejudicial to the interests of any security holder.

[11] Section 120 relates to directors and insider dealing, and is the relevant section incorporated in MPL's by-law No. 1. Section 120 requires a director or officer of a corporation who is a party, or has a material interest in a party, to a material contract or proposed contract to disclose that in writing, or request the nature and the extent of the interest to be entered into the minutes of the meeting of the directors. It allows a mechanism for approval of contracts of this type by the directors or the shareholders and affords some protection from any such contracts being void or voidable if the procedure is followed and if the contract was reasonable and fair to the corporation at the time it was approved.

2. Case Law Commenting on the Oppression Remedy

[12] Several cases provide summaries of the law in relation to the oppression remedy in Alberta. The historical development of the remedy is discussed in detail in *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Q.B.) at 131 to 148. In *Keho Holdings Ltd. v. Noble* (1987), 78 A.R. 131 (C.A.) at paras. 14-19, the Alberta Court of Appeal discusses definitions of unfairness, and talks about broad and liberal interpretation of the provisions.

[13] The leading case in Canada on the oppression remedy is the recent decision of the Supreme Court of Canada, *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. It established that

in assessing a claim of oppression, a court must answer two questions: firstly, does the evidence support the reasonable expectation asserted by the claimant; and secondly, does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of that interest? Factors for a court to consider in determining whether a reasonable expectation exists include: general commercial practice, the nature of the corporation, the relationship between the parties, past practice, steps the claimant could have taken to protect itself, any representations and agreements, and the fair resolution of conflicts between corporate stakeholders. The second question requires the claimant to show the failure to meet the reasonable expectations involved unfair conduct and prejudicial consequences. The onus is on the applicants, to prove on the balance of probabilities that the expectation put forth is reasonable, and that the conduct which is the subject of complaint is oppressive.

[14] Oppression is an equitable remedy, seeking to ensure fairness. It gives the court broad, equitable jurisdiction to enforce not just what is legal, but what is fair (*BCE* at para. 58). In order for conduct to be "oppressive", the court has to consider and have regard to the reasonable expectations of the applicant minority shareholders, objectively determined at the time of the conduct about which complaints have been made. The court has to determine if the reasonable expectations have been thwarted by the board.

[15] The determination of reasonable expectations is both objective and contextual. The actual wishes of the shareholder, or their unilateral expectations, are not conclusive. The expectation has to be reasonable looking at the facts of the case, the relationship at issue and the entire context. The expectations must have a grounding in the specific facts of the case, or the ordinary expectations derived from the laws of responsible corporate governance.

[16] Once a reasonable expectation is established, the focus shifts to whether the conduct was oppressive. Generally stated, oppressive conduct is conduct that is unfair, or unfairly disregards or prejudices the interests of minority shareholders. It is a visible departure from a standard of fair dealings. In a court review of conduct, it must be remembered that the mandate of the directors is to use their best judgement in managing the company. The judgement has to be informed, and have a reasonable basis.

[17] The business judgment rule is a presumption that in making a business decision, the directors of a company acted on an informed basis, in good faith and in honest belief that the action taken was in the best interests of the company: *Aronson v. Lewis* (1984), 473 A.2d 805 at 812 (Del. Sup. Ct. 1984). The purpose and operation of the business judgment rule is summarized in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 27 B.L.R. (3d) 53 (Ont. Sup. Ct. J.), aff’d (2004), 42 B.L.R. (3d) 34 (Ont. C.A.) at paras. 152-153:

> The business judgment rule protects Boards and directors from those that might second-guess their decisions. The court looks to see that the directors made a reasonable decision, not a perfect decision. This approach recognizes the autonomy and integrity of a

> corporation and the expertise of its directors. They are in the advantageous position of investigating and considering first-hand the circumstances that come before it and are in a far better position than a court to understand the affairs of the corporation and to guide its operation.
>
> However, directors are only protected to the extent that their actions actually evidence their business judgment. The principle of deference presupposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions. Courts are entitled to consider the content of their decision and the extent of the information on which it was based and to measure this against the facts as they existed at the time the impugned decision was made. Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination.

[18] The process taken by the directors in reaching their decision will be subject to a careful review, to determine if the presumption of the business judgment rule is rebutted. "There is no protection for directors who have made an unintelligent or unadvised judgment": *Smith v. Van Gorkom*, 488 A.2d 858 at 872 (Del. Sup. Ct. 1985). That case also suggests that after the fact events, such as subsequent board meetings, legal opinions or consideration by an independent committee, are not to be considered by the court in determining whether directors made an informed decision at the relevant time. Such after the fact actions may be used to determine whether the directors were able to remedy any of their previous actions or to determine if the applicants and other shareholders actually suffered any harm.

[19] Whether directors received independent legal and financial advice is a factor in examining the conduct of directors and committees. However, the fact that accountants made entries on the financial statements to reflect the effect of the self dealing transactions will not alleviate a finding of oppression, if the conduct was oppressive: *Low v. Ascot Jockey Club Ltd.* (1986), 1 B.C.L.R. (2d) 123 (S.C.). Bad faith need not be found, it is sufficient to find that the foreseeable result of the directors' actions would be oppressive to the complainant.

[20] In considering corporate governance when dealing with oppression actions, it must be kept in mind that a court is not required to do a microscopic examination of the processes and proceedings of the committee or the board. A "gold standard" is not to be sought, it is whether the failure to comply with corporate governance results in the directors not complying with their duty of good faith or duty of care. See: *Greenlight Capital Inc. v. Stronach* (2006), 22 B.L.R. (4th) 11 (Ont. Sup. Ct. J.).

[21] Excessive or unauthorized management fees, or self dealing transactions that were not properly approved or scrutinized by the Board have been examined in several cases. (See particularly, *Danylchuk v. Wolinsky* (2007), 30 B.L.R. (4th) 215 (Man. Q.B.), aff'd (2007), 225

Man. R. (2d) 2 (C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 63; *UPM-Kymmene Corp.* (Ont. Sup. Ct. J.); *Ascot Jockey Club*; *Buset Estate v. Buset Apartments Ltd.*, [2003] O.J. No. 3472 (Div. Ct.) aff'g (2001), 16 B.L.R. (3d) 168 (Ont. Sup. Ct. J.); and *Catalyst Fund General Partner I Ltd. v. Hollinger Inc.* (2006), 79 O.R. (3d) 288 (C.A.), aff'g (2004), 1 B.L.R. (4th) 186 (Ont. Sup. Ct. J.)). These cases show the application of general principles in self dealing transactions, and particularly the procedure desired, before any self dealing transaction is sanctioned by the board.

[22] The creation of a special committee from among independent members of the board of directors who do not have a conflict is seen by the courts as a mechanism to minimize actual or perceived conflicts of interest in scrutinizing transactions that are not at arms length. The purpose of the special committee is to advise the directors and make a recommendation to the board. Generally where the board acts on the recommendation of a special committee, the decision will be accorded respect under the business judgement rule, as long as the special committee has discharged its role independently and in good faith. Prudent decisions made on a reasonably informed basis should not be interfered with by a court, just as a court should not lightly usurp the function of the board to manage the corporation. The issue is whether there is an abuse of power, resulting in significant harm to the corporation. The best interest of the corporation has to be the overarching consideration in the decision making of the directors.

Overview: Determining the Reasonable Expectation of the Shareholders

[23] The applicants argue that the payments by MPL to Marpep after the commencement of the 1999 employment contracts involved unacceptable insider dealing. They argue that any new contractual arrangement for management services after 2000 between MPL and Marpep was never properly considered and approved by MPL's board. Moreover, they argue that even if there was board approval, the quantum of the payments to Marpep was oppressive to the minority shareholders. They request that Marpep repay, with interest, the sum of $2,977,779 which is the total of all management fees paid to Marpep from 2001 to 2004.

[24] The applicants state that it was a reasonable expectation that any salary and bonus taken by the insider directors would be in accordance with the 1999 salary contracts which were set by the board upon consultation with industry experts. They request that amounts taken in salary or bonus by Messrs. Martland and Pepper under their 2005 contracts in excess of the 1999 $175,000 base salary be re-paid to MPL. These amounts paid from 2005 to the end of 2008 total $1.45 million.

[25] The applicants also argue that after 1999, when any commercial reason ended for MPL to be loaning money to Marpep, it would be reasonable for the shareholders to expect that MPL would proceed to arrange for the orderly collection of this debt, on commercial terms, which would include interest from 1999. They argue that the decision of the board to allow Marpep to repay that loan over 8 years was oppressive and unfair, as was the determination of the interest rate.

[26] The respondents argue that not only did the board approve the payments to Marpep in an acceptable manner, but the direct marketing and management services provided through Marpep by Messrs. Pepper and Martland were unique and they were worth every dollar paid. They argue that the value of the contribution of Marpep is a decision for the board, and in deciding the amounts paid to Marpep from 2001 to 2004, the board acted honestly, in good faith and with the best interests of the corporation at heart. They argue that this is a classic case where the business judgement rule should apply. In relation to the terms of repayment of the Marpep loan, and the remuneration to the insider directors after 2005, the respondents argue that the board acted on advice from the IC, and had the best interests of MPL in mind. Further, the respondents argue that the expectations of these minority shareholders are not reasonable, having regard to the nature of the corporation, and its past practice. They further take the position that the applicants could have taken steps to protect themselves when they negotiated the purchase of their MPL shares, which were largely compensation for MPL's purchase of Carlson-On-Line.

[27] To evaluate whether the expectations of the applicants are reasonable, the court first has to look at the various factors enumerated by the Supreme Court of Canada in the *BCE* case. As in all cases of this kind, the decision is very fact specific, and a detailed look into some aspects of the history of MPL cannot be avoided in order to evaluate the arguments raised. As the considerations relating to the reasonable expectations on each of the three complaints under examination are in some senses generic, and in other aspects fact specific, I will review the relevant factors in relation to reasonable expectations in general, and then address the specific reasonable expectations in relation to each issue separately.

1. Representations and Agreements

[28] To assess the reasonable expectations of the shareholders, a court looks to public pronouncements, especially of publically traded companies, as those become commitments to shareholders and within the range of reasonable expectations that are objectively aroused.

[29] There is no question that in the pre-2000 period, the public statements of MPL, through its published financial statements, information circulars and annual reports, made it clear that there were contracts in place between Marpep, MPS and MPL and through these, benefits were flowing indirectly to Messrs. Pepper and Martland. Reviewing those, any minority shareholder would know that historically there had been self dealing transactions, as a description and the quantum of the benefit was disclosed.

[30] At the time of the warrant offering, and the 2000 information circular, the fact of the previous relationships was clearly disclosed, as was it made clear that all insider dealing agreements had been cancelled. The August 15, 2000 information circular referenced the November 15, 1994 agreement with MPS, which was terminated June 28, 1999. It also referenced an agreement with "no specific terms" between May 19,1988 and June 28, 1999 involving Marpep to "provide marketing, administrative and executive management services" and that this agreement had also been terminated by the parties on June 28, 1999. There was clear language that Messrs. Pepper and Martland had entered into employment agreements with

the corporation, pursuant to which they would receive a gross annual salary of $175,000 and benefits. The information stated that subject to termination provisions, each employment contract was for an indefinite term.

[31] On the basis of that reporting, a shareholder would have the reasonable expectation that the "old" system had been terminated, and Messrs. Pepper and Martland would receive their compensation by way of salary and benefits defined by the employment contract. These contracts were for an indefinite term. Much was made of the word "indefinite" at trial. I find that all that word could reasonably communicate to a shareholder is that the contracts were not time defined. The only expectation the shareholder could have is that if the contracts were changed, or any insider dealing with Marpep was to start again, it would be done with proper board consideration and approval, and in compliance with by-law No. 1.

[32] From the information provided by MPL, no minority shareholder would share the inside directors' hope that MPL would be up for sale shortly after 2000, or have any appreciation of Messrs. Pepper and Martland's position that they gave up the management contracts through Marpep and switched to salary contracts only with a short time frame in mind, until Yorkton sold MPL. Both Messrs. Pepper and Martland testified that they saw the involvement of Yorkton as a three stage process; firstly, to raise money, secondly, to develop the internet presence and thirdly, to sell the company. Messrs. Pepper and Martland's position was that after the burst of the dot.com bubble, there was a corporate realization that sales would not just happen on the internet. With that and the sharp downturn of MPL's fortunes in 2001, both testified they were not willing to give the services they had in the past for the salary and benefits set by the 1999 employment contracts. This attitude was made known to the board. Mr. Scott testified that he saw Yorkton as "tarting the company up for sale", and seemed to accept this attitude of the inside directors. However, I find as a fact that this mind-set of the directors was never communicated to the minority shareholders, formally or informally.

[33] The fact of the existence of a new management contract in 2001, which would pay management fees to Marpep, in addition to the salary and benefits in the 1999 salary contracts was not publically announced. In fact, the first time it was brought to the shareholders attention was in the mandatory disclosure in the annual report, and financial statements for the 2001 year end. The information circular for the August 2002 annual meeting did not disclose the 2001 benefits, stating the payment from MPL to the inside directors was $182,500 each under their employment contract and indicating that there was no material interest in any material transaction involving MPL other than the Marpep loan. This was contrary to the information in the 2001 financial statements and the annual report, which did reference the payments. After that, the management fee payments paid in 2002, 2003 and 2004 were all noted in the annual financial statements, the information circulars for the annual meetings, and the annual reports.

2. Commercial Practice and Corporate Governance

[34] Commercial practice plays a significant role in forming the reasonable expectations of parties. A departure from normal business practices or normal corporate governance that has the

effect of undermining or frustrating a complainant's exercise of its legal rights will generally, but not inevitably, give rise to a remedy. The court has to look at MPL's adherence to what would be considered necessary or usual corporate governance as it effects the issue of a public company entering into a contract with an entity in which a director has an interest, or enforcing a loan against such an entity.

[35] It was clear from the evidence that the basics of careful corporate governance have never been a focus for MPL. The outside directors are all friends of the inside directors, and have been on the board since its inception. It was apparent that although there was informal phone contact between individual board members and Mr. Pepper or Mr. Martland, formal meetings of the board were rare. Most appeared to have been done by telephone conference call, and minutes were generally non-existent.

[36] Mr. Pepper testified that it was his duty to keep minutes of the meetings, but he rarely did so. He admitted to that lack of attention until 2000, but at that time, he understood that the company had to "pull up its socks". This was because there were now more and varied shareholders. Up to 1999 the shares of MPL were owned 92% by Messrs. Pepper and Martland or Marpep, and the other 8%, largely by related parties. After 2000, their controlling interest was reduced to just over 50%.

[37] After 2000, there continued to be a poor attitude toward minute keeping. Minutes for only two board meetings were produced at trial. The first were the minutes of a special meeting of the board of directors of MPL on December 7, 2004 when the board considered and voted on the recommendations of the IC. The second was a certified copy of resolutions passed by consent (on signature of the directors) on February 14, 2000, necessary for Yorkton’s involvement and the warrant sale.

[38] Two other situations that demonstrate the general level of disrespect for generally accepted aspects of corporate governance are the following:

1. Mr. Winger was a director of MPL who resigned under pressure from the Ontario Securities Commission. Mr. Pepper testified he knew of Mr. Winger's problems in the States but was willing to have him on the board to help him out, and would not have insisted on his resignation, even in the face of the findings against him in the United States.

2. There seemed to be some question as to the composition of the compensation committee, a rather pertinent committee to the discussions in this case. Mr. Scott testified that he understood the compensation committee was himself, Mr. Ash and Mr. Goth. Mr. Pepper testified that Mr. Scott and Mr. Martland were on the compensation committee. The Notice of the Annual Meeting for 2006, 2007 and 2008 all clearly identify the compensation committee as Mr. Scott and Mr. Martland. The compensation committee is identified as the body that sets the bonuses for the inside directors.

[39] In this case, what brings corporate governance into sharp focus is that there is an admission that there was no formal documentation of the disclosure or consideration of details of a contract between MPL and Marpep after 1999. The respondents acknowledged that in 2001, there was no formal or documented process dealing with the fact that Marpep would charge fees for services provided by Messrs. Pepper and Martland. No written notice was given by Messrs. Martland or Pepper or Marpep, nor was there a formal directors meeting to consider the proposal, and approve it, before the fees were paid. There was no evidence of any attempt before the IC in 2004 to do any assessment of the services to be provided by Messrs. Pepper and Martland, assess their fair market value, and certainly, no thought seems to have been given to what services were covered in the salary contracts, as opposed to what services would come under a management contract. Nor were there any negotiations as to terms.

[40] If Messrs. Pepper and Martland and the board had followed normal business practice applicable to a director who has an interest in a company which wishes to enter into contractual relations with a corporation, there would have been disclosure of the interest of management in Marpep to the board. A careful consideration by the board with the best interests of MPL at heart would follow, looking at the terms and commercial acceptability of any proposal by Marpep to provide services to MPL. Under normally accepted corporate governance rules, this would be a reasonable expectation of the shareholders, if insider dealing was to occur by way of a new contract between MPL and Marpep.

3. Past Practice

[41] Past practice may create reasonable expectations among shareholders, especially in closely held corporations. Here, the applicants are not arguing past practice created an expectation. Interestingly, past practice appears to be heavily relied on by the respondents, as a justification for the actions of the board. They suggest that further dealings with Marpep, and the terms of those dealings, should come as no surprise to the minority shareholders, who were or should have been aware of the history of the company, and that history should have affected their expectations.

[42] The three directors who testified, Messrs. Pepper, Martland and Scott were consistent in their evidence that each year the outside directors received the draft financial statements, and approved the payment for that year to Marpep. This, it was suggested, was the practice before 2000, and the practice started again in 2001,when the payments in issue in this lawsuit started to be paid. This was explained as a historical practice and the respondents argued it was sufficient to satisfy the requirement to review insider dealing. They argue that reasonable shareholder expectations should not require more.

[43] The first time the fact of the payment to Marpep was dealt with after 2000 was when the financial statements for the 2001 year were prepared in 2002. Mr. Pepper testified that at the 2001 year end, he met with the internal accounting department members, they tallied the money that had been paid personally to Messrs. Pepper and Martland (or to others for their benefit) above their annual salary, and this number was discussed with the external auditor and placed in

the draft financial statements as the amount of remuneration paid that year to Marpep for management services. The only evidence of any review by the outside directors is the evidence of Mr. Scott, who testified that he was aware that Messrs. Pepper and Martland wanted to "revert" to the terms of Marpep's previous oral management contract. He indicated that he, and to his knowledge the rest of the outside directors, merely used the same test as for the pre-1999 management contract with Marpep, which was that it was acceptable as long as the fees were roughly in the range of 9% to 14% of gross revenue. He testified that he and the other outside directors voted separately on this compensation during a telephone conference directors meeting, and then all directors, including Messrs. Martland and Pepper would have voted to approve the financial statements. He described this as merely an extension of (or reversion to) how things were done before the involvement of Yorkton.

[44] I reject this use of past practice or "history" as a defence or justification to suggest that it was not reasonable for the shareholders to expect a clear request to the board in 2001 for a contract involving insider dealing, and a clear and independent consideration of such a request by the board. I find for the reasons set out below that this suggested historical practice is questionable, both as it is not supported by the written minutes that exist, and the evidence shows considerable historic confusion by the board about contractual terms. From the evidence, I find that historically, the board merely went along with and ratified whatever Messrs. Pepper and Martland and Marpep had already decided to do. It is important to understand this history, as it explains much of what happened after 2000.

3.1 What Do the Minutes Show of Past Practice?

[45] Interestingly, the only minutes for the pre-2000 period is one set of minutes which were necessitated by the prospectus filed in 2000 for the distribution of special warrants. Those minutes documented resolutions approving the financial statements for 1996, 1997 and 1998. Approval was done by all six directors, including Messrs. Martland and Pepper. This written record belies the evidence that the financial statements would have been approved each year, with a separate vote on compensation, and then an approval of the audited financial statements. If it was done in each of the years 1996, 1997 and 1998, as Messrs. Pepper and Scott testified it had been, why did it need to be done again in 2000 retroactively for those years?

3.2 Clear Confusion About The Details of the Pre-1999 Insider Dealing

[46] I find that the directors never really addressed their minds to the terms of any oral contract that existed from 1990 to 1999 between MPL and Marpep until after this action started, and justifications had to be made. The evidence at trial illustrated a great deal of misunderstanding by Messrs. Pepper and Martland, and the board of directors as to what, if anything, were the terms of any oral contract from 1990 to 1999. The confusion extends even to the terms of the written contracts. No witness satisfactorily explained how the written contracts interfaced with the oral contracts.

3.2 (a) The oral testimony about the pre-1999 contractual dealings.

[47] Mr. Pepper in his evidence carefully went through the history of the company, and explained that when MPL took over the assets of Marpep, the first Marpep contract was entered into between MPL and Marpep. He explained this was because all of the printing presses, leases and physical assets associated with producing the newsletters were still in Marpep, so it would be producing the newsletters, while these assets were all transferred over to MPL. He described the written agreement as providing two types of services, firstly, the physical production of the publications, and secondly the creation, conception, design and implementation of the marketing program to increase circulation. He very carefully testified that this first Marpep contract, as it involved insider dealing, was put to and specifically voted on by the minority shareholders, and it was disclosed to the Alberta Stock Exchange (ASE).

[48] Mr. Pepper then went on to identify that after the first Marpep contract expired at the end of December 1990, the production side, which was covered by the schedule of payments in the contract, was taken over by MPL. However, he testified that the creative side, being the direct sales program, was still provided by him and Mr. Martland under an oral contract. The amount to be paid every year under that oral contract was decided between Mr. Pepper and the internal accounting department at year end. They would meet with the external auditors, and: "we would decide on the value of the services produced for MPL. Frankly, it had a lot to do with what MPL could afford to pay". That fee was put in the draft financial statements, which were circulated to the board for comment and then the outside directors voted on them.

[49] Mr. Pepper indicated that from the year 1990 until the employment contracts of 1999, Marpep charged MPL amounts taken from the schedules in the first Marpep contract which amounted to about 9% of revenue. The fee gradually increased, so that it was up to 14% at times, but averaged about 12% over the years. Mr. Martland confirmed the overall practice, deferring to Mr. Pepper's evidence. Mr. Scott, the only outside director to testify at the trial, indicated the same general regime and that every year the outside directors would review the amount, put in the draft financial statements, use a "rule of thumb" percentage to revenue and approve the payment to Marpep, following which, all directors would approve the financial statements.

[50] The introduction of MPS was described by Mr. Pepper as a partnership of Messrs. Martland and Pepper, formed in 1994 to replace a third party direct marketing agency, "Surebank Marketing Services " which had gone out of business. MPL had used Surebank to "finance and run its direct marketing campaigns". Mr. Pepper's evidence was that the staff of MPL would outline the campaign, and Surebank would in essence provide the funds to do it. Surebank would receive a fee of about 25% of the cost of the campaign, usually within 10 days, but always within a maximum of 13 weeks. Mr. Pepper testified that the chartered banks would not lend money to MPL for these campaigns, so after Surebank disappeared, Messrs. Martland and Pepper provided financing services through MPS. Mr. Pepper testified that the written contract between MPS and MPL (exhibit1-tab 53) was approved by the outside directors. Mr. Scott gave this same explanation for the contract with MPS, and testified that he assumed the board approved the MPS contract, but did not have a specific memory of that and could not point to any minutes confirming such approval.

3.2 (b) The Written Contractual Terms

[51] A review of the two written contracts does not support the oral testimony about the contractual terms between MPL on one hand and Marpep or MPS on the other.

[52] The first Marpep agreement, seemingly so carefully approved by the shareholders according to Mr. Pepper, is a written agreement that says nothing about the so called "marketing services" of Messrs. Pepper and Martland. It is an agreement to provide editorial, production and circulation services in relation to the publications on a specific fee per page schedule. It covers specific services and in s. 2.01 states: "and such other services as may from time to time be agreed upon in writing between MPL and Marpep". When the agreement expired, on December 31, 1990, MPL had possession of all the hardware, and was set up and producing the publications, and had employees working on programs. Mr. Pepper's concept of the "creative" services under the Marpep agreement is not based anywhere in the written contract.

[53] No one seems to have addressed, in terms of this "oral" contract, that the 9% figure was derived from a schedule in the first Marpep agreement which was very specific to numbers of subscriptions and tasks, that were all things MPL had taken over by the end of 1990. There was no written contract saying that Marpep provided some unique marketing plan or copywriting talent.

[54] The other written contract was between MPL and MPS. It is a one page document signed by Mr. Pepper for MPS and Mr. Martland for MPL. MPS under the terms of the contract is to provide all of the "goods and services required to produce the campaign". Is this only money as suggested by Mr. Pepper in his oral evidence, or more? If it is money only, it was at a time when Marpep had an interest free loan from MPL of $747,000 at the start of 1994, and over $1 million at the end of that year (as reported in exhibit 1-tab 21). No witness could describe how the written contract with MPS interfaced with the so called "oral" agreement with Marpep. If the contract means what the plain words might imply, that MPS was undertaking to provide all goods and services required to produce a campaign, it was not doing so. All of the printing, collating, processing, and graphics were being done by MPL's staff and machines. There was no suggestion that MPS was anything other than the brains or input of Messrs. Martland and Pepper and possibly their chequebooks.

[55] The MPS contract is described in the MPL financial statements generally as a contract to provide project promotions, with the cost of the project to be charged within 90 days. The notes to the 1997 financial statements go a little further and indicate the amounts will be based on the number of paid subscriptions generated. In contrast, the information circular for the 2000 annual meeting, when Yorkton was involved and reporting was likely the most complete, describes the MPS contract as a contract whereby MPS performed direct marketing campaigns on behalf of MPL for management fees: "ranging from 5% to 15% above anticipated acquisition costs per subscriber for each subscription received, net of cancellations".

[56] Contrasting the written contracts that existed, and the testimony about the oral contracts, one is left with a very confusing picture as to what contractual relations existed between MPL and Marpep, and MPL and MPS.

3.2 (c) What was Really Happening

[57] Up to 1999, it would have been hard to determine the exact terms of any oral contract. In fact, this was frankly acknowledged in the information circular for the 2000 annual meeting of the shareholders, at the time of the warrant offering and Yorkton's involvement. In disclosing and describing insider transactions, that circular indicated that: "from May 19, 1988 to June 28, 1999, an agreement with no specific terms" existed between MPL and Marpep under which Marpep proved marketing, administrative and executive management services to MPL.

[58] So in reality, this "oral" contract really had no relationship to the first Marpep agreement. No one could explain the terms, or exactly how the amounts to be paid were determined. The first Marpep contract was not based on a fee calculated by a percentage of revenue. On a strict reading of the plain words, that contract never separately addressed a "second" line of services (the so called marketing program).

[59] In reality, Mr. Pepper was providing executive services, and Mr. Martland was overseeing the publications and involved in the direct marketing program. Historically, from 1990 to 1999, they used cash and money from MPL for themselves personally, and kept track of it in the ledger, where it was reflected as management fees. They took what the traffic would bear. At the end of the year, there was a discussion as to how the monies taken were to be dealt with on the financial statements, with input from accountants, including the auditors. None of the accountants, either internal employees or external auditors testified. There was nothing to suggest that any of the accountants were approaching the treatment of these amounts on any type of contractual basis; instead it would appear that they were deciding the most tax advantageous way to deal with the amounts.

[60] What was really happening was that Messrs. Martland and Pepper, used to running a private company, now had a public company doing the same business. They owned most of the shares, and the small minority they did not control were closely held. The board of directors were all friends of the inside directors, providing their services for little or no remuneration. Mr. Scott's evidence suggested the board cared only that the outside auditor had reviewed the payments in preparing the draft financial statements, and that the range of the Marpep fee fell within the range of 15% to 18% of revenue. He suggested, but could not be sure, that there were two separate votes on the financial statements, one on the remuneration each year without the inside directors involved, and one of the financial statements themselves, with all directors involved. His inability to recall any specific approval for a period of over a decade, demonstrates to me that often these matters were dealt with casually, during telephone meetings or discussions, and formalities were followed as an exception, not the rule.

[61] In addition, although there was discussion of the percentage of revenue paid to Marpep, there seems never to have been a calculation of the percentage of revenue being paid to Marpep and MPS, both under "insider dealing" contracts for seemingly at least some overlapping services. If one takes the 1996 payments to Marpep at almost $1.2 million and the amounts of $1.4 million paid to MPS that same year, the total is $2.6 million. Compared to revenue of $6 million, this is 43%. For 1997, $1.2 million paid to Marpep and $2.4 paid to MPS totals $3.6 which that year was 43% of MPL's revenue of $8 million.

3.3 The Post 2000 Situation

[62] It is no surprise that when Yorkton got involved to raise capital, it insisted that the loan with Marpep end, the MPS contract be terminated, and the Marpep agreement end. After independent advice as to quantum was received by the board from Hewitt and Associates, new written contracts of employment between Messrs. Pepper and Martland and MPL set out a salary of $175,000. The information circular to the shareholders for the 2000 annual shareholders meeting is detailed and honest about previous insider dealing transactions. The voting direction agreement signed between Messrs. Pepper and Martland, Marpep, MPL and Yorkton expressly included a negative covenant that neither Marpep, nor Messrs. Pepper and Martland, would enter into any non-arms length contract, agreement or arrangements with MPL without the proper approval of the board of directors of MPL (also requiring majority approval to include a Yorkton designee).

[63] In September, 2000, MPL produced a confidential information memorandum, when BMO became involved to arrange a sale of the company. That circular indicated that MPL employed 93 people, including 38 experienced financial research and editorial writers and also in-house graphics production staff. It addressed management compensation, indicating that the past agreement with Marpep was terminated in 1999 and that "such expenses would not be incurred under new ownership". It referred to direct marketing and newspaper inserts as continuing to be important marketing tools and talked about the necessity to market aggressively and creatively to assure revenue objectives were met or exceeded.

[64] As soon as the year 2000 started, so did the practice of Messrs. Pepper and Martland to draw money as needed, in addition to the base amount of salary. This money, Mr. Pepper explained, was taken as an advance on a bonus. However, no bonus was declared for the inside directors that year. At year end, the accountant merely added the $125,980 outstanding to the Marpep loan. It seems that no one; not Mr. Pepper, Mr. Martland, the internal accountant, the outside auditor, or any of the outside directors stopped to think about whether there was any legal basis to do that. It was not until this action was started that the $125,985 was repaid by Marpep in March, 2004. Clearly there was not any benefit to MPL in lending money interest free to Marpep, so additions to the loan had no basis to continue.

[65] In 2001, the year that Marpep started to receive fees for management services, Mr. Scott could not recall any specific discussion or request about MPL paying management fees to Marpep. The request was never put in writing, nor was any approval. Mr. Scott felt that at the

end of the year when the financial statements were approved, it was "implicit" approval of the reinstatement of the management services contract. He indicated that the board was well aware of the terms of the first Marpep contract, but he was unable to say what were the terms of the so called "oral " extension. He indicated that the directors merely continued to check each year to see that the same general percentage of revenue was taken by Marpep. His evidence was that as long as the percentage of the total revenue taken by Marpep was between 15% to 18%, he felt that was reasonable and he would approve it.

[66] The only evidence of any issue that any of the three directors who testified could recall of the outside directors questioning the remuneration set out in the draft financial statements, related to the recipient, not the quantum of payment. In 2001, the financial statements in note 14 disclosed a related party transaction that involved payment of $190,000 to a significant corporate shareholder. This turned out to be Inventory Depot Inc. (IDI). The money was not paid to IDI directly, it was originally paid to Marpep as a management fee. After it was explained as a tax advantageous transaction to Messrs. Pepper and Martland/Marpep, and neutral to MPL, this was apparently sufficient for outside directors to accept the designation of the management fee meant for Marpep to be shown as being paid directly to IDI on the MPL financial statements. This lead to the confusion about IDI and the inclusion of IDI and Mr. Ollie in the formulation of issue 1 in this litigation. It is also the explanation as to why any investigation into payment to those parties is moot, as it was really funds MPL paid to Marpep. Likewise, the management fee for Marpep was later restructured a year later, to be partly characterized as a "guarantee fee", for a personal guarantee given by Messrs. Martland and Pepper for MPL, again, assumably a more favourable tax treatment for them, but nothing to do with an actual negotiated contract between those inside directors and MPL, or a fee actually required or discussed at the time.

[67] The respondents raised an argument that once Yorkton disappeared from the picture, or lost interest, they were released from any terms of their agency agreement with Yorkton, which had a term that any representations and undertakings lasted for 14 months. Their argument was that after 14 months, anything could change, and they were at liberty to change the employment contracts, or enter into non-arms length transactions without the proper approval of the board as set out in the Yorkton agreement. This argument is a red herring for the purposes of this action, as it ignores the requirements of strict corporate governance on self dealing transactions. It does illustrate the mentality of the inside directors and the board, that with Yorkton's gradual exit from the scene, the inside directors and the board could just slip back into their prior mode of conduct, with nothing else required in terms of corporate governance.

[68] The aspect that seemed not to be appreciated by Messrs. Martland and Pepper and not addressed by the outside directors, is that once Messrs. Martland and Pepper had employment contracts, they had some duties that had to be performed for those wages. In fact they had performed those duties for half of 1999 and 2000 with no request for additional remuneration. So to return to the "old" contracts, whatever they were, meant someone should have carved out or delineated what were now management activities, expected of the CEO and president, and already paid for by the fair market value wages set using outside consultants in 1999. There does not appear to be any consideration of cancelling the employment agreement, nor any

consideration for any "double dipping" by getting a salary of $175,000 per annum and management fees measured by the same percentages as were used in the past, when no fair market salary contract existed.

[69] The position of Messrs. Pepper and Martland that they never meant to provide the pre-2000 marketing services under their employment contracts, and that their unique knowledge and success in the direct marketing planning and copywriting was needed once things changed in 2001, is not supported by the evidence. After the employment contracts were in place in 1999 and 2000, MPL did not wind down its direct marketing, or stop campaigns, or simply use old copy, it carried on the same number or more campaigns. Thus whatever management and copywriting skills Messrs. Pepper and Martland were providing pre-1999, they continued to provide in the last two quarters of 1999, and 2000 under their employment contracts.

[70] Specifically Mr. Pepper testified that his job did not change from 1991 to 2001. Mr. Martland also admitted on cross-examination that his job did not really change during 1999 to 2001, he still did the direct marketing and copywriting, and maybe he took on a bit more as new staff were putting information of the web site. He said he could not imagine MPL not doing direct marketing through those years, as it was "key" to MPL's business. This rather belies the reason that suddenly direct marketing was required again after the new paradigm failed, and thus a reversion to a Marpep management contract.

[71] None of Messrs. Martland, Pepper or Scott seemed to appreciate that in 2001 there were new shareholders, some of whom had gained their shares through investment in the company through the warrant sale in 2000, or some, such as the applicants, who obtained shares when Carlson-On-Line was vended into MPL. These shareholders had some legal rights. Particularly, the affairs of the company, including any insider dealing or director compensation could not be done in a way that was unfair or prejudicial to these rights. As the *Low* case points out, it is no longer a simple question of seeing what MPL could pay, or relying on an outside auditor to pick a "right" number. The directors appear to have given little consideration to the issue, and certainly did not address insider dealing with Marpep after 1999 with the approach one would expect for a public company, with a critical look at the services Marpep was going to provide, what their fair market value was, and the best interests of MPL.

[72] In fact, it seems a fairer characterization of what happened in early 2001 was that Messrs. Pepper and Martland realized that they were not going to sell their shares, they could not retire, and they wanted the type of financial return they had been receiving through Marpep and MPS. They merely started to take the money. Any discussion with the directors was one on one, over the telephone. By January 26, 2001, the general ledger for "management fees" showed that $113,292 had already been paid to the benefit of Messrs. Pepper, Martland or Marpep. They and the outside directors gave no thought to the proper governance of the corporation.

4. The Nature of the Corporation

[73] The *BCE* case pointed out that the size, nature and structure of the corporation are relevant factors in assessing reasonable expectations. Courts may accord more latitude to directors of small, closely held corporations to deviate from strict formalities than to the directors of larger public companies. MPL was a small public company. Up until 2000 it would be described as a closely held corporation, but after Yorkton's involvement in 2000, when the company raised money in the public market by the sale of warrants, and Marpep sold three million shares, it was no longer closely held.

5. Preventative Steps

[74] The *BCE* case sets out that in determining whether a shareholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. For example, could a secured creditor have negotiated protections against the prejudice suffered?

[75] The respondents raised the fact that when Mr. Carlson sold Carlson-on-Line, and received shares of MPL in partial payment, he and his legal counsel had a due diligence look at MPL. It is argued he did or should have seen the history of the Marpep loan and also the contracts and amounts of management fees being paid historically. The respondents also argue it was no surprise that the employment contracts were for an indefinite period of time. They argue that most of the plaintiffs (as they are related or closely held to Mr. Carlson) could have insisted on clauses or protections such as no further insider dealing or limits on compensation for Messrs. Pepper and Martland, but no such assurances were requested.

[76] Firstly, in relation to this action, the issues as defined by court order define the question of reasonable expectation not only in terms of the named applicants, but also "other security holders of MPL". There was no suggestion that other holders of common shares could have somehow protected themselves against insider dealing.

[77] As for the argument as it was raised against Mr. Carlson, although he could have tried to negotiate more assurances from the directors at the time he acquired his shares, there is nothing to suggest Mr. Carlson would have had any idea or suspicion that insider dealing would start again without formal board approval. It is a consideration that the Marpep loan was clearly shown as interest free with no terms of repayment, and no concern was raised about that when Mr. Carslon negotiated his share purchase.

6. Fair Resolution of Conflicting Issues

[78] The *BCE* case pointed out that conflicts may arise between the interests of corporate stakeholders, among themselves, or between stakeholders and the corporation. The court was clear that where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty, and to act in the best interests of the corporation, viewed as a good corporate citizen.

[79] The respondents rely heavily on the process and recommendations of the IC, which examined the issues in this litigation. The IC's recommendations were accepted by the board of MPL, with the exception of a change in the manner of calculating the interest rate on the Marpep loan. They point to the law that states that if the directors act on the advice of a committee, composed of persons having no conflict of interest, and the committee has acted independently, in good faith and made an informed recommendation, the business judgement rule should apply.

[80] The applicants attack the IC report, and thus the directors' decision on three bases. Firstly, they argue that as it relates to whether compensation taken from 2001 to 2004 should be paid back, that issue was not a formal issue in the mandate of the IC, nor should it have been, as deference to an IC by the court under the business judgement rule is based on the IC committee being struck and dealing with the issue at the time it arises, not retroactively due to litigation. They suggest that the IC is afforded deference only as it relates to forward looking decisions. Secondly, the applicants argue that the work of the IC was tainted, in that the inside directors, as well as their legal counsel, were involved in the process. Thirdly, the applicants argue the IC was merely a window dressing as the board of directors adopted the IC's recommendations on compensation as well as many other business matters, but then took no steps to implement the recommendations of the rest of the IC report, essentially ignoring all issues related to future governance of MPL.

6.1 The Timing of the Appointment of an Independent Committee

[81] The IC was appointed after this action started, and so evaluated payments from MPL to Marpep as management fees from 2001 to 2003 retroactively. Likewise, the IC was reviewing the omission by the board to address proper terms for the collection of the Marpep loan after the fact. There is a distinction between this and the IC dealing with proper inside director compensation from 2004 forward. Board meetings, legal opinions or independent committees which are after the fact, taking a retroactive view, should not be looked at in determining if the directors made an informed decision at the time to which deference is due. They may be used, rather, to see if previous acts or omissions were remedied or the shareholders suffered harm. After the fact information is helpful in any review, but does not change the fact that the focus initially is on the manner of decision making and the basis for the decision (or non-decision) at that time.

6.2 The Mandate of the Independent Committee

[82] The mandate to the IC was set out in writing. It was: to review the litigation; to examine the company's business model and the financial operating plans presented by management; and to make recommendations to the full board of directors. It was given a mandate far wider than the litigation. The mandate allowed the IC to review the Carlson litigation and thus to review all of the materials filed, to get the input of senior management, including Messrs. Pepper and Martland (specifically mentioned) and if necessary, the accountants, auditors and legal advisor of the company. The IC was also to examine the MPL business model, the future business model, the Marpep loan, the employment agreements and the direct marketing program. It was to make

recommendations to the full board to ensure the short and long term profitability of MPL, and maximize shareholder value for all the shareholders and to protect the best interest of the company. It was to suggest the business model for MPL to adopt. If direct marketing was approved, the IC was to recommend who should provide those services. The IC was specifically asked to look at the loan to Marpep and decide if, when and how the current balance should be repaid. The IC was directed to record minutes of all relevant meetings, and was authorized to retain the services of any independent consultants it deemed necessary, including financial, legal, compensation or marketing consultants.

[83] Thus the independent committee here was charged with a large undertaking, not only was it to review specific issues raised by the lawsuit, but also the elephant underneath: what was the future business plan, and how was it to be achieved?

[84] Mr. Scott spent much of his time on the witness stand describing the process by which the IC undertook its study. He explained that Mr. Winger (who had previously been an outside director) was retained as an administrative consultant, to help with the sheer volume of the work, and the tight time schedule. He was to summarize the litigation issues, get input for the senior management, gather information and coordinate the report.

[85] The IC hired Deloitte to provide a report initially focussing on corporate function. The Hay report was commissioned by the IC, to look at equivalent key executive compensation in other similarly positioned companies. Various interviews were conducted to get information about direct marketing skills, methods of delivery and costs. These are all attached as appendixes to the IC report.

6.3 Was the IC truly Independent?

[86] The allegation of tainting revolves around the involvement of Messrs. Pepper and Martland and their legal counsel, Mr. Stephenson, in the information to and workings of the IC.

[87] Dealing first with legal counsel, Mr. Stephenson was paid by MPL and at the time of the IC deliberation represented MPL, Messrs. Pepper and Martland and Marpep, all of whom were named as respondents and faced exposure in this lawsuit. It is clear from the evidence that he met with the IC and explained their mandate, making it clear that the IC could have its own independent legal counsel. Mr. Scott testified that Mr. Stephenson give him the “Repap case” (*UPM-Kymmene*) for his review. Mr. Scott said he found that helpful, as he had never heard of minority oppression actions, and the case assisted him to understand that the process had to be transparent and independent.

[88] In his direct evidence, Mr. Scott denied that Mr. Stephenson provided legal advice to the IC and in cross-examination indicted that it would be "inappropriate" for the IC to retain him in that capacity. He said that Mr. Stephenson was an advisor to the committee about process. However, on cross-examination it was pointed out to Mr. Scott that he, himself, had identified Mr. Stephenson as counsel for MPL and also to the IC, specifically in his e-mail, exhibit 39.

Also, the IC report itself on page 23 lists Mr. Stephenson as counsel, providing advice and support. Mr. Scott admitted in cross-examination that at trial he could understand the conflict of Mr. Stephenson being an advisor to the IC, although it would appear he was unaware of it at the time of the IC's work or deliberation. This is concerning, in that at the time all the work was being done by the IC, at least one of its two members was not on guard, or alert to the conflict issues that could arise in conjunction with the involvement of Mr. Stephenson.

[89] Management's written report to the shareholders in the MPL annual report for 2004 expressly indicted that the IC was comprised of two directors who: "retained their own legal counsel".

[90] So what does the record show of Mr. Stephenson's involvement?

1. Mr. Stephenson was noted as a participant and present for five out of the six meetings of the IC, for which there were recorded minutes.

2. Mr. Stephenson was copied with many of the e-mail communications between Mr. Scott and Mr. Ash and others, including exhibit 33, discussing the Hay report. He was being copied with the "soft copy" of the report from Deloitte on August 18, 2004 and was going to be involved in the call of the IC members with the report's writer, Mr. Cornfield the next day. (Exhibit 39).

3. Exhibit 40, an e-mail of August 26, indicates that Mr. Stephenson was being copied with e-mails between Messrs. Scott, Winger and Ash about the final Deloitte report, and an agenda for a meeting August 27, which specifically indicated as one of the items on the agenda, after reviewing initial comments on the draft Deloitte report, item (4): "to determine and to receive advice from counsel as to the appropriate next steps in fulfilling the IC's mandate from MPL's Board of Directors".

4. At the meeting of August 27, Mr. Stephenson provided some legal advice. Mr. Winger's notes of that meeting (exhibit 14) were produced by way of undertaking in this litigation. Parts of them were blacked out by counsel for the respondents, indicating "those portions which document legal advice have been deleted". As this determination was made by counsel for the respondents, and the only lawyer at the meeting was Mr. Stephenson, the only possible privilege would be between a lawyer and his client, and no other explanation was provided by the respondents, I infer that legal advice was given by a lawyer, Mr. Stephenson, to a client, the IC, at the meeting of August 27.

5. Exhibit 41 makes it clear that comments on the draft Deloitte report were being provided to Mr. Stephenson. Exhibit 42 indicates that as of September 20, Mr. Winger understood that Mr. Stephenson wanted to be involved in the September 21 conference call " because of his specific interest and activity in the

compensation segment." The minutes of the September 21 conference call indicate discussions with Deloitte to review, comment on and if necessary, approve Deloitte's plan recommendation for the additional compensation work (the value of copywrite work).

6. Exhibit 45 indicates that the November 15 draft of the IC report was sent to Mr. Stephenson by Mr. Winger, "for his review and comment". In exhibit 47, Messrs. Winger and Scott were exchanging e-mails indicating: "Roy Stephenson was concerned about making sure that Chris (Deloitte) obtained data as to the cost of outsourcing all or a portion of the components of Barrie's and Steve's responsibilities" and again the same sentiment is referenced in exhibit 48, "I left a voice mail for Chris Rose to call me about the data gathering with respect to outsourcing costs that Roy wanted emphasized".

[91] The concern about tainting was also raised by the applicants in relation to the involvement of Messrs. Pepper and Martland. Clearly, it was necessary to have them interviewed and to give input on the business plan and to explain their perception of their contribution to the direct marketing program. Deloitte needed to address this for a future business plan. However, the IC had to be on guard about any involvement of or influence by the inside directors on the ultimate recommendations of the IC. Mr. Scott testified that he felt Messrs. Pepper and Martland had no input into the final draft of the IC report, although they were provided with drafts to be sure that the report narrative was correct in terms of descriptions of how the company was run.

[92] What does the record show of the involvement of Messrs. Pepper and Martland?

1. The record indicates that Messrs. Pepper and Martland were very involved in putting together descriptions of the tasks of themselves and staff members, and coming up with a business plan.

2. There were e-mail communications (exhibits 32, 35, 36) which revealed discussions that a draft of the Mr. Crane's work (that became the final Hay report) was being provided to Messrs. Martland and Pepper. Exhibit 37 demonstrates that minutes of a call from the IC with Deloitte were being provided to Messrs. Martland and Pepper "for their review".

3. Exhibit 41 and the minutes of the IC's meeting of August 27, 2004 make it clear that a draft of the first Deloitte report was to be and was in fact provided to Messrs. Martland and Pepper for their comments. Comments were reviewed and circulated before a meeting which Mr. Winger had with David Cornfield (from Deloitte’s) to review the comments and discuss any additional work that Deloitte should do on compensation. Exhibit 44 indicates that Messrs. Martland and Pepper had made comments on a draft Deloitte report.

4. Mr. Pepper was in touch with Mr. Norin, who was consulted by the IC as an expert. His written report is tab 8 to the first Deloitte report. In July of 2004, Mr. Norin indicated through an e-mail (exhibit 25) that he had read some material and was going to meet with at least Mr. Pepper to discuss it. The subject title on the e-mail is "review of MPL Direct Marketing Program". His evidence was that he believes he showed a draft of his report to the IC to Messrs. Martland and Pepper, as well as the finalized report. No one told him not to communicate with Messrs. Martland and Pepper. Interestingly, he also provided his report as a "favour" to Messrs. Pepper and Martland, there was no charge for the report. The Norin report was commented upon in detail and relied upon by Deloitte in their report to the IC.

5. The documents included in exhibit 1-tab 158 are background for the MPL plan for the future. They were largely authored by Messrs. Pepper and Martland and provided to the IC. They give a history of the self dealing contracts, and make a case for how Marpep and Messrs. Pepper and Martland received compensation historically. In those documents MPL's growth is directly linked to the "modest compensation" paid to Messrs. Martland and Pepper and Marpep (p. 9). They tout the fact that the 1989 and 1990 services agreement with Marpep was vetted by the ASE and approved by shareholders, but then gloss over the period of 1991 onward, saying only that Messrs. Martland and Pepper provided direct marketing and editorial services through Marpep, and look at the annual fees as a percentage to revenue amount, justifying it as less than the 16% under the first Marpep agreement. The documents fail to document the historic involvement of MPS. Pages 36 to 38 are a full pitched lobby to the IC as to whether MPL received fair value from its arrangement with Marpep, and give a long discussion with a US market consultant, Mr. Smith, which “MPL” (I assume Messrs. Pepper and Martland) had comment on the model of MPL and the use of Marpep. This latter discussion really amounts to Messrs. Martland and Pepper leading their own hearsay expert evidence before the IC.

[93] The above is in stark contrast to the evidence of Mr. Pepper, who testified in relation to his involvement with the IC. Mr. Pepper said he met with Deloitte two or three times, and prepared organizational charts and information.

[94] In May, 2004 e-mail communication showed that the IC was waiting for a suggested proposal from Messrs. Martland and Pepper about the repayment of the Marpep loan, and then the IC could discuss and determine reasonable terms of repayment. The evidence was that no proposal was ever received, and the IC never went to Messrs. Martland or Pepper to determine their or Marpep’s ability to repay the Marpep loan. The IC merely looked at the time over which the loan was incurred and picked a time over which to pay it back.

[95] As a result of the above considerations, I accept that Mr. Scott, Mr. Ash and Mr. Winger spent serious time and effort on the work of the IC, and had the best of intentions. They clearly

were realistic about MPL's future and delivered some hard messages about the future of the company. However, I cannot ignore the fact that the e-mail communications and minutes suggest that Mr. Stephenson was involved in almost every step of their work, and not in an insubstantial way. He was clearly making suggestions, reviewing draft reports and had at heart the best interests of his clients, which included Marpep and Messrs. Pepper and Martland. Of most concern, no one on the IC seemed to understand or be aware of the potential for conflict or influence. The IC treated Mr. Stephenson either as its counsel, when it needed legal help, or its friendly advisor. By doing so, one has to ask if the IC could have been alive to the influence that may have been cast on the process.

[96] Although Mr. Scott indicated in evidence that he felt the report was free of influence from management, and he re-iterated this belief in his re-examination, the closeness of Messrs. Pepper, Martland and Stephenson to the process raises concerns. When I consider this, in association with the fact that the two members and the administrative agent were all old time friends of the inside directors, I find that the IC report has to be treated cautiously, and is not entitled the deference that would otherwise be given to an IC report that was clearly independent and free of influence, and subsequently adopted by the directors.

6.4 Was the IC merely Window Dressing

[97] The applicants alleged that the IC was merely a sham, set up to justify the actions of the inside directors and thus circumvent the law suit. It is argued this was best illustrated when the IC, after receiving the Hay report, requested the second report from Deloitte to justify the direct marketing component of the inside directors' work. Secondly, they argued that almost none of the IC’s recommendations embraced by the board of directors were implemented, except the compensation recommendations which were effective immediately. They argued that the board was never serious about following through with the report as it related to succession planning and future directions, only wanting the IC to deal with the monetary issues raised in this lawsuit.

[98] In relation to the first suggestion, I do not accept that the IC was set up as a sham to justify the past position of the board. When I review the breath of the report, and the effort, and when I consider the evidence of Mr. Scott, I do not find this IC was a charade, or empty exercise. I find that the IC undertook its mission seriously and obtained expert assistance in grappling with the issues. The breath of the report is illuminating, obviously some key issues were identified; that MPL needed a succession plan, remuneration issues had to be reviewed, and corporate governance be taken seriously.

[99] I find the IC's step to have Deloitte prepare a second report on the direct marketing issues was not meant as a charade or cover-up to obtain support for a pre-determined result. I accept the act of obtaining the second Deloitte report as a prudent exercise. Mr. Scott obviously had serious concerns about one aspect of the Hay report. The direct marketing contribution of Messrs. Martland and Pepper seems front and center in how they present and talk about the company, and is the one feature that may differentiate this company from the sample Mr. Crane reviewed.

Mr. Crane himself endorsed the search for further information as a reasonable thing to do, when trying to get maximum information to make a decision.

[100] The third allegation raises a more significant issue, as it is clear from reading the IC report that it had serious concerns about corporate governance, and the whole approach of management, which seemed devoid of any effective succession planning. The IC made recommendations about succession planning, and put priorities of A, B or C on these recommendations, representing time frames of six months, one year and up to two years, respectively. The board adopted these time frames. No doubt these priorities were ambitious, but they were a response to things that were lacking, for instance, to have written criteria for bonuses, and to clearly set out succession planning.

[101] The cross-examination of Mr. Scott made it clear that the board has not held management accountable to these deadlines, and very little has been done in follow up. Nothing seems to have been done to try other copywriters, or to groom anyone to replace aging management. This was no more clearly illustrated than by the evidence of Mr. Martland, who when questioned in direct examination about any succession plan, testified that MPL had a one million dollar insurance policy on his life, and that the company could run one or two years without upper management, and the insurance money would have to be used to search for and pay one or two leaders. No steps have been taken by the board to set written criteria for bonus recognition. The comment that the only part of the IC recommendations that were acted on right away and implemented were those dealing with the monetary aspects of this lawsuit has a ring of truth to it, as it was clear that most of the recommendations arising from matters not dealing with the monetary matters in issue in this litigation seem to have fallen by the wayside.

[102] I do find that this lack of enforcement says much about the board and its ability to really control what happens in the company, and particularly getting the attention of the inside directors and influencing their management. However, I do not find that fact in itself is a reason to find the whole IC a sham.

6.5 Conclusion on the Independent Committee

[103] As a result, I find that the IC work and recommendations provide helpful information to the court, especially the reports that were commissioned. However, the decisions of the IC, accepted by the board, do not attract the deference suggested in the business judgement rule in relation to its review of issues about which management had already made decisions (the Marpep management amounts from 2001-2004), or about which it failed to make decisions (re-negotiating the Marpep loan). Also, its independence is subject to question as it seemingly was not even aware of the possibility of influence on its decision by: having counsel for the inside directors and Marpep working with it; providing Messrs. Pepper and Martland with copies of draft reports and inviting comment; receiving and relying on the Norin report which had been influenced by Messrs. Martland and Pepper; and relying on Messrs. Pepper and Martland, not only for information about MPL and its structure, but also receiving literature from them advocating their position.

Issue 1. Management Fees to Marpep

1. The Reasonable Expectation

[104] When one considers the analysis of the factors above, in the context of the facts and background of MPL, the reasonable expectation which the applicants advance is fairly simple. They advance the expectation that after 2000, if there was going to be insider dealing, the insiders would approach the board with the details of their proposal, make a case for the contract, and that the board would consider and evaluate the proposal, looking at the need for and the fair market value of the services. The board would then make a decision with the best interests of the corporation in mind.

[105] This expectation is grounded in basic principles of good corporate governance. Although past practice before 1999 demonstrated that insider dealing had occurred, and particularly between Marpep and MPL, legally significant changes had occurred in 1999, and the public disclosure and statements of the company suggested that the manner of compensation of Messrs. Pepper and Martland had changed.

[106] The respondents acknowledged that the ordinary expectations arising from generally accepted rules of corporate governance on insider dealing were not followed after 1999. The first time any witness can point to a meeting of the board in which the post 2000 payments to Marpep were considered by the full board, would be in approving the financial statements from 2001, which occurred in 2002. It is clear the board treated this merely as a reversion to the oral terms of the pre-1999 contract with Marpep, with no thought that their duties lay to a broad range of shareholders, many of whom now were not related to the insiders. The approvals so formally sought in relation to the insider dealings for the first Marpep contract in 1988 were not followed.

[107] Although the inside dealing with Marpep was partially disclosed in the public disclosure in 2002 (for the year end 2001), and then more completely described in the required annual public disclosure in subsequent years, such publication does not get around the fact that the reasonable expectations of the shareholders as to how the board would deal with insider contracts were not met.

2. Where the Amounts Paid to Marpep from 2001-2004 Oppressive?

[108] Once the applicants have established a reasonable expectation as to how insider dealing, such as the Marpep management fees, should have been considered, and that expectation was not met, the court then has to go to the next step and make a determination of whether the fact of the contract with Marpep from 2001 onwards, or the amount paid, was oppressive. To complete a successful claim for oppression, the claimant must show that the failure to meet the expectation involved unfair conduct or prejudicial consequences. This involves a determination of whether the inside directors through Marpep were providing a service at fair market value. If so, there is nothing oppressive to the minority shareholders that company money went to pay for

management or marketing skills it would only have had to obtain from third parties, at the same price.

[109] The respondents argued that the two insider directors made critical and unique contributions to the success of MPL, not only as the president and chief executive officer, but also through their unique and successful writing and supervision of the direct marketing programs.

[110] The respondents point to MPL as a "market leader", citing internal and external market reasons for its lack of growth, but suggest it obtains high recognition from independent industry sources. In addition, they say the fact that MPL is the "lone man standing" in Canadian financial publications sales is a measure of its success. They point to the "unique and critical leadership roles and contribution of the founders and major shareholders", being Messrs. Pepper and Martland and the companies they control. The emphasis is on their senior management and executive services, and the provision of marketing, copywriting and promotional services.

[111] An evaluation of whether there was oppression or unfair treatment of the minority shareholders involves a review of the appropriateness of the compensation paid to the inside directors, as salary and through Marpep. Whether it is fair, examined in retrospect, takes the court into a consideration of: the thinking and findings of the IC, a review of the Deloitte reports, a review of the expert evidence about direct marketing programs and a consideration of the copywriting and marketing skills actually provided by Marpep. These factors are all considered to determine what was the fair market value for the services Marpep provided to MPL from 2001 through 2004, and whether the payment of $2.977 million was a fair payment for those services, or unfair and oppressive to the minority shareholders.

2.1 The IC's Consideration of the 2001-2004 Management Fees

[112] The IC indicated in its conclusions that while the process followed in fixing the 2001-2003 compensation would not meet the more stringent corporate governance standards required in 2004, the problem would be fixed on a go forward basis. It stated: "on the basis of the consultant's reports, the IC believes MPL received fair value for the money paid in 2001-2004 and recommends that repayment of some or all of the compensation should not be sought." No reasons were given for that thinking in the report.

[113] The only added insight provided at trial to that recommendation by the IC or its acceptance by the board was the evidence of Mr. Scott. He suggested that looking at the second Deloitte report, which gave a range of between 25% to 75% of possible compensation to Marpep for outsourcing the copywriting, the total compensation that could justified by that report, with salary at $275,000 and a full bonus, would be in the range of $695,000 to $937,000 total for both Messrs. Martland and Pepper in any one year. Mr. Scott indicated that the $350,000 base salary ($175,000 each) and approximately $700,000 paid to Marpep in each of those years, was just over one million and the IC felt the “discrepancy” was not significant enough to require any pay

back. Nothing more was added in evidence as to the business decision of the board in accepting the IC recommendation.

2.2 The Insider Director's Contribution to MPL's Direct Marketing Program

[114] It is clear that Messrs. Pepper and Martland, having been involved from the inception of the company, had to learn the concepts of direct marketing. The evidence established that although they collaborated and obviously worked together, Mr. Pepper was the financial director, and Mr. Martland was more the artistic and copywriter director. Mr. Pepper did not write copy, the evidence was that his involvement in the marketing campaigns was as a sounding board against whom Mr. Martland liked to bounce ideas.

[115] Messrs. Martland and Pepper had worked hard to establish their publication business in the mid to late 1960s. From the time they came to own the Canadian Business Services in 1968, both their partnership and the later corporate vehicles through which the publications were held relied on direct mail marketing to sell and cross sell publications. The evidence established that the experience of MPL has been quite consistent, annually 30% of their subscribers do not renew, so each year, to stay equal, those subscribers had to be replaced. The respondents' emphasis throughout the trial was that the board had to be sure it compensated them for the contribution they brought as a team to the direct marketing program.

[116] In evaluating this aspect of the claim, I had the benefit of several experts who talked about direct marketing, its importance, the availability of copywriting, and how to assess its value. I will summarized the parts of their evidence which I accepted and were important to me in coming to my decision.

[117] Mr. Tennenhouse was qualified as an expert in the area of direct marketing in Canada. He testified about his experience as a copywriter in Canada, and about his involvement in the Canadian Marketing Association and the Direct Marketing Council. He testified that hourly rates charged by freelance copywriters range from $175 to $350 an hour, and that salaries range from $35,000 to $90,000. He testified that there are post-secondary institutions in Canada that teach copy writing courses.

[118] Mr. Frunaux was qualified as an expert witness to talk about direct marketing and subscription based newsletter businesses in the 1980's. He also gave factual evidence about his experience at Hume Publishers, a past competitor of MPL, where he worked until 1989 when he started up his own company which provides custom publishing services in Canada. He was also on the board of the Canadian Marketing Association from 1986 to 1989. He confirmed various basic understandings about direct marketing, and testified about his usage of copywriters in Canada. He stressed the need to use Canadian copywriters when selling goods in Canada, and also to have competing packages, to constantly test the copy of one writer against another. He confirmed various prices for copywriters in the 1980's, with salaries ranging from $75,000 to $80,000 per year. He confirmed that that the sole measure of a copywriter's success is results. He knew MPL and Messrs. Martland and Pepper as competitors, but was not able to comment on

the reasonableness of remuneration of Messrs. Martland and Pepper, not was he called upon to do so.

[119] Mr. Norin, the CEO of Agora Inc., was qualified as an expert to give opinion evidence about the financial advisory newsletter business and the use of direct response advertising in that business. He testified that an annual drop of 30% of subscribers in a financial newsletter business did not surprise him. He testified about the use of copywriters and direct marketing. He had an interesting perspective, as at one point, his company looked to buy MPL. As a result, he had some familiarity with its business. His advice to MPL at the time was to try new copywriters, to train Canadians, and he stressed that the test of success in direct response advertising is solely in the number of subscriptions bought. His evidence at trial was illuminating, as although in his written report to the IC he talked about Agora paying excess of $1 million to an individual to who is a "strategic consultant", much of that payment was a bonus for extraordinary results. It would not follow that this figure relates to MPL's situation. His evidence stressed the need for results, and the need to link payment to results received. The totality of his evidence leads me to concur with some of the critique of his report provided by Deloitte at p. 41 of their report.

[120] Mr. Crane was qualified as an expert in the area of executive compensation, and gave evidence about the Hay Compensation Report, of which he was the author. He also provided comments on the second Deloitte report. He explained that it was impossible to find a direct comparator public company to determine executive compensation in the publications business, as MPL is a unique company in Canada. He put together a list of comparators, and discussed this list with Mr. Scott, who also had a human resources background. He then ran comparative numbers to see appropriate compensation. Looking at the 2003 year, he took the salary that each of the inside directors received and added to that one half of the money paid to Marpep in 2003. This amounted to compensation to each of Messrs. Pepper and Martland of $548,300. He found this to be the highest observed within the comparator group of companies and in the 87th percentile of cash compensation received by other CEO/COO figures. He commented that as a general rule, compensation of the CEO tends to bear a relationship to the fortunes of the company. He felt that the compensation package suffered from an inappropriate balance between fixed and variable rewards and recommended that the current salary of $175,000 be continued, with a target bonus of 50% of salary, with standards set by the board annually, and any bonus award at the end of year would be directly related to performance measured against those criteria. He testified that the figure of $175,000 was recommended in 2004, the date of his report, and that amount would have to be adjusted to $190,000 to $200,000 today, if adjusted for inflation and marketplace movement since 2004.

[121] When reviewing the second Deloitte report, Mr. Crane particularly stressed his concern that some of the payment to the inside directors had to be linked to MPL's performance. He was careful in his comments to emphasis that it is not so much the amount of the proposal of $275,000 for compensation from 2005, but the fact that it would be better to have less fixed salary, and more bonus, either yearly or long term, linked to written aims and objectives set by the board, which would include an understanding of the business model, and goals to properly evaluate discretionary remuneration each year.

[122] There are a number of themes that were prominent and persuasive to me when I consider the expert evidence I heard about direct marketing and compensation:

1. All witnesses who testified about direct marketing at trial confirmed that there are three components: the list (to whom the offer is sent or directed), the offer (which the sender wants the recipient to accept) and the copy (the way the offer is presented, the write up, the sales job, that convinces the consumer to say yes). There were differences of opinion from the experts who testified as to which component is most important. One witness suggested the list is crucial, the best copy in the world will not sell to the wrong people. Others touted the mantra "copy as king". What was clear was that all three aspects are important. The basics of direct marketing are not complex, the devil is in the detail, of getting each of the three components right.

2. Financial publication businesses that rely on direct marketing by mail need to constantly test their copy. No one can say what is good copy, or a good campaign before it is tested, the value is totally in the consumers' response. The measure of success of a campaign is how many people accept the offer. Thus, constant testing is required to test any one change against the "control". Universally the witnesses seemed to agree that the test of the copy is not the prose, how it may sound or seem to the writer or the executive, but rather the results it achieves in the market. Every copy grows stale, so constant change is required.

3. Organizations that depend on direct mail selling which have been successful generally use multiple copywriters, and generally speaking use resources to constantly try new copywriters, testing the work of one against another.

4. Compensation for copywriters varies, generally the trend is that they are paid more in the United States than Canada. The consensus was that if one wants to sell in Canada, one should use Canadian copywriters who understand the market.

5. A copywriter for MPL does not need a background in finances in order to write copy. A good copywriter can take any information, inform himself or herself of the industry and write for it.

6. "Superstar" copywriters and graphic artists are few and can demand very high wages. Their services would be hard for MPL to obtain, due to cost and high competing demand for their services.

[123] From the expert evidence, I understand that direct marketing is important to MPL, and constant dedication to writing and rewriting promotional material and getting it mailed out to an appropriate target audience is required. Having said that, the science behind direct marketing is not a secret or hard to learn. There has never been a suggestion that getting the list involved

special talent from the inside directors, as getting the lists at MPL was the responsibility and work of an employee, Ms. Tannenbaum. Nor was there a suggestion that content of the actual financial newsletters or product that was sold was something for which the skills of Messrs. Martland or Pepper were essential. Neither writes the content of the newsletters. MPL employs writers and editors. Mr. Martland oversees this, but no evidence suggested that this would be other than in a supervisory role as expected from a president and compensated for in his salary. The components that might lead to any compensation above and beyond normal, fair market executive pay are any special services by way of contribution to the copy, or overseeing the marketing program, that is value added. It was suggested that some of this part of the duties performed by Messrs. Pepper and Martland would have had to have been done by others than the President and CEO had Messrs. Martland and Pepper left in the 2001 to 2004 period.

[124] The dilemma is that this contribution is hard to measure. Marpep did not have a staff, or some special equipment, or anything that provides a service to MPL, other than the brains and copywriting skills of Messrs. Pepper and Martland. Fairly, the special expertise is that of Mr. Martland, as Mr. Pepper is only a sounding board on these issues. The question is what part of these services were outside of what might otherwise be expected of chief executive officers, and how should that part be compensated?

2.3 A Consideration of the Deloitte Reports

[125] The first Deloitte report looked at comparative salaries, but recognized there was a difficult issue of how to deal with any copywriting skills of Messrs. Pepper and Martland. It suggested a compensation practice when assisting smaller companies where the CEO position is combined with a senior role in marketing, has been to prorate compensation based on the balance of time spent in the varied roles.

[126] The first Deloitte report also agreed with the Hay report that compensation of a CEO would generally bear relationship to the fortunes of the company, indicating it was consistent with their experience that strong company performance is often reflected in improved CEO compensation. Particularly, it noted this had not been the pattern at MPL in the 2001 to 2003 period.

[127] The first Deloitte report recognized that any goodwill that exists in MPL is personal goodwill; it is tied to Martland and Pepper and not the business. It indicates:

> To the extent that a large portion of the success of MPL is due to the unique abilities of Messrs. Martland and Pepper, it would not appear unreasonable that compensation levels should be commensurate with such exceptional abilities that are brought to the business. However, the value of such abilities must also be measured in the context of the organization to which those abilities are provided and the financial results and prospect of the subject organization.

[128] One thing the first Deloitte report attempted to do was to look at return on investment in direct marketing, in terms of targets set for the programs. However, it expressed a concern that the costs of each program did not include indirect costs, such as development costs, salaries, overhead and other costs, nor did Deloitte audit the revenue or cost figures. From this, I take it that Deloitte was unable to provide a reliable analysis using this technique.

[129] The second Deloitte report was an attempt to critically look at the operation of MPL and come up with a method to evaluate any additional services. This report attempted to ascribe the cost to MPL of replacing the current roles and responsibilities of Messrs. Martland and Pepper. At page 5, it identified that there is a "significant freelance market of independent direct marketing copywriters who are widely used in Canada and the United States". It utilized a model using a three person executive structure, with a CEO of the company and both a director and a vice-president of finance and administration, as a workable structure to provide executive leadership for MPL. The report assigned a "reasonable" compensation to the aggregate of these three positions at $439,000 base pay, with the possibility to earn further incentive pay of $135,000 for a total of $574,000, with a comment that a key driver of bonus at more senior levels is the financial performance of the company.

[130] Further, the report acknowledged that these three positions would need some level of freelance copywriting, as overseeing and strategic planning of the sales and marketing is the responsibility left with the executives, and included in their notional remuneration, but clearly all of the copywriting work and design of the direct marketing packages cannot be left with them. The report estimated 100% of this notional cost by suggesting 18 direct mail programs at a cost of $21,000 each (using freelance fees from the United Sates with royalties) for a total cost of $484,500. The report then recognized that at MPL, Mr. Bishop does day to day copywriting and it was common practice at MPL at the time to re-use successful copy.

[131] The report estimated the costs depending if 25%, 50% or 75% of the program was freelanced, and presents alternatives for consideration, based on compensating Messrs. Martland and Pepper for covering the total three notional executive positions which would result in compensation of $574,000 and adding to that a value ranging from $121,000 (based on the executives doing 25% of copywriting), $242,000 (based on 50% copywriting) to $363,000 (based on 75%) for a range of total executive compensation of $695,000 to $937,000.

[132] A careful review of the second Deloitte report is important, as it was an honest attempt to provide some background information on which the IC could make its decision. The first report focused on executive compensation, but raised the unique situation of Messrs. Pepper and Martland, their unique relationship historically to MPL, and the dependence of MPL on direct marketing. The second report was requested as a result of the IC's concern that the contribution of Messrs. Martland and Pepper to direct marketing was not sufficiently researched. It would appear that the approach of Deloitte was balanced, as it outlined alternatives and different ways to approach the issue.

[133] The only content criticism which I would levy at the Deloitte analysis after hearing all of the evidence, tested under cross-examination, is that it used in its calculations of costs for MPL outsourcing the direct marketing, a calculation of royalties for each copy of media which, I find, is not usual or required in the Canadian market. In addition, historically MPL has not done eighteen new promotional programs a year. Mr. Martland himself, in his estimates in exhibit 26, used two packages a year, for each of seven advisory publications. A more reasonable calculation of comparative copywriting costs would be fourteen campaigns a year times $21,000, which is $294,000. That may be generous as the evidence by all parties was that services cost more in the United States than Canada, but I recognize that it may be reasonable at times for MPL to experiment with some American copywriters. Thus a revised notional cost of $294,000, not the $484,500 suggested, would be defensible on the evidence as presented to the court.

2.4 Analysis of A Fair and Reasonable Payment to Marpep from 2001 to 2004

[134] The question of whether the amounts paid to Marpep in addition to executive compensation are oppressive to the minority shareholders is a determination of whether, on an independent, sober review, the compensation paid to Marpep was at fair market value, or could be justified by the board in terms of their reasonable management of the company, at the time the decision was made, with the best interests of the corporation in mind.

[135] In this case, the court has to consider how to separate the services that Messrs. Martland and Pepper provided beyond expected executive services that were being compensated by the $175,000 a year salary. Once separated, the question is what MPL would have had to pay another contractor to do these services in the years 2001-2004, so as to evaluate whether what was paid to Marpep to perform those services from 2001 to 2004 was unfairly prejudicial to the applicants and other security holders of MPL.

[136] The evidence did not provide a breakdown of hours actually spent by Messrs. Pepper or Martland on some tasks as opposed to others. The discussion was largely around how to run the direct marketing program and the implementation of that program, including the copywriting contribution of Mr. Martland.

[137] It is extremely hard from the evidence to get a handle on the amount of the writing that Mr. Martland actually did, or exactly what was involved in the generation of an idea and the follow through. Mr. Martland, when asked in direct examination if he did the "bulk of the writing", did not answer yes, he talked about how he does the grunt work and how it was a collaborative effort with Mr. Pepper, who he would ask for advice on his copy.

[138] Mr. Martland was clear in his evidence that MPL has a staff, and they contributed. He emphasized the contribution of all staff, saying "we are not a one man band". Clearly, staff are the ones operating machines and putting the packages together, and keeping tabs on the results. Likewise, it was acknowledged that Ms. Tanenbaum is responsible for finding the lists and overseeing all the marketing staff. Mr. Berger, who has been with MPL for fourteen and a half years, writes copy for direct marketing and also does modifications on material that Mr.

Martland writes. Mr. Bishop has been employed by MPL for approximately thirteen years and does copywriting. In fact Mr. Martland's evidence was that Mr. Bishop writes all of the company "premiums" or magalogs, which are longer mini-magazine formats which are used in direct mail outs to help sell the product. Mr. Martland presented these as having been instrumental in successful campaigns.

[139] It might have been helpful at trial to have had the perspective of Mr. Berger and Mr. Bishop, or to have some better breakdown of the division of duties, time spent, or the nuts and bolts of the process of copywriting at MPL. It was difficult to evaluate exactly how much of this function is performed by Messrs. Pepper and Martland. This was clearly an issue with which Deloitte had struggled.

[140] In analyzing this question, I find that part of the difficulty is that since the board never carefully directed their attention to the insider dealing from 2001 to 2004, there was never a meaningful written job description for either Mr. Pepper or Mr. Martland. MPL never undertook any effort to itemize what was contracted for as president or CEO, and what part of the direct marketing program would not be covered or compensated in that job description. The argument by Messrs. Pepper and Martland is that their executive compensation should not include the creation, conception and design of the direct marketing program, with the view to increase circulation.

[141] Generally speaking, it would be irregular for a public company to pay management fees to a private holding company of two inside directors, when those directors are under an employment contract as the top two executive employees to provide management services. Marpep was not providing a physical plant, or anything other than the minds and experience of the two top executives. Had the board thought of this, a clearer delineation of duties would have been made much earlier.

[142] The other part of this problem has been contributed to by Messrs. Pepper and Martland themselves in that as they grew MPL through the years, their constant message has been and continues to be that they provide absolutely essential services, which no one else can do as well as they do. The company has survived, but really, no one can say how good Mr. Martland's copy or direction of marketing is compared to anyone else's, as there was no evidence of a result based test of his copy as against another copywriter, or his overall marketing scheme run directly against someone else's. No acceptable explanation was given for not trying to hire more copywriters, or test others, or grow new talent. Mr. Martland merely indicated he had tried to hire copywriters or an advertising agency twice in the past, and both were unacceptable experiences to him. He wanted people to come knocking on MPL's door, to show some initiative, he was not going to go out searching for them. There has not been anything other than a feeble attempt to search out and use other writers.

[143] The constant search for and use of new copywriters was a key part of the business plan of Agora, and it was the advice that Mr. Norin had for MPL after his company looked to buy MPL. The expert evidence of both Mr. Norin and Mr. Fruneau, who both had experience in direct

marketing for financial type newsletter industries, was the need to constantly use new writers to test their copywrite services. The problem with the MPL set up was that to get out and test writers, or contract with others, would reduce the justification for what Marpep or the management team were claiming for their services, as not only would others be paid to do it (not Marpep), but the risk was there that other copywriters might have produced better results. Clearly, the present model worked well for Messrs. Pepper and Martland. Marpep, their personal holding company, had been making generous amounts of money through fees. They saw no financial reason to develop MPL in any other manner.

[144] This fact was forcefully realized by the IC. In their report, the majority of the recommendations attempted to address succession planning, the need for written plans, the need for deadlines and performance objectives. But despite the board giving tight deadlines to implement the non-monetary recommendations of the IC, the record of both management and the board in implementing these steps after 2004 is far from acceptable. Really very little progress has been made. The inevitable conclusion is that Messrs. Pepper and Martland love their jobs. They have had little financial or other reason to give up their positions. The board has done little to make them change this behaviour, which it is not beneficial to the other shareholders, or to the future, longer term growth of MPL.

[145] How then, should this court decide what the additional services were, and what would have been reasonable compensation had the board properly done its job?

[146] Mr. Martland in exhibit 26 tried to estimate the cost to do 14 direct marketing programs a year using other personnel. He used a cost of $25,000 (U.S.) a package, which he converted to $30,000 Canadian. He came up with a base cost of $420,000 but put in a royalty payment of $150,000 to increase that to $570,000. He attempted to justify the MPL performance results by comparing them with circulation numbers that he had for equivalent United States financial publications, and then adjusting those for the lesser population in Canada. The problem with a comparison such as this was demonstrated when Mr. Norin testified using an organizational chart and numbers for his company Agora (exhibit 23) which revealed incorrect statistics for Agora were used by Mr. Martland to make his comparisons.

[147] Interestingly, in contrast to this, the information circular prepared with Mr. Martland's input in 2000 (described in para. 63 of this decision) indicates that new management would not have the expenses of the Marpep management contract. Nowhere does it suggest that these services could not be provided in-house, or that these services would have to be outsourced at large cost.

[148] There was an argument made by the applicants that when the employment contracts were set in 1999, Hewitt and Associates had input into an assessment of comparative terms of employment, and as a result any compensation to Messrs. Pepper and Martland should be restricted to that amount. I do not accept that had Messrs. Pepper and Martland approached the board in 2001 with a request for a review of their salary, or the ability to enter into a services

contract with Marpep, a salary restricted to $175,000 would have been the only reasonable business decision in the best interests of MPL.

[149] When I look critically at the second Deloitte report, the approach that it has used is instructive. The model inserted one more person at the senior level, with compensation of $125,000, plus a chance to earn a bonus. I question whether compensation to Messrs. Pepper and Martland should include compensation for all three positions with full bonus, as I do not find from the evidence that they effectively carried out all of these jobs from 2001 to 2004. They may have tried to, but the description of their work was not of geniuses working at breaknet speed and doing the work of three people as well as writing all or most of the advertising copy and completely directing the marketing program. The evidence before me was clear that they live, breath and exist for the company, but I do not find from the evidence that they each worked the equivalent of one and a half full time jobs, and made such a major contribution to copywriting and marketing beyond what would be expected in an executive position, that they should be awarded 75% of any replacement cost of those services.

[150] So when I try to ascribe a value to what would have been proper compensation for 2001 to 2004 for the services of Marpep, or the contribution it provided, I have to consider that Messrs. Pepper and Martland were personally paid $175,000 under their employment contracts. The only other benefit was a car allowance of some $7,500. This totals $365,000, but does not cover what Deloitte suggested was the "third " position. I am willing to recognize it is reasonable to split 50% of that function between Messrs. Pepper and Martland as they were effectively fulfilling some, but not the total role of that notional third position. This would notionally add an extra one half of the $125,000 attributed to that position, or $62,500 between the two. Looking at the notional cost of totally outsourcing MPL's direct marketing campaigns at a cost of $294,000, I have to consider that from 2001 to 2004, some of these services were provided in-house, mostly by Messrs. Bishop and Berger. Outsourcing 50% of the notional direct marketing fee would cost $147,000. I find that adding $62,500 for executive services and $147,000 for 50% of copywriting for a total of $209,500 to the $365,000 salary paid to Messrs. Pepper and Martland under the employment contract totals $574,500, and that sum would represent a generous, but fair, notional assessment of the total fair market value of services provided by Messrs. Martland and Pepper to MPL for those each of those years.

[151] The IC took the top amount of the second Deloitte report in looking at what was paid from 2001 to 2004. Clearly, this was the area being pushed most by Mr. Stephenson in their meetings, and was also of utmost concern to Mr. Scott. The concern I have about taking that number is that it credits Messrs. Martland and Pepper with doing 75% of the copywriting and direct marketing for the years 2001 to 2004, which they did not and it credits them as if they had been performing all the duties of the three notional positions set up by Deloitte, with full bonuses. This type of executive performance was not shown for the years 2001 to 2004, nor would full bonuses be merited.

[152] From the point of view of the shareholders from 2001 to 2004, and especially the minority shareholders complaining in this action, very little benefit was going to the share value

or dividends during those years. Subscriptions were flat. In 2001 MPL had a net loss before taxes of $3.4 million, in 2002 a net income before taxes of just over $1 million, in 2003 a net income before taxes of $16,000 and in 2004, a net loss before taxes of $900,000. Share prices throughout these years were very short of dramatic, between a low of 10 cents to a high of 45 cents. Most of the investors in 1999 had invested at roughly $1.25 a share. The results of the direct marketing were not spectacular, all that happened was the company subscription rates stayed flat and revenue decreased. It the face of that, it is very difficult for the board to justify payment of $755,000 in 2001, $733,984 in 2002, $733,984 in 2003 and $742,133 in 2004 to Marpep, or a total of just over $2.9 million in self dealing transactions over those four years.

[153] The other aspect that I have to address, is whether the board should have considered a bonus under the employment contracts of 1999. It seems to have never been a consideration from 2001to 2004, as the inside directors started taking management fees for Marpep in January each year, and so bonuses were not justified. Viewing the performance of MPL if the Marpep payments had not been made, it would have been reasonable for the board to consider a bonus for the year 2002, to recognize the effort and work in that year when management particularly rolled up their sleeves and turned the financial picture of MPL around, from a before tax loss of $3.4 million at year end 2001 to a before tax gain of just over $1 million in 2002.

[154] Thus, on the evidence before the court, I find that an additional $209,500 per year between Messrs. Pepper and Martland would be reasonable, had they gone to the board in 2001 and properly requested a review of their contract and the board properly reviewed any additional services they proposed to provide through Marpep. In addition, it would have been reasonable for Messrs. Pepper and Martland to have received a bonus for MPL's performance in 2002. A maximum bonus under their contract of employment would be 50% of $175,000, or $72,500 to each inside director. Thus, had the board actually considered the extra work proposed to be done by Marpep, an annual amount of $209,500 would have been a reasonable payment for each of the four years, for a total of $838,000. Adding the assessment of an additional $175,000 in bonus for the financial year of 2002 would result in a total of $1,013,000. When one compares this to the payment of $2,977,779, the difference is $1,964,779.

[155] The conclusion I reach is that the payment of $1,964,779 in management fees to Marpep, a private holding company owned and controlled by Messrs. Pepper and Martland between 2001 and 2004 was oppressive to the applicants and other security holders, and they are entitled to a remedy as a result.

Issue 2. Post 2004 Inside Director Compensation

1. The Reasonable Expectation

[156] The reasonable expectations argued by the applicants about setting the compensation for the inside directors from 2004 to 2008 is largely based on ordinary commercial practice and corporate governance principles. They advance the expectation that each year the board would consider the skills of the inside directors, the performance of MPL, the realities of the

marketplace and determine the proper compensation using business judgement, and that would be done in making any changes to the 1999 employment contracts with Messrs. Pepper and Martland as well as deciding any annual bonus. The relief the applicants requested at trial suggests that the salary contracts of 1999 were at fair market value, and should not have been changed, so all compensation and bonus above $175,000 should be repaid.

[157] The issue of executive compensation is a common, annual task entrusted to the board of every public company. Public disclosure of the benefits received by the executives is required, so the shareholders can be informed of compensation. This is one area where the business judgement rule may be particularly important, as remuneration is a decision in which the board has discretion to balance the need to retain and properly compensate the executive, but also use compensation to guide and direct the organization. Profitability of the corporation and shareholder returns should also be in the minds of the board while making these decisions.

[158] Here the IC reported in 2004, after substantial input on a difficult determination of the proper fair market value for executive services in a market with limited comparables. The IC suggested that the salary for Messrs. Pepper and Martland be set at $275,000 from January 1, 2005 onwards, with the ability to earn a bonus of 100% of base salary, with a target of 50% based on the achievement of pre-established goals, to be approved by the compensation committee, based on quantitative (corporate financial targets against budget) and qualitative (strategic business objectives related to succession planning implementation) measures. The board of directors accepted the decision to terminate any use of Marpep for management fees, and set the salary at the IC's recommended level.

[159] The IC report at pp. 2 and 3 clearly outlined the need for variable compensation, with base, midterm and long term compensation elements. The IC was clearly looking for a figure that reflected the fact that in the future there was to be no Marpep contract, so remuneration in the contracts with Messrs. Marpep and Pepper had to reflect all of the services they brought to MPL, not only as management, but whatever part of the direct marketing program they were planning and overseeing. The IC's reasoning in picking the $275,000 figure was also stated to be a recognition of the need to obtain the enthusiastic participation of Messrs. Martland and Pepper for the next three to five years while implementing a succession planning process to mitigate the reliance on the co-founders of the business.

[160] Regrettably, none of the board criteria for bonuses over these four years was set out in writing. It was not clear from the evidence that specific goals were actually set at the start of any year. The 2006, 2007 and 2008 annual information circulars indicate the compensation committee to be Mr. Scott and Mr. Martland, and that the bonus is set by the compensation committee. These optics immediately raise the issue of partiality. On this question, though, I accept the evidence of Mr. Scott that he and the other outside directors decided matters of compensation.

[161] Any complaint which the shareholders have here would be that the board did not fairly and fully consider data on executive compensation in changing the 1999 employment contracts

to those which started in 2005, and that written or even clear oral objectives were not set and thus bonuses were awarded in error. Generally, the board's decision would be provided great deference, as it is not a reasonable expectation that the 1999 salary contracts were set in stone and could not be changed. Had the board independently and with reasonable business judgement decided to change those contracts, no review would be undertaken by the court as that is all the shareholders can reasonably expect.

[162] However, here the board's decision was to accept the IC's recommendation in total, both as to amounts and deadlines to set written bonus objectives. As the process of the IC was likely tainted, and the IC recommendation was the basis for setting the base executive salary from 2005 onwards, the presumption of deference to the business judgment rule is rebutted and a review by the court of the fairness of those numbers to the shareholders is justified. Also, a failure to set out pre-established goals as bonus objectives for the years 2005 through 2008, after the requirement was accepted by the board in resolution 3 on December 7, 2004 is a breach of the reasonable expectations of the shareholders, and leads to an assessment of whether awarding those bonuses was oppressive conduct.

2. Was the Compensation Paid to the Insider Directors since 2004 Oppressive?

[163] I have found that it was a reasonable expectation of the minority shareholders that once salary contracts were put in place in 1999, any changes to them would be with proper consideration by the board. For the reasons set out above, the applicants are entitled to a review of whether the terms of the new contract, including a base salary of $275,000 and a bonus was unfair or oppressive to their interests. Also, as no criteria were set in advance by the board for bonuses, although the board clearly endorsed the IC recommendation that this should be done, the question arises as to whether the bonuses awarded annually in 2005, 2006 and 2007 were oppressive to the minority shareholders.

[164] In evaluating this aspect of the claim, I rely heavily on the expert evidence of Mr. Crane, who I find testified truthfully and fairly to all parties. Mr. Crane indicated that the $175,000 adopted in 1999 would be more in the range of $190,000 to $200,000 if adjusted to 2008 values. His concern with the $275,000 salary approved by the board in 2004 was not so much the quantum of the compensation, but that more of the base amount should be determinated on clearly specified bonus criteria so that it clearly indicated the board's direction to management.

[165] Clearly, the 1999 salary numbers were not set in stone; salary numbers are generally expected to be visited by the board annually. By way of comparison, taking an annual flat increase of 5% for the five years from 1999 to 2004 results in an increase of $8,750 per annum to $218,750 by mid-2004, and $253,750 by mid-2008.

[166] When I look at all the data under consideration by the IC in setting ongoing salary, as well as the expert evidence at trial on this subject, I do not find that the applicants have proven that it was unfair or oppressive for the board to accept the IC's recommendations, and after deciding to cancel any contract with Marpep for management or marketing services, to assess the

annual salary of Messrs. Pepper and Martland at $275,000. That number is not unreasonable or out of line with industry numbers.

[167] In attempting to evaluate the bonuses of $137,500 in 2005 and 2006, and $50,000 in 2007, there is unfortunately no indication, in writing or otherwise, of any pre-determined targets or levels of performance that were set. The employment contracts of January 2005 set eligibility for a bonus of up to 100% of base salary, with a target of 50% (or $137,500) based on pre-established goals as set out at the beginning of each year and approved by the compensation committee of the board. Any such criteria were not described in evidence, and it appeared that none were ever formally set.

[168] There is no doubt from the evidence that from 2005 to 2008, MPL received the enthusiastic participation of Messrs. Martland and Pepper, who have continued to give their time and energy leading MPL, and running the direct marketing program. However, also clear from the evidence is that there has not been one shred of progress made in terms of succession planning. Quite frankly, MPL appears stalled on that front. This was no more clearly illustrated at trial than when Mr. Martland, proclaiming himself to be the main mover behind direct marketing, at the age of 74, was talking about the insurance policy being MPL's succession plan. The lack of action taken on the priorities suggested by the IC and accepted by the board other than those monetary decisions that were immediately implemented in 2004 is quite frankly not only disappointing, but also detrimental to the long term interests of MPL.

[169] A court has to be careful in assessing these matters to be sensitive that annual decisions on bonuses were made every year by the board. If the board has chosen one of several reasonable alternatives, acting honestly, in good faith and with the best interests of the corporation at heart, the court should defer to their business judgement, as long as the decision does not unfairly disregard the rights of a group of shareholders. Clearly set bonus objectives, and a careful consideration of those, in conjunction with the year end, with the interests of MPL at heart would have left the board entitled to deference to its decisions.

[170] The issues of 50% of the available maximum bonuses being awarded in 2005 and 2006 and a lesser bonus in 2007 becomes problematic for a court review. Definitely there was discretion for the board to award these bonuses. The criteria used were not clear from the evidence. This is a demonstration of the lack of proper attention to governance by the board.

[171] The evidence demonstrates that although subscription numbers were flat or slightly declining during those years, the financial performance in before tax numbers of MPL was: a profit of $466,000 in 2005, a loss of $123,000 in 2006 and a profit of $202,000 in 2007. The successful court challenge to the postal rate revision was an important financial initiative for MPL taken by management during these years.

[172] Although the issue of the bonuses is close to the line, I am mindful that annually the board did independently cast its mind to executive bonuses. It is easy to question why when the company lost money in 2006, the bonus was larger than in 2007 when there was a profit.

However, the bottom line of the financial statement is not the only determination for a bonus, just as it does not always reflect the true measure of a corporation's health over time. There has to be a visible departure from a standard of fair dealings in an oppression action. The applicants have not met the onus upon them to show on the balance of probabilities that by awarding the bonuses since 2004 in the amounts it did, that the board acted oppressively to their interests.

Issue 3. The Repayment of the Marpep Loan

1. The Reasonable Expectation

[173] The determination of reasonable expectations in relation to the repayment of the Marpep loan requires a consideration of the history of the loan and past practice, the representations made by MPL about this loan, commercial and corporate governance issues, and the fair resolution of conflicting issues, the latter including a consideration of the process of the IC.

1.1 The Genesis of the Loan and Historical Context

[174] The exact genesis of MPL lending money to Marpep was not clear from the evidence. Suffice to say, very early on in the relationship between Marpep and MPL, MPL was providing cheques and cash to Marpep, or Messrs. Martland and Pepper which was ultimately dealt with in accounting terms as a loan to Marpep. The first evidence about the loan is that it came to the attention of the Alberta Securities Commission (ASC), which started correspondence about the disclosure of the loan in the financial statements. Eventually as result of a course of correspondence between the ASC and MPL, the Marpep loan was more clearly described in the disclosure seen in the 1994 financial highlights as: "a pre-payment of management expenses to be incurred in future periods", with an indication the timing was to permit the adoption of the most favourable treatment for income tax reporting by MPL. It indicated that the balance due was the net result of a series of advances and repayments made in the normal course of business between MPL and its parent Marpep.

[175] The reason for maintaining the Marpep loan historically was that it was a tax advantage to MPL. No evidence was called to evaluate the quantum of the advantage to MPL. The advantage to Marpep was significant, an interest free loan of varying amounts, at times over $1 million.

[176] The addition of the $125,985 to the loan at the end of 2000 resulted from a continuation of Messrs. Pepper and Martland using a "management fee ledger" that pre-1999 had been used to keep track of MPL paying personal accounts, credit cards, and cash to Messrs. Martland or Pepper or money to Marpep. The explanation given by Mr. Pepper was that it was thought to be an advance on bonuses. Interestingly, an examination of that ledger in 2000 shows that by May 2000 the accumulated amount given by MPL was over $100,000 and it went up over $500,000 for at least two months and was over $400,000 for another two months. Bonuses of this amount could not have been contemplated by the written employment contracts in place in 2000.

1.2 Representations

[177] Reasonable expectations of any shareholders that would arise in relation to the Marpep loan from the financial statements and company reporting was that this loan was unsecured, did not bear interest and had no specific terms of repayment. That statement was quite clear from the public reporting to the shareholders both before and after 2000. This is significant, as it would suggest expectations of the shareholders should not be higher.

[178] The reason for MPL to advance interest free, open ended credit to Marpep finished in 1999. There was no longer a management contract, so pre-payment had no meaning and the tax advantage was gone. Nothing changed about the reporting of this loan except that the information circular for the August 2001 shareholder meeting indicated the funds were extended on a "revolving line of credit" and had increased by $125,985.

1.3 Principles of Corporate Governance

[179] Accepted principles of corporate governance would generally dictate that when a public company lends money to an inside director or their closely held corporation, it would be at a fair market rate, or if not, there would be a commercially defensible reason from the point of view of MPL. Examples of these reasons might be that the loan benefit was a consideration in setting annual compensation, or an incentive for an executive to move (as in the case of a personal house mortgage at less than fair market rate).

1.4 The IC Consideration and Board Action

[180] The IC report on pp. 12 and 13 outlines the IC's consideration of this issue. It looks at the reason that the loan originated in 1989 and notes that the loan historically was unsecured and bore no interest. The written record of the IC suggests that it based its recommendation on the period over which the loan had been incurred, and what was possible in terms of repayment from Marpep. Interestingly, Mr. Scott's evidence, confirmed by Messrs. Pepper and Martland was that no one ever approached the inside directors and asked what they (or Marpep) could manage in terms of repayment. The board knew that Marpep had received about $5 million for the sale of MPL shares in 2000, and also that it received over $700,000 each year from 2001 through 2004 in management fees, while Messrs. Pepper and Martland received salaries in those years.

[181] Noticeably absent from the consideration of the IC, based on the written record and the evidence of Mr. Scott, was any consideration of the benefit to Marpep to have an interest free loan for fifteen plus years, or the cost of borrowing to MPL while it was lending money to Marpep, or an analysis of any tax savings to MPL.

[182] Mr. Scott in his evidence indicated he could not recall any discussion around the taking of the extra $125,985, or the allocation apparently decided by the accountant to merely add those funds to the Marpep loan, when no bonus was declared for the 2000 financial year.

1.5 Analysis of the Factors

[183] There was a clearly disclosed reason for MPL to advance an interest free loan to Marpep up to July 1, 1999. The board exercised a discretion to make that loan interest free. There would be no basis for any expectation by the shareholders that this be treated any differently, while the historical reason existed for the prepayment.

[184] Although the representation of MPL historically may mitigate against an expectation to require a repayment schedule for the loan, ordinary expectations from the laws of responsible corporate governance would suggest management should prudently re-evaluate the terms of the loan, once any reason to lend money to the holding company of the inside directors had disappeared. The loan was always disclosed as an asset of MPL.

[185] I find that it would be a reasonable expectation of the minority shareholders to expect management to address this loan with Marpep, in the changed circumstances, and review or re-negotiate the terms of the loan. Although the historic explanation for the loan was clearly made public, shareholders would reasonably expect a board to be in tune with changing circumstances, and be vigilant about careful evaluation of any conflict that arose between benefits for insider directors, and the interest of the corporation.

[186] The board failed to do this from 2000 to 2004, and then relied on and largely adopted the recommendations of the IC in 2004, after this litigation commenced. Again, because of my comments about the process of the IC, this decision is subject to court review as to whether it was oppressive to the shareholders.

2. Are the Repayment Terms of the Marpep Loan Oppressive?

[187] I have found that the minority shareholders were justified to have an expectation that the Marpep loan would have been re-examined once there was no reason for it from MPL's point of view, and reasonable repayment terms would have been negotiated by the board. This amount outstanding to Marpep was always shown as a loan, there was never any suggestion it would not be repaid. Although it was always described as a loan without interest and with no terms of repayment, once any justifiable reason for a loan to management's holding company had ended, it is in compliance with good corporate governance and a reasonable expectation that the board would negotiate the terms of repayment of the loan to Marpep. This was not done until December 2004, after this action stated and the IC reported. The issue to determine is whether any action or inaction by the board on this issue was unfair or oppressive to the minority shareholders.

[188] This court was not provided with any evidence to show the amount of tax which was saved by MPL by pre-paying management expenses, to have any sense of historical benefits of the loan to MPL. On the other hand, this court is able to notionally look at the benefit of a loan to Marpep by considering the interest Marpep saved by not having to borrow money at commercial rates. For instance, choosing a notional interest rate of 5%, when the loan was $1 million, the

interest savings would be $50,000 a year and at a notional interest rate of 10%, the saving to Marpep would be $100,000 a year. In reality, the quantum of the loan varied from year to year and during each year, as would the quantum of any reasonable interest rate.

[189] After the loan no longer provided any benefit to MPL, MPL paid substantial amounts in management fees to Marpep. Looking at this as strictly a business transaction, it seems somewhat incomprehensible that MPL would pay Marpep nearly $3 million between 2001 and 2004 and never request a set off of the monies owing on the loan. The failure of management or the board to even address their minds to this business debt is surprising. Had they done so, and used some reasonable business judgement, with the best interests of MPL considered, there would be deference to their decision due to the business judgement rule. However, it seems no consideration was given to this loan, its new circumstances, or any relative benefit or detriment to MPL, until after this action was started, and the IC reported.

[190] The IC looked at a repayment schedule and an interest rate. The board reviewed and adopted the recommended repayment terms of equal amounts over eight years, but set interest using the LIBOR rate plus 1%. The rationale for the eight years was the period of time over which the debt accrued. No thought appears to have been given to the price to MPL to borrow that money while it was repaid, the interest rates that would be paid by Marpep to borrow money historically while this credit was extended or the ability of Marpep to repay the loan.

[191] The onus is on the applicant to show unfairness in the way the repayment of the Marpep loan was handled by the board. The concept of designating interest on the Marpep loan would require the board to consider a commercially defendable interest rate. No evidence was lead to suggest the LIBOR rate plus 1% lacked a commercial basis. Despite concerns about the independence of the IC, it cannot be said from the evidence that the length of time for repayment or the interest rate is some visible departure from a standard of fair dealing.

[192] Neither the board or the IC seemed to have addressed the question of interest on the Marpep loan from 1999 to 2004. After 1999, when any tax benefit to MPL ceased, the extension of this credit from MPL to Marpep became an insider benefit. The IC report references the fact that the first settlement agreement referenced the agreement by MPL not to use the Marpep loan structure in the future and stated that: "Messrs. Martland and Pepper by signing the settlement agreement, in effect, agreed to repay the Marpep loan over time." Reasonable business terms in the repayment of a loan were only considered from the point of the IC deliberation in 2004. The $125,985, which was taken in 2000 but not paid back until 2004 did not include any interest payment to MPL for Marpep having had the use of those funds from 2000 to 2004.

[193] Clearly, the minority shareholders put MPL on notice of their concern about this loan by their letter in early 2003, when they asked for details about the loans. This was after they had raised the issue with the Ontario Securities Commission.

[194] I am mindful that the court has to be careful when considering an oppression action, that as long as the directors have selected one of several reasonable business alternatives, the court

should not be usurping their decisions. Oppression remedies should not be the basis to litigate every business decision which a minority shareholder does not like. Here, though, Marpep owed money to MPL. Marpep was wholly owned by the insider directors. Marpep and the board should have been alert to the sensitivity of dealing with closely held entities. The failure to address repayment of the loan and interest means that from 2001 to 2004 MPL was paying sums to Marpep, but making no request to set off outstanding loan amounts against those payments, or set an interest rate. When the omission to address this is weighed against the reasonable expectation of the shareholders, the type of loan in issue, as well as the history of this matter, I find the applicants have shown that the failure to address or demand an interest rate from 1999 onwards was unfair and oppressive to the applicants, who are shareholders.

[195] After January 1, 2000, it should have been clear that the loan from Marpep needed to be paid back and there is no reasonable explanation as to why interest would not be paid, when there was no benefit to MPL any longer in extending credit, and set-off would be expected by anyone in an arms length relationship. In early 2003 the omission of the board to deal with this was clearly raised. The board did nothing to address the issue until late 2004. Interest should have been considered and assessed. An appropriate remedy has to consider that the board and Marpep, had they addressed the issue in early 2000 may have taken some time to reach an agreement. The loan had always been no interest to 1999 and was always described that way.

[196] As a result, interest will be assessed from June 1, 2003 (just after commencement of this action) when it should have been clear to the respondents that the shareholders expected this to be addressed, and by which time it would have been reasonable to expect an arrangement to have been in place had this matter been properly addressed by the board. On the basis of the evidence before the court, the LIBOR rate plus 1% should be applied, as that was the rate deemed reasonable after 2004, when the board actually addressed its mind to a reasonable interest rate.

Issue 4. Remedies

[197] As a result of this action, and the reasoning set out above, the applicants are entitled to the following remedies:

1. Marpep is to repay to MPL the sum of $1,964,779 being the amount of excessive management fees taken from 2001 to 2004 without proper process. MPL is entitled to a judgement in that amount against Marpep. Interest shall be paid on any overpayment taken as of each year end, from January 1 of the next year at the LIBOR rate plus 1% until payment.

2 Interest shall accrue on all the outstanding amounts under the Marpep loan in the amount of the LIBOR rate plus 1% from June 1, 2003.

[198] The applicants asked for a number of other remedies:

1. That if Marpep fails to pay any amounts ordered by a certain date, that the MPL shares controlled by it and the inside directors be surrendered to MPL and cancelled with a credit to the judgement of the average closing price MPL shares traded for during the first three months of 2008, or the eight cents a share set out in the take over bid unsuccessfully offered before the trial in 2008.

2. An order restraining Marpep, or Messrs. Pepper or Martland from taking any benefits beyond what is in their employment contracts, including any bonus which is awarded pursuant to written performance criteria established by the board in advance.

3. An order dismissing the current outside directors of MPL, or directing that new and different directors be appointed by Mintz and partners on an timely basis until an annual general meeting is held.

4. An order appointing Mintz as a receiver/manager of MPL, or alternatively, as a monitor or inspector of the company, with the power to supervise the management of MPL in an orderly manner and to appoint interim directors for approval by the court.

[199] These requests are all based on concerns by the applicants that the prolonged history of this litigation demonstrates that despite the action starting in 2003, and the settlement agreement to allow an independent committee to be involved, all directors of MPL do not understand important issues of corporate governance. The applicants argued that the outside directors have demonstrated that they do not sufficiently comprehend the need to be truly separate from the inside directors, to such an extent that they need to be replaced. They point to: the whole history of the way MPL has been run; the insider dealing repeatedly indulged in by Messrs. Pepper and Martland and left unchecked by the board; and the inability of the board and unwillingness of the executive to implement or pay more than lip service to most of the recommendations of the IC; as demonstrating that MPL is not being properly managed.

[200] The applicants fear that they will be obliged to come before the court again, as Messrs. Pepper and Martland and the board simply do not "get it" when faced with issues of corporate governance, particularly those related to insider dealing.

[201] The court has very wide discretion in ordering remedies under s. 242 of the *BCA*. The types of remedies sought by the applicants have been granted in other Canadian cases. However, in general, the court should apply the least intrusive remedy possible and not overly interfere with the affairs of a corporation. Remedies have to end the oppression and prevent future litigation. Remedies under oppression actions should restore the balance between the parties, but they should not award the applicants rights that were beyond the reasonable expectations of shareholders. Court orders should attempt to address the specific complaints, and not resort to more drastic measures unless they are indicated and needed.

[202] In relation to the request that if Marpep fails to pay any amounts by a certain date, that shares controlled by it or the inside directors should be surrendered to MPL, this is a request for seizure and execution remedies at the time of a judgment. That is an extraordinary remedy. I am not satisfied on the evidence before me that the situation is such that I should be making orders requiring shares to be seized or sold to treasury, especially when such an order could affect other priorities to those shares about which there is no evidence before the court. I do not have evidence before me that the board would refuse to execute on the judgment or that Marpep would refuse to pay. Marpep did pay one-half of the outstanding loan in 1999 when requested to do so by Yorkton. I do appreciate the concern of the applicants that the inside directors and outside directors may not be diligent on taking steps to collect this judgment, and that to force them to do so the applicants would have to initiate further legal proceedings. Taking in consideration all the facts of this case, I will direct that the applicants are at liberty to bring a further application before this court asking that the shares be seized or sold to treasury, or other execution be pursued by the company, if the judgment against Marpep is not paid within one year from the date of this decision.

[203] In relation to the request for a restraining order, restraining Messrs. Pepper or Martland from taking any benefits beyond what is in their employment contracts and any bonus which is awarded pursuant to written performance criteria established by the board in advance and restraining Marpep from receiving any benefits, again this is a wide request. There is nothing to suggest that since 2005 Marpep has received further benefits from MPL or that the directors intend to bestow any upon it. I have left the employment contracts of 2005 awarded to Messrs. Pepper and Martland in place. I will direct that the board of directors must annually set written guidelines or goals to be achieved for either of Messrs. Pepper or Martland to receive a bonus in any fiscal year after 2008, and a copy of any such written goals or guidelines are to be provided to counsel for the applicants by March 15 of each fiscal year. In addition, detailed written reasons recorded in minutes will be required for any change in executive base salary or the current written employment contracts. These requirements will continue for the next five fiscal years, subject to any further order of this court.

[204] In relation to the request that the current outside directors of MPL be dismissed or that new and different directors be appointed by Mintz, this interferes with the ability of majority shareholders to control the election of directors. Each outside director upon receiving this judgment may well question his qualifications or wish to be re-elected as a director, especially when that position has been without pay and in light of the duties which the directors failed to address in the past. It would be concerning if the board of directors remained the same in the future, as it does appear that corporate governance has not been given appropriate priority by any of the directors in the past.

[205] It would be appropriate that the applicants have the ability to have some type of representation on the board for a period of time. Although it is unusual for a court to interfere with the appointment of the board, here the issue is how to ensure the board is attune to issues of insider dealing and inside director compensation, without giving the minority shareholders the rights that belong to the majority. In this case, I find the appropriate remedy is that the applicants

have the right to appoint one outside director to the board for the next five years or until further order of this court. That right attaches only to these applicants as long as they are shareholders of MPL and the right does not attach to their shares if transferred. I will leave to counsel the manner in which this direction shall be implemented, either party shall have the right to come back to ask for further directions from this court if the enforcement of this direction requires further consideration, in light of the by-laws or constitution of MPL.

[206] In relation to the request that Mintz be appointed as receiver/managers of MPL or alternatively as a monitor or inspector of the company, I am not willing to make this direction. Receivers should only be appointed in exceptional circumstances where it is necessary to preserve corporate property. The appointment of receivers or monitors should only be used where the interests of the minority shareholders have been so grossly abused that the very presence of the existing management would lead to further abuse. Also, the appointment of a receiver can result in significant costs for the corporation, and have significant impact on MPL's public image. I do not find that type of intervention is warranted by the issues that have been brought forth in this lawsuit.

Summary and Conclusion

[207] In the Notice of Meeting and Management Proxy Circular for the annual meeting of shareholders for at least the 2006, 2007 and 2008 years, the following statement was made in relation to ethical business conduct:

> The board has not adopted a written code of business conduct and ethics for its directors, officers and employees and believes that the small number of directors, officers and employees makes adoption of a code unnecessary. The skill and knowledge of board members and advice from counsel ensure that directors exercise independent judgement in considering transactions and agreements in respect of which a director or executive officer has a material interest.

[208] When a close analysis is done of the manner of making decisions about inside director compensation and contracts which involved insider dealing, perhaps a written code of business conduct would have reminded the directors of the need to honour process. A written code may have lead to a considered and proper method of dealing with insider contracts, and more care in avoiding the conflicts that arise when two inside directors who see and promote themselves as the life blood of the company proceed to run a public corporation as if it were a closely held private company.

[209] This case demonstrates how the legitimate expectations of shareholders have to be respected. Insider dealing has to be identified and carefully evaluated. The board has to make truly independent decisions about contracts with insider directors, based not only on the information from those directors, but on independent market information.

[210] Messrs. Pepper and Martland have devoted their talents and care to a company which they started and nurtured, but basic corporate governance was never something they took seriously or seemed to fully appreciate. Nor was it appreciated or applied by the outside directors, their friends who sat on the board as a favour. Likewise, their advisors failed to see that the oral contracts and loose procedure would eventually lead minority shareholders to ask legitimate questions about insider dealing.

[211] The applicants made submissions as to costs at trial, asking that any costs ordered against MPL should be reimbursed by the two inside directors. The respondents asked that any submissions as to costs be dealt with after this decision was rendered. If the parties cannot agree on costs once this decision is reviewed by them, either party may bring an application before me to deal with costs. Any such application, if it is to be brought, must be filed within 90 days of this judgement.

Heard on the 17th day of November, 2008 to the 28th day of November, 2008.
Dated at the City of Calgary, Alberta this 18th day of February, 2009.

R.E. Nation
J.C.Q.B.A.

Appearances:

Blair C. Yorke-Slader, Bennett Jones LLP
for the Applicants

Roy E. Stephenson, Lerners LLP and
E. David D. Tavender, Q.C.,
Fraser Milner Casgrain LLP
for the Respondents

TAB 15

Naneff v. Con-Crete Holdings Limited et al.

[Indexed as: Naneff v. Con-Crete Holdings Ltd.]

23 O.R. (3d) 481
[1995] O.J. No. 1377
No. C20548

Court of Appeal for Ontario,
Carthy, Galligan and Austin JJ.A.
May 16, 1995

Corporations -- Oppression -- Remedies -- Father building up business and then making two sons equal owners of equity in business while retaining complete control himself -- Family rupture resulting in one son being removed as officer of all companies comprising family business and excluded from participation in and income from business -- Conduct of family oppressive -- Trial judge erring in ordering that business be sold publicly as going concern with each of or any combination of father and sons being entitled to purchase it -- Remedy going further than rectification of oppression and not giving expression to reasonable expectations of son -- Remedy being punitive towards father -- Appropriate remedy being to have family purchase son's shares at fair market value without minority discount.

NN built a very successful business, refusing to borrow from outside sources and financing all expansion by retaining profits in the business. In 1977, by means of an estate freeze, he made his two sons, AN and BN, equal owners of all of the equity in the business, while retaining complete control himself through redeemable voting special or preference shares.

In 1990, a family rupture occurred; angry over AN's lifestyle and his relationship with a woman, the family not only threw AN out of the family home, but also removed him as an officer of all of the companies comprising the family business and excluded him from participation in and management of the business. His income from the business was virtually cut off.

In an application by AN for a remedy under s. 248 of the Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA"), the trial judge found that the family's conduct was oppressive to AN. No appeal was taken from that finding. The trial judge ordered that the business be sold publicly as a going concern with each of or any combination of NN, AN and BN being entitled to purchase it. The Divisional Court upheld, with one variation, that judgment: [1994] O.J. No. 1811. The family appealed with respect to the remedy granted.

Held, the appeal should be allowed.

The remedy of public sale of the family business amounted to an error in principle and was unjust to NN. While the fact that this case concerned a family business could not oust the provisions of s. 248 of the OBCA, the fact that this was a family business had to be kept in mind when fashioning a remedy as it bore directly upon the reasonable expectations of the principals. Any remedy granted under s. 248(3) had to be fashioned so that it was just, having regard to the considerations of a personal character which existed among NN, AN and BN.

The discretionary powers in s. 248(3) of the OBCA, broad as they are, must nevertheless be exercised within two important limitations: they must only rectify oppressive conduct, and they may protect only the person's interest as a shareholder, director or officer as such. The provisions of s. 248 cannot be used to protect or to advance the personal interests of shareholders, officers, or directors.

AN could not reasonably have expected to control the family business while NN was alive and active. Moreover, he could not reasonably expect NN's paternal bounty to continue if NN no longer considered him to be a dutiful son and if the family ties were severed. The remedy granted by the trial judge did more than simply rectify oppression. It gave AN something which he knew he could never have while NN was alive and active -- the opportunity to obtain full control of the family business. Moreover, the remedy was a punitive one towards NN, since it put at risk the very condition upon which NN exercised his bounty in favour of his sons: his total control during his active life of a business to which he had devoted 40 years of his life. The OBCA authorizes a court to rectify oppression; it does not authorize the court to punish it.

The second error in the remedy was that it attempted to protect AN's interest in the family business as a son and family member, in addition to protecting his interest as a shareholder as such.

The appropriate remedy in this case was that NN and BN acquire AN's shares of the companies at fair market value, without minority discount.

Cases referred to

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), affg (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.); Ebrahimi v. Westbourne Galleries Ltd., [1973] A.C. 360, [1972] 2 All E.R. 492, [1972] 2 W.L.R. 1289, 116 Sol. Jo. 412 (H.L.); H.R. Harmer Ltd. (Re), [1958] 3 All E.R. 689, [1959] 1 W.L.R. 62, 103 Sol. Jo. 73 (C.A.); Mason v. Intercity Properties Ltd. (1987), 59 O.R. (2d) 631, 38 D.L.R. (4th) 681, 37 B.L.R. 6, 22 O.A.C. 161 (C.A.); Mathers v. Mathers (1993), 123 N.S.R. (2d) 14, 340 A.P.R. 14, 16 C.P.C. (3d) 16 (C.A.), revg (1992), 113 N.S.R. (2d) 284, 309 A.P.R. 284 (T.D.); Stone v. Stonehurst Enterprises Ltd. (1987), 80 N.B.R. (2d) 290, 202 A.P.R. 290 (Q.B.)

Statutes referred to

Business Corporations Act, R.S.N.B. 1973, c. B-9.1, s. 166(2)
Business Corporations Act, R.S.O. 1990, c. B.16, s. 248
Companies Act, 1948 (U.K.), s. 222
Courts of Justice Act, R.S.O. 1990, c. C.43

Authorities referred to

MacIntosh, J.G., "The Retrospectivity of the Oppression Remedy" (1987-88), 13 Can. Bus. L.J. 219, p. 225

APPEAL from a judgment of the Divisional Court (1994), 19 O.R. (3d) 691, 16 B.L.R. (2d) 169, affirming with one variation a judgment in the respondent's favour (1993), 11 B.L.R. (2d) 218 (Ont. Gen. Div.), in an application for a remedy under s. 248 of the Business Corporations Act, R.S.O. 1990, c. B.16.

J. Edgar Sexton, Q.C., and Larry P. Lowenstein, for appellants.

Brian P. Bellmore and Roger W. Proctor, for respondent.

The judgment of the court was delivered by

GALLIGAN J.A.: -- One usually reads of unfortunate family break-ups in family law cases. This appeal demonstrates that they can also occur in commercial cases.

The appellants appeal, with leave, from a judgment of the Divisional Court ((1994), 19 O.R. (3d) 691, 16 B.L.R. (2d) 169) upholding, with one variation, a judgment in the respondent's favour given at trial by Blair J. ((1993), 11 B.L.R. (2d) 218). The respondent's application was for relief under the oppression provisions contained in s. 248 of the Business Corporations Act, R.S.O. 1990, c. B.16 ("O.B.C.A."). The text of s. 248 is set out as a schedule to these reasons [see p. 496-97 post]. Blair J. found oppression by the appellants and granted remedies to the respondent. The appellants did not contest the findings of oppression before the Divisional Court and they do not do so before this court.

A. THE CIRCUMSTANCES

The facts and the evidence upon which they were found are set out in great detail in the very full reasons for judgment delivered by Blair J. The reasons for judgment show great sensitivity for the feelings of all of the family members. It will do a disservice to those excellent reasons when I briefly summarize the facts. But it is necessary to do so in order to put the issues in the appeal in their factual context.

This case involves a family business operated through a number of different companies. For the purposes of my decision, it is not necessary to outline the details of how the companies are owned and controlled nor the way in which they are inter-related. Except where it becomes necessary to refer to specific details of the companies and their holdings, I will refer to them comprehensively as the business, or the family business.

Natscho Naneff is the father of the family. In these reasons, I will refer to him as Mr. Naneff. Ingeborg Gina Naneff is the mother and I will refer to her as Mrs. Naneff. Alexander Naneff, the respondent in the appeal, is the elder of Mr. and Mrs. Naneff's two children. He is 36 years of age. In the factums filed, he has been referred to as Alex. I will also refer to him by that shortened name. Boris Naneff is now 33 years of age and is the second Naneff son.

Mr. Naneff came to Canada from Bulgaria in 1951. He was a graduate civil engineer but because his European degree was not recognized here and because of his limited English, he could not work in his chosen profession. He found work at Inco and settled in Sudbury. He saved his money and after a short time started his own business producing concrete blocks in Sudbury. Through his keen business sense and hard work, Mr. Naneff's enterprise thrived. His business expanded both geographically and in terms of product. It now includes a number of concrete block plants and ready-mix plants in Dowling, Espanola, Elliott Lake, Blind River, Sturgeon Falls and South River. The original plant in Sudbury has been modernized and expanded to include a precast concrete plant. The business either owns or has rights to extract aggregates from gravel pits and quarries in Sudbury, Elliott Lake and North Bay. In North Bay, the business has two concrete block plants, a precast plant and a ready-mix plant. In addition to the original plant in Sudbury, it has a concrete pipe plant and manufactures prestressed hollow core building slabs. It also has a second ready-mix plant and a Kwik-Mix manufacturing plant. Most of this growth and expansion took place well before Alex and Boris became active in the business. In the last year in which Alex was involved in the business, the gross revenues of only some of its companies were well in excess of $23 million.

Mr. Naneff has demonstrated a business acumen that is rare in the business world of the 1980s and 1990s. Throughout the history of the business, he has refused to borrow from outside sources and has financed all of the expansion by retaining profits in the business. At the time of the trial, the family business was debt free. Blair J. said (at p. 227): "Mr. Naneff can be justifiably proud of the thriving business which he has created and fashioned into such a successful enterprise."

It was Mr. Naneff's passionate desire that his sons come into the business with him and succeed him in it when he died or chose to retire. To that end, he had both of his sons work in the business, particularly after school, on weekends and during school vacations. He showered his bounty upon them in the form of educational opportunities, flying lessons, vacations, powerful cars, snowmobiles and boats.

In 1977, when Alex and Boris were still in high school, Mr. Naneff took the step which is at the root of these unhappy proceedings under the O.B.C.A. By means of an estate freeze with respect to one of his companies, he made his two sons equal owners of all of the common shares of the company through which the business was then being operated. Reorganization took place in 1987 but did not change the effect of the estate freeze.

While he gave the equity in his business to his sons, he did not give them control. In fact he retained complete control of the business through redeemable voting special or preference shares. Those shares gave him the right, which he has never ceased to exercise, of complete and final operating control and the right to declare what dividends will be paid, when they will be paid, and to whom they will be paid. He has always directed what the recipients of the dividends would do with them. The arrangement ensured that he would have that control for as long as he lived. It is not necessary to set out the details of the estate freeze; what is important, however, is that the effect of it was that Mr. Naneff gave the equity of his business to his sons but retained full, final and ultimate control over it until he died.

Alex entered the business full-time in 1981 and Boris followed him into the business in 1985. They both undertook and executed important responsibilities. There is no doubt that both sons worked hard and effectively. Blair J. found that the business became "a team effort" between father and sons and that it prospered during the years that the three of them worked together. Blair J. also found that Mr. Naneff "remained -- and still remains -- the ultimate decisionmaker in these operations" (at p. 229).

In 1989 and 1990, dark clouds appeared over this happy family and its prosperous business. Alex's parents began to have legitimate parental concerns about his lifestyle when he was not at work. Coupled with that concern was what the parents considered a far more serious development. Alex began to keep company with a woman of whom Mr. and Mrs. Naneff ardently disapproved. It is unnecessary to recount the details of the parents' attempts to have Alex change his ways nor of Alex's reaction to them. A year of threats and promises, of estrangements and reconciliations, culminated in a family rupture on Christmas Day 1990 which Blair J. described as immediate, traumatic, and unfortunately, lasting (at p. 238):

> Alex was thrown out of the family home. Boris physically threw some of Alex's belongings after him. He was told that he was out of Rainbow [the family business], and that the family was going to teach him a lesson.

The other family members followed through on the threat. As soon as the necessary directors' meetings could be held and the paperwork completed, Alex was removed as an officer of all of the companies comprising the family business and ordered to stay off the business premises. He was excluded from all participation in and management of the business. He was virtually cut off from income from it. Until this litigation was started and an interim order was made in November 1992, all Alex received from the business was $35,000.

This conduct, and other conduct by Mr. and Mrs. Naneff and Boris toward Alex after December 25, 1990, was found by Blair J. to be oppressive to Alex within the meaning of s. 248 of the O.B.C.A. No appeal is taken, nor could it successfully be taken, from that finding.

Before turning to a consideration of the remedies granted to Alex I think this review of the background should be completed by the following extract from the reasons for judgment given by Blair J. (at p. 251):

> The desire -- understandable and genuine as it may be -- to chastise and correct the actual and perceived failing of a son or brother in his personal life, is not a basis for ignoring the duties and obligations which the parent and sibling owe in their corporate capacities to the son and brother in his corporate capacity. In circumstances such as these, the strictures of the O.B.C.A. and of corporate law override the family desires. In their corporate capacity as directors they are required to act in good faith and in the best interests of the company, and not for some extraneous purpose . . . [references omitted].
>
> Here, the Naneffs may have felt that their interests as a family in dealing with Alex's perceived failings and the interests of the Rainbow Group in this respect were one and the same. They are not. Alex's personal life had no adverse effect on his business/company life.

I agree that family differences can never justify oppression under s. 248 of the O.B.C.A.

B. THE REMEDIES ORDERED BY BLAIR J.

The judgment at trial contained a number of specific remedies. The fundamental and most important remedy, contained in para. 9, was that the business, i.e., those corporations which comprise it, be sold publicly as a going concern with each of or any combination of Mr. Naneff, Alex and Boris being entitled to purchase it. There were remedies contained in paras. 4 to 7 inclusive of the judgment which set aside certain changes in corporate structure and other corporate arrangements which were made after Alex was ejected. Those remedies were ordered in an effort to restore the corporate arrangements to the state which they were in at the time of Alex's ejection. One remedy ordered the payment to Alex of his outstanding shareholder's loans to two of the corporations together with interest. There were two other ancillary remedies which I will mention later. I propose to discuss those remedies and give my opinion with respect to their validity.

1. Public Sale of the Companies Forming the Business as a Going Concern

Before discussing the merits of the challenge to this remedy, I wish to make brief reference to the principles which guide an appellate court in its review of a remedy ordered under s. 248(3) of the O.B.C.A. Section 248(3) empowers a court upon a finding of oppression to make any order "it thinks fit". When that broad discretion is given to a court of first instance, the law is clear that an appellate court's power of review is quite limited. In Mason v. Intercity Properties Ltd. (1987), 59 O.R. (2d) 631 at p. 636, 38 D.L.R. (4th) 681 (C.A.), Blair J.A. set out the governing principle:

> The governing principle is that such a discretion must be exercised judicially and that an appellate court is only entitled to interfere where it has been established that the lower court has erred in principle or its decision is otherwise unjust.

I approach this issue, therefore, keeping in mind that this court can only interfere with the remedy if it concludes that there was an error in principle on the part of Blair J. or if the remedy in all of the circumstances is an unjust one. It cannot be interfered with, as Carruthers J. said (at p. 701) when giving the judgment of the Divisional Court, "simply because someone else might prefer a different way of going about things". With great deference to Blair J., who is a distinguished jurist with extensive commercial law experience, I regret to say that I have concluded, in the circumstances of this case, that the remedy of public sale of this business amounts to an error in principle and is unjust to Mr. Naneff.

At the outset I think it is important to keep in mind that this is not a normal commercial operation where partners make contributions and share the equity according to their contributions or where persons invest in a business by the purchase of shares. This is a family business where the dynamics of the relationship between the principals are very different from those between the principals in a normal commercial business. As the courts below have correctly held, the fact that this is a family business cannot oust the provisions of s. 248 of the O.B.C.A. Nevertheless, I am convinced that the fact that this is a family matter must be kept very much in mind when fashioning a remedy under s. 248(3) as it bears directly upon the reasonable expectations of the principals.

I have come to that conclusion after considering certain observations made by Lord Wilberforce during the course of his speech in Ebrahimi v. Westbourne Galleries Ltd., [1973] A.C. 360, [1972] 2 All E.R. 492 (H.L.). The statute under consideration, the Companies Act, 1948, s. 222, authorized the court to wind up a company if it was "just and equitable" to do so. In my opinion, the words "just and equitable" convey the same meaning as the word "fit" in s. 248(3) of the O.B.C.A. Lord Wilberforce explained that when this jurisdiction is being exercised, the relationship between the principals should not be looked at from a technical legal point of view; rather the court should examine and act upon the real rights, expectations and obligations which actually exist between the principals. He said at p. 379:

> The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality

> in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

(Emphasis added)

Thus, I think any remedy granted under s. 248(3) in this case had to be fashioned so that it was just, having regard to the considerations of a personal character which existed among Mr. Naneff, Alex and Boris.

The provisions of s. 248(3) give the court a very broad discretion in the manner in which it can fashion a remedy. Broad as that discretion is, however, it can only be exercised for a very specific purpose; that is, to rectify the oppression. This qualification is found in the wording of s. 248(2) which gives the court the power, if it finds oppression or certain other unfair conduct, to "make an order to rectify the matters complained of". Therefore, the result of the exercise of the discretion contained in s. 248(3) must be the rectification of the oppressive conduct. If it has some other result the remedy would be one which is not authorized by law. I agree with the opinion expressed by Professor J.G. MacIntosh in his paper "The Retrospectivity of the Oppression Remedy" (1987-88), 13 Can. Bus. L.J. 219 at p. 225:

The private law character of the enactment strengthens the argument, for in seeking to redress equity between private parties the provision does not seek to punish but to apply a measure of corrective justice.

(Emphasis added)

That opinion was referred to with approval by Glube C.J.T.D. in Mathers v. Mathers (1992), 113 N.S.R. (2d) 284 (N.S.T.D.) at p. 304, 309 A.P.R. 284, reversed on other grounds (1993), 123 N.S.R. (2d) 14, 340 A.P.R. 14 (C.A.).

My analysis of s. 248(2) indicates that there is another limit imposed by law upon the apparently unlimited discretionary powers contained in s. 248(3). Section 248(2) provides that when the court is satisfied that in respect of a corporation there is certain specified conduct "that is oppressive, or unfairly prejudicial to or that unfairly disregards the interest of any security holder, creditor, director, or officer of the corporation, the court may make an order to rectify the matters complained of" (emphasis added). The expression "security holder" includes a shareholder. Thus, the provision only deals with the interest of a shareholder, creditor, director or officer. It follows from a plain reading of the provision that any rectification of a matter complained of can only be made with respect to the person's interest as a shareholder, creditor, director or officer.

In Stone v. Stonehurst Enterprises Ltd. (1987), 80 N.B.R. (2d) 290, 202 A.P.R. 290 (Q.B.), Landry J. was called upon to interpret s. 166(2) of the New Brunswick Business Corporations Act, R.S.N.B. 1973, c. B-9.1, whose provisions are the same as s. 248(2) of the O.B.C.A. The company in question was a family company run as a family business. The company decided to sell its assets. A minority shareholder in his personal capacity wanted to buy the assets and bid for them. When the majority shareholder exercised her controlling interest and sold the assets to someone else, the minority shareholder attacked the transaction as being oppressive to him as a shareholder. Landry J. held that the Act protected a person's interest as a shareholder "as such". Basing his opinion on the judgment of Jenkins L.J. in Re H.R. Harmer Ltd., [1958] 3 All E.R. 689 at p. 698, [1959] 1 W.L.R. 62 (C.A.), Landry J. said at p. 305:

> It must be remembered, and it is very important in this case, that it is only the interest of a shareholder as such, or of a director or officer as such that is protected by this section.
>
> The applicant must establish that his interest as a shareholder has been affected. He may of course have other interests, such as being a prospective purchaser of the assets of the company. But it is only the applicant's interest as a shareholder which we must be concerned with in applying s. 166.

(Emphasis in original)

I agree with and adopt Landry J.'s analysis as a correct statement of the law. Persons who are shareholders, officers and directors of companies may have other personal interests which are intimately connected to a transaction. However, it is only their interests as shareholder, officer or director as such which are protected by s. 248 of the O.B.C.A. The provisions of that section cannot be used to protect or to advance directly or indirectly their other personal interests.

I conclude, therefore, that the discretionary powers in s. 248(3) O.B.C.A. must be exercised within two important limitations:

(i) they must only rectify oppressive conduct

(ii) they may protect only the person's interest as a shareholder, director or officer as such.

The law is clear that when determining whether there has been oppression of a minority shareholder, the court must determine what the reasonable expectations of that person were according to the arrangements which existed between the principals. The cases on this issue are collected and analyzed by Farley J. in

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 at p. 123 (Ont. Gen. Div.), affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.). I agree with his comment at pp. 185-86:

> Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual "wish list". They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.

The determination of reasonable expectations will also, in my view, have an important bearing upon the decision as to what is a just remedy in a particular case.

The finding made by Blair J. that Alex expected ultimately to be an equal co-owner of the business with his brother cannot be challenged. However, it must be interpreted in the light of two other important and intertwined considerations. The first consideration is that Alex fully understood that until death or voluntary retirement his father retained ultimate control over the business even to the extent of deciding what dividends would be paid and what would be done with any of those dividends. The second consideration is that this was a family business which had been built by his father.

The importance of the first of those considerations is that Alex knew that until his father died or retired he could under no circumstances have any right to have or even to share absolute control of the business. Therefore, under no circumstances could Alex's reasonable expectations include the right to control the family business while his father was alive and active. The second consideration is important because, while Alex expected that his father would give him an equal share in the control of the business upon his death or retirement, that expectation was based upon his belief that his father would continue to be bountiful to him in the future. It should have been apparent to Alex that he could not expect that paternal bounty to continue if his father for good reason or bad no longer considered him to be a dutiful son. It would have been quite unrealistic of Alex to expect that his father would continue to be bountiful to him if his family ties were severed. Alex knew that the reason for his father giving him one-half of the equity in the family business was his father's desire for his sons to work with him in his business. He must also have known that it would be impossible for him, Mr. Naneff and Boris to work together in the business as a family if the family bonds ceased to exist. It is for those reasons that Alex's reasonable expectation must be looked at in the light of the family relationship.

It is my view that the first error in principle in this remedy is that it did more than simply rectify oppression. As I noted above, the O.B.C.A. authorizes a court to rectify oppressive conduct. I think the words of Farley J. in Ballard, supra, at p. 197 are very appropriate in this respect:

> The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party. I note that in Explo [Explo Syndicate v. Explo Inc., a decision of the Ontario High Court, released June 29, 1989], Gravely L.J.S.C. stated at p. 20:
>
> > In approaching a remedy the court, in my view, should interfere as little as possible and only to the extent necessary to redress the unfairness.

(Emphasis added)

The order of Blair J. gave Alex something which he knew he could never have while his father was alive and active -- the opportunity to obtain full control of the family business. A remedy that rectifies cannot be a remedy which gives a shareholder something that even he never could have reasonably expected.

Moreover, I am unable to view the remedy as anything other than a punitive one towards Mr. Naneff. There was never any doubt among the three men that Mr. Naneff would exercise ultimate control of the family business until he died or retired. Mr. Naneff solidified his right of complete control by the corporate arrangements he put in place at the time of the estate freeze and which he kept in place to the knowledge of his sons throughout the time that the three of them worked together. It is not the task of any court of law to judge the family dispute or to rule upon the justice of the expulsion of Alex from the family. However, I am unable to accept as anything other than punitive, a remedy which puts at risk the very condition upon which Mr. Naneff exercised his bounty in favour of his sons -- his total control of the business during his active life. The O.B.C.A. authorizes a court to rectify oppression; it does not authorize the court to punish for it.

The second error in this remedy is that it attempts to protect Alex's interest in the family business as a son and family member, in addition to protecting his interest as a shareholder as such. As I mentioned above, it is my view that Alex's expectation of ultimately obtaining an equal share of the control of the business with Boris was based upon his expectation of being the continuing object of his father's bounty. That in turn depended upon him remaining in his father's favour and remaining in his father's eyes a member of the family. The remedy of public sale, which gives Alex the opportunity to buy the company, enables him to obtain that control while out of his father's favour. This appears to protect much more than his interest as a shareholder as such; it protects, indeed it advances, his interest as a son.

It is my view, therefore, that the remedy imposed in this case constituted an error in principle in that it did more than rectify oppression, and it did more than protect Alex's interest as a shareholder as such in the companies.

As well as concluding that the remedy granted to Alex was wrong in principle, it is my view that the remedy was unjust to Mr. Naneff. By the time of Alex's ouster from the business, Mr.

Naneff had devoted almost 40 years of his life to creating, nurturing and building the business into a very significant enterprise. Instead of using profits from the business to acquire other personal assets, he used them to finance the growth and expansion of the business. There was never any doubt in the minds of his sons that their father gave them their equity positions upon the understanding that he would retain ultimate control as long as he wanted to exercise it. No one can disparage the productive and devoted work which Alex put into the business. But his nine years of contribution pales to almost insignificance when compared with that of his father's contribution.

The effect of the relief granted to Alex is to put Mr. Naneff in the position where he is just another person, equal to Alex, who is entitled to buy the business which he had himself founded and built from nothing. The remedy jeopardizes something which Alex knew was always to be his father's, the right to ultimate control of the business. The remedy gives to Alex the possibility of taking control of the business, something he knew he could never have during his father's lifetime. Having regard to the circumstances of this case this remedy, which jeopardizes the right which everyone knew belonged to Mr. Naneff and which gives Alex the opportunity to take away that right, strikes me as unjust.

At trial there were three possible fundamental remedies suggested to the trial judge. One of them was properly rejected out of hand. No more need be said about it. The alternative remedy to public sale of the business as a going concern was that Mr. Naneff and Boris acquire Alex's shares of the companies at fair market value, without minority discount. In my view that was the just remedy in this case. While I find that Mr. Naneff's oppressive conduct should not endanger his right to control the business, neither should he be able to take away what he had given to Alex, or to take away what Alex had contributed to the business. This remedy, together with certain of the other remedies ordered by Blair J., would have had the effect of fully compensating Alex for the value of the equity given to him by his father and for his own contributions to the business. The value of his shares would reflect the success of the business and Alex's contribution toward that success, as well as the value of the gift of equity which he had received from his father. When I discuss the remedy respecting the shareholders' loans, it will be seen that when the business was ordered to repay Alex the amounts of his loans, in fact he was receiving his share of the operating profits of the business over previous years.

This remedy would be just because it will put Alex, in so far as money can, in the position which he would have been in had he not been ejected. It would not give him an opportunity to which he had no reasonable expectation. It would not put at risk Mr. Naneff's right to ultimate control which Alex knew was a condition of his father's gift of equity. The remedy would protect Alex's interest as a shareholder as such.

It is my opinion that para. 9 of the trial judgment, which provides for the sale of the appellant companies on the open market as a going concern, cannot be sustained. In its place, I would order that the appellants acquire Alex's shares of the companies at fair market value fixed as of the date of his ouster, December 25, 1990. It is conceded on behalf of the appellants that it would not be fair to apply a minority discount to the market value of Alex's shares. I agree and would order that there be no minority discount when fixing the fair market value of his shares. Alex is also entitled to prejudgment interest on the value of his shares as provided in the Courts of Justice Act, R.S.O. 1990, c. C.43, from December 25, 1990.

In the event that the parties cannot agree upon the value of the shares or to having the value of them fixed in some other way, I would direct a new trial restricted to fixing the value of Alex's shares in the appellant companies as of December 25, 1990. In my view the costs of such a new trial ought to be in the discretion of the judge presiding at it.

2. The Remedies Contained in Paras. 4 to 7 Inclusive of the Trial Judgment

These remedies all relate to steps taken after December 25,

1990. They are directed to returning the companies to their status as of that date. Because I would set aside the remedy of public sale and direct that the appellants acquire Alex's shares as of December 25, 1990, those remedies are no longer relevant. I would, therefore, set them aside.

3. Lansing Avenue

Blair J. directed that Mr. Naneff convey to Alex a certain property on Lansing Avenue in Sudbury. That remedy was varied by the Divisional Court. No appeal was taken from that remedy as varied. It is, therefore, unnecessary to say anything more about it except that I would uphold the judgment of the Divisional Court in so far as it maintained that remedy in its varied form.

4. Repayment of Alex's Outstanding Shareholder's Loans to Rainbow Concrete Industries Limited and to Skead Transport Inc.

The only issue now outstanding about this remedy is the date upon which interest on the loans ought to begin to run. Blair J. held that interest ought to be paid upon them from April 1, 1992. The argument that a later date ought to have been chosen is not persuasive. I would not interfere with the date chosen by Blair J.

Strictly speaking, while this is all that need be said about this issue, I think I should outline the way in which those loans were created. When Mr. Naneff was of the opinion that sufficient profits had been earned from the business, he would direct that dividends be paid equally to his sons who would then pay the income tax upon them. After the taxes were paid, the amount of the dividends remaining were required to be loaned back by Alex and Boris to one of the companies making up the business. It was out of those transactions that the substantial loan balances were generated in Alex's account. Alex's loan to Rainbow Concrete Industries Limited amounted to just under $835,000 on December 25, 1990 and his loan to Skead Transport Inc. was just under $100,000. Both Alex and Boris had all of their personal expenses of every kind paid by the business and those payments were charged against their loan accounts. In addition, each drew a very modest salary from the business. Thus, it can be seen that the loan balances were Alex's share of profits earned by the business over a number of years. When the appellants were ordered to pay Alex's outstanding shareholders' loans he was being paid his share of profits accumulated in the business.

5. Compensation Akin to Damages for Wrongful Dismissal

Blair J. found that when dismissal is part of an overall pattern of oppression the provisions of s. 248(3)(j) of the O.B.C.A. authorize payment of compensation to the aggrieved person. He ordered monetary compensation in the amount of $200,000. While no challenge is taken to the making of an award, the amount of it is in dispute.

It is my view that the evidence justified an award of compensation in the amount of $200,000 in this case. I would not interfere with that assessment.

C. COSTS

1. Costs of the Trial

Blair J. awarded the respondent his costs of the trial on a solicitor and client basis. It is apparent that a very large part of this trial involved an attempt by the appellants to defeat the claim of oppression and to prove that Alex's job performance and personal life justified his expulsion from the family business. Without a doubt, that stance must have greatly prolonged the trial and must have been calculated to humiliate Alex. While I respectfully disagree with Blair J. upon the appropriate remedy in this case, the stance of the appellants on the issue of oppression convinces me that his order of costs at trial should not be interfered with.

2. Costs of the Appeals

Because I think the appellants should succeed on the remedy issue and because they have not maintained their untenable defence to the claim of oppression, they are entitled to their costs of the appeals. I would therefore allow them their costs of the appeal to the Divisional Court and to this court, including the costs of the motion for leave to appeal.

3. Costs of the New Trial

As indicated above I think that the costs of a new trial, if one is held, should be in the discretion of the judge presiding at it.

D. DISPOSITION

For the reasons set out above I would dispose of this appeal on the following basis:

1. I would allow the appeal from the Divisional Court and set aside its judgment except in so far as it upholds with a variation the order of Blair J. relating to the Lansing Avenue property.

2. I would strike out paras. 4 to 7 inclusive and para. 9 of the judgment of Blair J. and in their place I would order that the appellants acquire all of the shares which the respondent owns in any of the companies making up the family business at fair market value as of December 25, 1990 without minority discount together with prejudgment interest as provided in the Courts of Justice Act from that date. That a new trial be ordered to fix the value of the respondent's shares as provided for in para. 2. above. The costs of the new trial to be in the discretion of the judge presiding at it.

4. That in all other respects the judgment of Blair J. be affirmed.

5. That the appellants should have their costs of the appeal to the Divisional Court and to this court including the motion for leave to appeal.

SCHEDULE

Excerpt from the Ontario Business Corporations Act, R.S.O. 1990, c. B.16

248(1) A complainant, the Director and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. E(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue.

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 186(4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders.

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under clause (3) (f) or (g) if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

Appeal allowed.

TAB 16

Court of Queen's Bench of Alberta

Citation: 864789 Alberta Ltd. v. Haas Enterprises Inc., 2008 ABQB 555

Date:20080909
Docket: 0703 02341
Registry: Edmonton

Between:

864789 Alberta Ltd. and Donald Gibson

Plaintiffs

- and -

Haas Enterprises Inc., Alberta Custom Tee Ltd., Alberta Custom Tee (2006) Ltd., Haas Leasing Inc. and Peter Haas

Defendants

Reasons for Judgment
of the
Honourable Madam Justice D.L. Shelley

Terms Used in this Judgment

[1] In this Judgment the following words and expressions shall have the following meanings:

- "*ABCA*" means the Alberta Business Corporations Act, R.S.A. 2000, c. B-9;
- "ACT" means Alberta Custom Tee Ltd.;
- "ACT 2006" means Alberta Custom Tee (2006) Ltd.;
- "Applicants" means collectively 864789 and Gibson;
- "864789" means 864789 Alberta Ltd.;
- "Enterprises" means Haas Enterprises Inc.;
- "Gibson" means Donald Gibson;
- "Haas" means Peter Haas;
- "Leasing" means Haas Leasing Inc.;

- “Respondents” means collectively Enterprises, ACT, ACT 2006, Leasing and Haas;
- “USA” means a Unanimous Shareholders Agreement within the meaning of the *ABCA.*

Nature of the Application

[2] The Applicants allege that:

(a) The actions of Enterprises and Haas have been and continue to be oppressive and unfairly prejudicial to their interests;

(b) The business and affairs of Leasing and ACT have been carried on or conducted in a manner that is oppressive or unfairly prejudicial to or unfairly disregards their interests;

(c) The powers of Haas as a Director of Leasing have been exercised in a manner which is oppressive or unfairly prejudicial to or that unfairly disregards their interests; and

(d) There has been a breakdown of confidence and good faith between the Applicants and the Respondents.

[3] Therefore the Applicants have brought this application pursuant to Sections 242 and 243 of the *ABCA*, seeking relief under what is commonly referred to and will sometimes be referred to by me as the “oppression remedy”.

[4] In their Notice of Motion the Applicants sought various remedies, some of which, for reasons which will be outlined later in this Judgment, are no longer viable. As a result, the Applicants suggest that one of the following remaining remedies are the most appropriate in the circumstances:

(a) an Order directing Enterprises to complete the purchase of 864789’s shares for $301,737.50 or, alternatively,

(b) directing that those shares be valued and redeemed as at August 15, 2005.

Background

[5] In November 1993, Gibson began employment with ACT as a general labourer. In 1997 he became plant manager, with duties that included “sales and purchase, staffing, scheduling, product design”. At that time, Gibson acquired (through his holding company, 864789) 10.1% of the shares in ACT and entered into a USA (the “1997 USA”). Prior to that, ACT had been a

wholly owned subsidiary of Leasing. Haas was the sole Director of Leasing and one of ACT's Directors.

[6] The Applicants allege that Gibson acquired "managerial duties" for Leasing in 1999. Although the Defendants deny this in their Statement of Defence, they do not explicitly dispute this in the materials filed in connection with the application. Rather, they assert that Gibson was never a Leasing employee, as he never received either a T4 slip or pay cheque from Leasing. Gibson has never been a Director of ACT or Leasing.

[7] As a result of a restructuring done in 2000, 864789's shares in ACT were exchanged for 10.1% of the shares in Leasing. As a result, Gibson, 864789, Haas and Enterprises entered into a new USA (the "2000 USA"). Save for changes in some names and dates, its provisions were essentially identical to the 1997 USA.

[8] The 2000 USA included the following provisions:

> "3. No dividend will be declared on any Common Shares or Preferred Shares of the Corporation (or shares of ACT) without the consent of all parties to this Agreement. . . .
>
> 9. In the event the Controlling Shareholder of 864789 is terminated for any reason as an employee of the Corporation, then 864789 agrees to sell and HEI agrees to purchase all of 864789's shares as determined by paragraph 15 of this Agreement (hereinafter referred to in this paragraph as the "Valuation"). The payment for and transfer of 864789's shares shall occur as follows:
>
> > (a) Within 30 days of the termination of the Controlling Shareholder of 864789 as an employee the Corporation, HEI shall pay to 864789 1/3 of the Valuation amount and 864789 shall transfer ½ of its shares to HEI. HEI shall also cause the Corporation to repay to 864789 all outstanding shareholder loans by said date;
> >
> > (b) Within 1 year of the event set out in subparagraph (a), HEI shall pay an additional 1/3 of the Valuation amount to 864879 and 864879 shall transfer the remaining 50 percent of its shares in the Corporation to HEI; and
> >
> > (c) Within 1 year from the event set out in sub-paragraph (b), HEI shall pay to 864789 the remaining 1/3 of the Valuation. . . .
>
> 17. The Controlling Shareholder of HEI agrees to consult with the Controlling Shareholder of 864789 on any major decisions affecting the Corporation or ACT

> and in particular as they relate to any expenditures which would be considered to be out of the ordinary course of business."

"Corporation" was defined as Haas Leasing Inc. and "HEI" was defined as Haas Enterprises Inc. Gibson was the Controlling Shareholder of 864789 and Haas was the Controlling Shareholder of HEI. Enterprises, Haas, 864789, Gibson, Leasing and ACT were parties to the 2000 USA.

[9] Gibson's employment was terminated on August 15, 2005. This was confirmed in at least two letters, each dated August 22, 2005 and sent by the Respondents' solicitors:

1. The first was sent to 864789, to the attention of Gibson, advising that "your employment with Alberta Custom Tee Ltd. and Haas Leasing Ltd. has been terminated for cause". It went on to confirm that the provisions of Sections 9 and 15 of the 2000 USA had come into effect;

2. The second was sent to KPMG LLP, copied to 864789 to the attention of Gibson, confirming that Gibson's employment with ACT had been terminated. This letter further confirmed that this termination was a triggering event referred to in paragraph 9 of the 2000 USA, and therefore a valuation of Leasing's shares was required for the purposes of the buyout contemplated in paragraph 15.

[10] The Applicants had suggested that an informal valuation be done; but Leasing, Enterprises and Haas insisted on a formal valuation by a certified business valuator and indicated their preference that KPMG be the valuator, as KPMG had acted earlier for the Haas group of companies. KPMG began the valuation process. While it was underway there was an exchange of numerous letters between counsel, which addressed items of contention including: disagreements over setoffs against the shareholder's loan account arising from alleged amounts owed by Gibson personally, and whether such amounts were referable to the construction of a garage at Gibson's residence or to a car purchase; and whether a minority shareholder discount ought to be applied to the purchase price of the shares. In July of 2006 counsel for the Respondents presented a draft statement of adjustments which stated that it related to the purchase of shares of 864789 pursuant to the 2000 USA.

[11] KPMG proceeded to complete the valuation. Their valuation report was issued October 23, 2006, valuing the fair market value of all of the shares of Leasing in the range of between $2,668,000 and $3,300,700 (or $1,334 to $1,653.50 per share), after deducting net shareholder loans payable. KPMG had no comment as to the applicability of a minority discount.

[12] Under cover of a letter dated October 31, 2006, the solicitors for Haas, Enterprises and Leasing delivered a cheque for $135,765.10 to the Applicants' solicitor. The letter confirmed that the cheque was being tendered in connection with the purchase of 864789's shares in Leasing pursuant to paragraph 9 of the 2000 USA. It also confirmed that a further payment of $90,623.07 would be payable in one year's time. The Applicants directed their solicitor to return

the cheque, taking the position that payment of $181,667.29 was called for under the agreement, which sum represented two-thirds of the valuation amount determined by KPMG. The letter also demanded payment of an additional amount of $100,579.16 on or before August 15, 2007. Counsel for the Respondents immediately advised counsel for the Applicants that they would be recommending that the funds be paid in to court, with a request that 864789's shares be transferred to Enterprises. The letter further confirmed that "We are ready, willing and able to pay the funds forwarded to you without limiting your right to argue the amount or consideration properly payable and the outstanding shareholder loan account.... you have refused our client's funds and also refused to transfer the shares which are <u>now beneficially owned by our client"</u> (emphasis added).

[13] On December 15, 2006 the Respondents' counsel sent a letter to the Applicants' counsel advising that the Respondents now took the position that Gibson had never been in the employment of Leasing and that the earlier correspondence indicating that his employment had been terminated by Leasing was an error. The Respondents further took the position that, as a result, they no longer had a "right to acquire" 864789's shares in Leasing.

[14] Also on December 15, 2006, there was a meeting of the Board of Directors of ACT in which the Directors discussed the corporation's reduced earnings and a potential liability claim from a customer. The Board then approved a sale of the inventory and leasehold improvements and a transfer of the employees of ACT to ACT 2006, effective November 1, 2006. The Applicants were informed of these decisions in January 2007.

[15] The Applicants filed a Statement of Claim in these proceedings on February 22, 2007. On June 21, 2007, the Applicants were provided with various documents relating to the transactions conducted at the December 2006 Directors' meeting. On July 9, 2007, 864789 was served with a Notice of Special Meeting of Shareholders, the purpose of which was to conduct a vote on a special resolution to dissolve Leasing and to distribute its assets. The Applicants' counsel wrote to the Respondents' counsel objecting to the meeting but the Applicants did not attend it.

[16] ACT and Leasing were dissolved on September 6, 2007. On that same date the Applicants filed a Notice of Motion seeking, among other remedies, an Order restraining the Respondents from winding-up ACT and Leasing. The following day, on September 7, Justice Topolniski of this Court granted an Order restraining ACT and Leasing from making any distribution of assets and adjourned the balance of the application.

Issues

[17] I must determine:

1. Whether the termination of Gibson as an employee (of either or both ACT and Leasing) in August 2005 triggered Section 9 of the 2000 USA. In connection with this determination, I must also determine whether:

(a) Gibson was an employee of Leasing;

(b) The parties to the 2000 USA intended Section 9 to refer to Gibson's employment with ACT and whether a definitional issue arose as a result of the parties inadvertently overlooking the consequential amendment which was required to the replacement of the 1997 USA with the 2000 USA. If so, I must determine whether rectification is appropriate;

2. In the alternative, whether a separate purchase agreement arose (either expressly, impliedly, or through a course of conduct) as a result of the correspondence sent by the Respondents and their counsel to the Applicants and their counsel following the termination of Gibson's employment and 864789's management agreement in August 2005. If so, I must determine who is bound by such agreement;

3. Whether the actions of some or all of the Respondents following the termination events that occurred in August 2005 (including the transfer of assets and employees and the winding up of ACT and Leasing) constituted oppressive conduct on the part of one or more of the Respondents;

4. Depending on my determinations in relation to the above issues, if one or more of the Applicants are entitled to a remedy pursuant to Section 242 of the *ABCA*, the appropriate remedy in the circumstances of this case.

Legislation

[18] Section 242 of the *ABCA* reads, in part, as follows:

Relief by Court on the ground of oppression or unfairness

242(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver- manager;

. . .

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

. . .

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

. . .

(n) an order for the liquidation and dissolution of the corporation;

. . .

(p) an order requiring the trial of any issue; . . .

Position of the Parties

Position of the Applicants

[19] The Applicants take the position that Section 9 of the 2000 USA was clearly triggered by the events that occurred in August 2005. They take the position that the parties' intention is clear, given the history of the provisions in question, the factual circumstances surrounding the replacement of the 1997 USA with the 2000 USA, the rules and responsibilities of Gibson with the Haas group of companies and the actions of the parties subsequent to the August 2005 events. They further submit that acceptance of the Respondents' argument, that Gibson was not an employee of Leasing and that termination of his employment in August 2005 did not trigger the buy/sell provision contained in Section 9, would render the 2000 USA meaningless and absurd for two reasons:

1. It is clear that the parties contemplated Gibson's employment with one or more members of the Haas group. Relying on the Supreme Court of Canada decision in ***Toronto (City) v. W.H. Hotel Ltd.***, 56 D.L.R. (2d) 539, the Applicants argue that I ought to resist interpreting the 2000 USA in such a manner as would result in commercial absurdity. As interpretation in the manner suggested by the Respondents would lead to an "absurdity, repugnancy or inconsistency which reasonable people cannot be supposed to have contemplated under the circumstances, it ought if possible to be modified so as to avoid such a result" (quoted by the Supreme Court of Canada, from the decision in ***Diederichsen v. Farquharson Brothers***, at paragraph 13 of ***Toronto v. W.H. Hotel***).

2. The word "employment", as used in Section 9 of the 2000 USA, ought to be interpreted broadly to give effect to the intention of the parties. Although the Applicants agree that Gibson was not paid directly by Leasing, but continued to be paid by ACT after the 2000 restructuring, Gibson did provide services to Leasing after the time of the restructuring.

[20] Clearly, all of the parties acted, immediately upon the termination events that occurred in August 2005, as if Section 9 had been triggered and it was only after Gibson refused to accept the amount offered for 864789's shares that ACT, Leasing and Haas sought to avoid Enterprises' obligations under the 2000 USA. 864789 was justified in rejecting the cheque that was tendered

as the first payment under the 2000 USA because it represented the low end of the valuation that had been completed by the valuator chosen by Leasing, Enterprises, ACT and Haas. In addition, it represented only the first payment called for under the agreement, when in fact both payments were due by the time the cheque was tendered.

[21] The Applicants assert that following their rightful return of the inadequate cheque tendered pursuant to Sections 9 and 15 of the 2000 USA, the Respondents engaged in oppressive conduct in a number of ways, including:

1. By failing to consult with Gibson, as required pursuant to Section 17 of the 2000 USA, when it proceeded to construct a $1,800,000 building, distribute profits, restructure the corporations, sell their assets, assign Haas' personal debt to ACT, terminate equipment leases and hire new employees;

2. By failing to distribute dividends and bonuses as required pursuant to Section 2 and 4 of the 2000 USA;

3. By denying 864789 access to business and financial information to which it was entitled; and

4. By transferring all of the assets of ACT and Leasing and then winding them up in order to frustrate the 2000 USA and impede the Applicants' recovery should they be granted judgment in the action which had been commenced by them.

[22] Although the Applicants acknowledge that they received notice of a shareholders' meeting in 2007, Gibson did not attend because he felt that doing so would have been inconsistent with his position that he was no longer a shareholder of Leasing because the 2000 USA required a buyout of 864789's shares effective August 2005.

[23] Because the transfer of assets and winding-up of Leasing immediately prior to the issuance of Justice Topolniski's order makes restoration of their interests impossible, the Applicants also take the position that the only practical remedy left to impose is to require the Respondents to complete the share purchase contemplated by Section 9 of the 2000 USA. They submit that it is appropriate to use the existing KPMG valuation, establishing the purchase price at the mid-level suggested by them rather than the low level originally offered by Enterprises. The Applicants submit that there is no question that there is authority to do so pursuant to Section 242(3)(g) of the *ABCA.*

[24] In support of their position that some or all of the Respondents have engaged in oppressive conduct entitling them to the remedy suggested, the Applicants rely on, in particular, ***First Edmonton Place Ltd. v. 315888 Alberta Ltd.***, 60 Alta. L.R. (2d) 122, ***Stech v. Davies***, 80

A.R. 298; ***Westfair Foods Ltd. v. Watt***, 115 A.R. 34, ***Mikulak v. Rubin***, 2001 ABQB 594, and ***820099 Ontario Inc. v. Harold E. Ballard Ltd.***, 1991 CarswellOnt 142.

Position of the Respondents

[25] The Respondents' main concern is that in most applications of this nature it is clear from the outset what the appropriate remedy is. In this case, the Respondents argue that the Applicants are seeking summary judgment without actually applying for it and are cleverly disguising a summary judgment application as an oppression remedy application. They argue that the Notice of Motion did not include the specific remedy sought at the application.

[26] The Respondents argue that two issues are particularly germane:

1. The proper interpretation of Section 9 of the 2000 USA. In relation to this issue, the Respondents argue that the Applicants are seeking rectification without pleading it; and

2. Whether Gibson was an employee of Leasing. The Respondents argue that this is a triable issue requiring examinations for discovery and a trial. They argue that granting the remedy sought by the Applicants would preclude litigation of live issues.

[27] The Respondents submit that the events of 2005 were normal negotiations between the parties undertaken at a time when the Respondents mistakenly believed that there was a contractual obligation to repurchase 864789's shares pursuant to the 2000 USA. They argue that the letter sent by Haas' lawyer, confirming termination of Gibson's employment with Leasing, did not make him an employee of Leasing. Instead, they rely on the fact that Leasing never issued a paycheque or T-4 slip to Gibson as proof that he was not an employee of Leasing and, accordingly, that Section 9 could never have been triggered by his termination.

[28] Furthermore, the Respondents submit that the negotiations which followed the events of August 2005 were never concluded because the parties were never *ad idem* with respect to the value of 864789's shares in Leasing. They point to the fact that the parties heavily disputed the value of the shares as weighing against my ability to determine a value in connection with this application.

[29] With respect to the Applicants' assertion of oppressive conduct on the part of the Respondents, the Respondents submit that the cases do not lay out a clear black and white test for oppression. They submit that the question of whether oppressive conduct has occurred turns largely on the facts of each case. Further, they point out that the cases dealing with oppression do not eliminate the concept of majority rule. In this case, the majority shareholder voted to sell the assets of Leasing for legitimate reasons for fair value and it is not open to the minority shareholder to question that decision, particularly since 864789 chose not to exercise its right, under Section 191 of the *ABCA*, to dispute the transaction at the shareholders' meeting

of which it had notice.

[30] In addition, the Respondents submit that the Applicants have failed to provide any evidence of their reasonable expectations or that their reasonable expectations were not met. They take the position that the reasonable expectation of a 10.1% shareholder, viewed objectively, is that it would be provided with reasonable notice of important decisions but that the will of 89.9% majority shareholder would prevail over the desires of the minority shareholder. The Respondents submit that the oppression remedy should be used only in response to unfair or harsh treatment of a minority shareholder and ought not to be used to override the decision of the majority.

[31] The Respondents submit that, following the sale of the assets, the proceeds of the sale were paid out by dividend. 864789 did not receive any of those proceeds because Leasing took the position that it was entitled to set off 865789's entitlements against amounts owed by that shareholder to Leasing.

[32] The Respondents concede that the obligation to consult imposed by Section 17 of the 2000 USA was breached, but argue that the breach was meaningless because the provision requiring consultation did not require Leasing or Haas to follow or have regard to the results of that consultation process.

[33] The Respondents submit that the only rights the Applicants have belong to 864789, as Gibson was not a shareholder or director. As a shareholder in Leasing, 864789 is a creditor which is asserting an unproven claim. The appropriate remedy is to have that dispute proceed to trial and to allow the corporations to continue operating.

[34] In support of their position, the Respondents rely on ***Keho Holdings Ltd. v. Noble***, 78 A.R. 131, ***Brant Investments Ltd. v. KeepRite Inc.***, 80 D.L.R. (4th) 161(affirmed by the Ontario Court of Appeal, (1991) 3 O.R. (3d)), ***Alberta Treasury Branches v. SevenWay Capital Corp.***, 2000 ABCA 194, ***IGM Resources Corp. v. 97978 Alberta Ltd.***, 2004 ABQB 925, and ***Mikulak***.

Reply Position of the Applicants

[35] The Applicants dispute the Respondents' contention that all corporate notices were done properly. Rather, the only notice given of the shareholders' meeting was given in July 2007, after the Applicants commenced their action, seeking to retroactively approve the sale of assets that had already occurred.

[36] The Applicants also submit that rectification of the 2000 USA was clearly pled in the Statement of Claim. They dispute that the application is an indirect attempt to obtain summary judgment in respect of an unproven debt claim. Rather, they submit that they are seeking an appropriate remedy under Section 242 because the Respondents' actions have eliminated most of the other remedies originally sought by them. They submit that the requested remedy will

provide prompt and effective resolution of the dispute, one of the aims of Section 242 of the *ABCA.*

[37] Contrary to the Respondents' submission that Gibson is not entitled to seek a remedy, they point out that he was the General Manager of ACT and Leasing and was also a party to the 2000 USA, having rights and obligations under it. He is therefore properly a complainant in these proceedings.

[38] In relation to the Respondents' claim for a set-off in relation to amounts it claims are owed as shareholders' loans, the Applicants suggest that a hold-back could be established pending litigation of that amount if I consider it necessary to do so. Given the Respondents' propensity to restructure and to transfer assets, the Applicants suggest that, if a trial is ordered for all issues, some form of security ought to be required from the Respondents pending resolution (the Respondents suggest the sum of $600,000), as well as the funding of the Applicants' costs on an interim basis.

Analysis

1. Was Section 9 of the 2000 USA triggered?

[39] For the following reasons, I have concluded that the buy/sell provision contained in Section 9 of the 2000 USA was triggered by the events that occurred in August 2005.

(a) Was Gibson an employee of Leasing?

[40] The uncontradicted evidence of Gibson was that he provided services to both ACT (before and after the 2000 restructuring) and Leasing (after the 2000 restructuring). He was plant manager responsible for all aspects of managing the business, including but not limited to the purchase of equipment for Leasing. Prior to the restructuring in 2000, Gibson received paycheques and T-4 slips from ACT. That practice continued after the restructuring. However, a person who is employed by a number of corporations that are part of a corporate group may receive a paycheque from only one of them. The manner in which a corporate group chooses to issue paycheques and T-4 slips to its employees is not determinative of this issue. The Respondents do not dispute Gibson's description of the services provided to the corporations comprising the Haas group but rest their argument solely on the manner in which that group chose to issue payment. I reject that argument and find that the services provided by Gibson to Leasing made him an employee of Leasing within the meaning of the 2000 USA.

(b) Did the parties intend Section 9 of the 2000 USA to refer to Gibson's employment with ACT, resulting in a definitional issue arising as a result of the parties inadvertently overlooking the consequential amendment which was required when the 1997 USA was replaced by the 2000 USA? If so, is rectification appropriate?

[41] In addition to the foregoing reason, it is very clear that the parties intended Section 9 of the 2000 USA to refer to Gibson's employment with the Haas group, be it ACT, Leasing, or both. Clearly, they intended Section 9 to come into play when Gibson was no longer involved in either or both corporations. Acceptance of the Respondents' argument would indeed render the 2000 USA absurd and meaningless. The parties had counsel prepare a replacement USA at the time of the restructure and it can only be assumed that they intended it to have some effect. Therefore, if I am wrong in my conclusion with respect to Gibson's employment status with Leasing, and the 2000 USA ought to have referred to his continuing employment with ACT, rectification is not only appropriate, it is necessary, to give effect to the obvious intentions of the parties in entering into Section 9 of the 2000 USA.

[42] The parties' intentions are made abundantly clear from their actions immediately following the termination letters sent by counsel for Enterprises, ACT, Leasing and Haas. These were all parties involved in the negotiation and drafting of the 2000 USA. I reject their suggestion that they mistakenly ordered a valuation and entered into considerable discussion concerning the value of the shares required to be purchased and sold under Section 9 of that agreement because they did not realize that the agreement did not apply in these circumstances. Rather, it is hard to resist the suggestion of the Applicants that, when 864789 refused to accept the cheque which was tendered to it on a unilateral basis following receipt of the valuation, they began looking for a basis to avoid purchasing the shares pursuant to Section 9.

2. In the alternative, did a separate purchase agreement arise (either expressly, impliedly, or through a course of conduct) as a result of the correspondence sent by the Respondents and their counsel to the Applicants and their counsel following the termination of Gibson's employment and 864789's management agreement in August 2005? If so, who is bound such an agreement?

[43] Given my conclusion that Section 9 of the 2000 USA was triggered by the events that occurred in August 2005, no separate purchase agreement arose as a result of the correspondence that was exchanged following the termination events of August 2005. Rather, that correspondence was pursuant to, and in furtherance of concluding the purchase and sale referred to in, Section 9 of the 2000 USA.

3. Did the actions of some or all of the Respondents following the termination events that occurred in August 2005 (including the failure to consult, the transfer of assets and employees and the winding up of ACT and Leasing) constitute oppressive conduct on the part of one or more of the Respondents?

[44] As the Respondents have pointed out, the goal of Section 242 of the *ABCA* is to protect minority shareholders from unfair treatment without usurping the function of the Board of Directors and without supplanting the legitimate exercise of control by the majority (***Brant v. KeepRite***). It is not my function to substitute my business judgment for that of the Board of Directors. Rather, I am required to evaluate both the method and effect of the impugned conduct. Further, "just because the majority outvotes the minority does not make for oppression. There

must be some unfair disregard for the legitimate rights of the minority. . .amounting to some visible departure from the standards of fair dealing or a violation of the conditions of fair play" (***IGM Resources***, quoting from ***400280 Alberta Ltd. v. Franko's Heating and Air Conditioning (1992) Ltd.***, 26 Alta. L.R. (3d) 421). The oppression remedy should not be used by a minority shareholder as a means of taking control of a corporation from the majority.

[45] In ***First Edmonton Place***, the Court reviewed the history of what was then a recent amendment to the *Canada Business Corporations Act*, seeking guidance on the proper interpretation of Section 242 of the *ABCA*. The Courts concluded that the goal of the Legislature was to balance the interests of minority and majority shareholders. The oppression remedy was enacted to provide broad remedial discretion to the Courts, with Section 242 to be given a liberal interpretation in favour of complainants without, however, the Courts venturing into management of corporations. So while majority rule of corporations remain fundamental to corporate law, it is clear the majority must act fairly. In determining whether oppression has occurred, Courts should look beyond strict legal rights to the relationship between the parties.

[46] In ***Westfair***, the Court provided guidance as to the requirement that the majority treat the minority justly and fairly. The Alberta Court of Appeal observed that within a corporation "there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the corporate structure". It observed that directors must have regard for all shareholder interests that are deserving of protection, in particular, "nourished hopes" or "reasonable expectations". The Court observed that reasonable expectations are ones that are raised in one party by the words or conduct of the other and that these are deserving of protection. The Court further observed that whether an expectation is reasonable ought to be assessed on "all the words and deeds of the parties . . . not necessarily only those confined to paper, and not necessarily only those made when the relationship first arose" (emphasis added).

[47] As has been pointed out by the Respondents, each case must be decided on its specific facts and the categories of "unfair", "oppressive" or "prejudicial" conduct within the meaning of Section 242 are not watertight compartments. In interpreting and applying Section 242 then, the Court must guard against too narrow an interpretation, which might result in overly restrictive meanings to the intended remedy conferred by the legislation. Therefore, the Court has "tremendous latitude" in making orders under the oppression remedy and "a judge should be able to use his [or her] ingenuity to effect the remedy most suitable to the situation" (***820099 Ontario v. Ballard)***.

[48] The principles governing the conduct referred to in Section 242 as "oppressive, unfairly prejudicial or unfairly disregarding of the interests of a stakeholder" were outlined in ***Mikulak***:

(a) use of the word 'interests' suggests that the conduct can affect something broader than a shareholder's strict legal right (i.e., shareholder expectations);

(b) shareholder expectations must be reasonable;

(c) the Court ought to focus on the impact of the conduct; and

(d) it would be unfair not to provide a remedy when the interests of shareholders have been detrimentally impacted.

The Court reiterated that the oppression remedy was not, however, designed to act as a dispute resolution mechanism for quarrelling shareholders.

[49] The conduct referred to in Section 242 refers both to the manner in which corporate affairs and directors' powers are carried out and to the effect of that conduct. To constitute oppressive conduct under Section 242, it is not necessary to prove bad faith intentions; rather, bad faith is a factor to be considered when determining the unfairness of a result, as well as the appropriateness of a remedy.

[50] In addition to the cases referred to me by counsel, I consider the case of ***Downtown Eatery (1993) Ltd. v. Ontario***, 54 O.R. (3d) 161, to be factually similar and relevant to the case before me. In that case two individuals owned and operated a group of corporations. One of the corporations was the defendant in a wrongful dismissal case. After the commencement of the action, the directors restructured the group, transferred the assets of the defendant to other corporations and caused the defendant to cease conducting business. The judgment eventually obtained against the defendant corporation was therefore worthless. The Ontario Court of Appeal held that, even though the restructuring was not motivated to avoid paying the judgment, there was no question that the draining of assets was unfairly prejudicial and disregarding of the interests of the plaintiff. It held that the directors were under an obligation to ensure that the defendant corporation retained a reserve to cover this potential liability, that it was a reasonable expectation for them to do so as the time they terminated the operations of the defendant corporation and stripped it of its assets. They held that the wrongful termination was not oppressive. Rather, they were business transactions which left the corporation unable to pay the potential judgment that violated Ontario's equivalent of Section 242 of the *ABCA*.

[51] In the case before me, the restructuring of Leasing and ACT left the corporations unable to pay a potential judgment for the breach of contract actions which have been commenced by the Applicants. Haas, as Director, did not maintain any reserve for this potential liability. Such failure disregarded 864789's and Gibson's reasonable expectation that, in terminating the business of Leasing and ACT and transferring all of their assets, a reasonable contingency fund would be maintained to cover this liability. The effect of not maintaining such a fund is itself oppressive, regardless of whether, as the Applicants claim, the Respondents deliberately planned to impede successful recovery on a judgment. While the Respondents are correct in asserting that the Directors had the authority to sell the assets of the corporations based on the will of the majority shareholder, it was not the selling of the assets that was the wrong. The harm done was preventing 864789 and Gibson from being able to collect on a judgment should either or both obtain one. So, whether or not the Respondents are accurate in their assertion that they had a *bona fide* unrelated purpose in transferring the assets (that being a potential lawsuit which they believed might be commenced by a third party), the effect of their actions was to unfairly and

prejudicially affect Gibson's and 864789's interests. This, then, is not a case (like some of those relied on by the Respondents) in which a minority shareholder is attempting to wrest control of a corporation from its directors or majority shareholder. Rather, it is one in which the complainants have brought an application under Section 242 in light of actions by the director and majority shareholder which impacted their interests in an unfair and prejudicial manner.

[52] Having concluded that there was oppressive conduct unfairly and prejudicially affecting the interests of 864789 Alberta Ltd. and Gibson, which of the Respondents are liable for this conduct? All of Enterprises, ACT, Leasing and Haas were parties to the 2000 USA and aware of their obligations under it as well as the Applicants' rights and obligations under it. They were all aware of the claims of the Applicants (in the case of 864789, its claim to have its shares purchased pursuant to Section 9 of the 2000 USA and, in the case of Gibson, his claim for wrongful dismissal). Some of the oppressive conduct occurred following the issuance of the Statement of Claim. Some occurred on the eve of the application before Justice Topolniski, a step taken to obtain remedies that would have prevented the transfer of assets which occurred almost simultaneously with the hearing of that application.

[53] Relevant on this point is the case of ***Gottlieb v. Adam***, (1994) 21 O.R. (3d) 248, cited with approval in ***Budd v. Gentra Inc.***, [1998] 111 O.A.C. 288, in turn cited with approval in ***McAteer v. Devoncroft Developments Ltd.***, 2001 ABQB 917. In ***Gottlieb***, *supra*, a minority shareholder and director initiated a buy/sell provision contained in a shareholder agreement. He paid for the shares but did not pay out a shareholder loan, in violation of the agreement. He then removed the majority shareholder as shareholder, director and officer. As argued by the Respondents in this case, the question was whether the Applicant was limited to a claim for damages for breach of the shareholder agreement. However, the Court held that the breach of a shareholder's agreement can be effected in such a manner as to constitute oppressive conduct under Section 242. The Court observed that:

> "The oppressive conduct related to a shareholder's agreement, a private contractual arrangement between the parties rather than an element of the corporate structure of the company. While the facts, viewed in isolation, might seem to make the oppression remedy inapplicable, further consideration leads to the opposite conclusion. The minority shareholder employed her capacity as a director to carry out the appropriation of the shares of the majority holder. It is the use of the director's position in this manner, to effect that appropriation, that is oppressive."

[54] This position is supported by ***Linamar Corp. v. Wescast Industries Inc.***, [2004] O.J. No. 2449, citing ***GATX Corp. v. Hawker Sibbeley Canada Inc.***, (1996) 27 B.L.R. (2d) 251, which all confirmed that "the interpretation of rights under a shareholders' agreement constitutes part of the affairs of a corporation and is subject to the application of the oppression remedy". These cases also confirm that the breach of a shareholders' agreement or breach of an obligation to perform the agreement in good faith can constitute oppression.

[55] ***Itak International Corp. v. CPI Plastics Group Ltd.***, [2006] O.J. No. 2637, is a case on point with the issues in this application. In that case, a shareholder agreement entitled the applicant to retract its shares, thereby obligating the respondent to purchase them. The respondent's directors refused to do so. Although the directors claimed the refusal was based on the negative impact the retraction would have on the other shareholders, the Court held that the directors had not met the standard of the business judgment rules. The Court went on to declare the decision of the directors, to cause ***CPI*** to be in breach of its contractual obligations, oppressive in unfairly disregarding the reasonable expectations of the applicant. At paragraph 47 of its judgment, the Court stated:

> "Agreements between the parties tend to constitute the best evidence of the parties' reasonable expectations. Oppression proceedings that are based on the enforcement of prior contractual agreements tend to be clearer than other such proceedings in that such contracts may inform the court's decision as to the reasonable expectations of the parties."

[56] In the case before me, I have concluded that Haas, sole director of Enterprises, caused Enterprises to refuse to purchase 864789's shares as it was required to do pursuant to Section 9, because 864789 refused to accept a lower purchase price that it suggested was payable pursuant to the valuation and an amount which did not reflect the full amount then owing under the terms of the 2000 USA. Instead, he took a position which, if accepted, would have rendered the 2000 USA meaningless and of no effect. In addition to refusing to proceed with the purchase of the shares required under the 2000 USA during the approximately one-year period in which he led the Applicants to believe that Enterprises was in the process of fulfilling these obligations, he proceeded to cause Enterprises to make and implement significant decisions regarding acquisitions and restructuring without consulting with the Applicants as required under the 2000 USA. Again, he now argues that that obligation was meaningless and was not intended to impose any obligations on the parties to the 2000 USA. I reject this argument, as to do otherwise would be to accept that all of the parties to both the 1997 USA and the 2000 USA, and their counsel, negotiated agreements without any intention that significant provisions were to have any effect.

[57] Shares were issued to 864789 in 1997 and then in 2000 for a reason. The two USAs were also entered into for a reason. Presumably the reason was to ensure Gibson's hard work and effort in the Haas group of companies, the shareholder interests (through his corporation, 864789) being the incentive to encourage his efforts to increase the profitability of those corporations. The USAs provided an escape to all parties, in case they decided to part ways. It was a reasonable expectation that the shares would be purchased when Gibson was no longer personally involved in day-to-day operations. It is telling that immediately upon terminating Gibson's involvement in operations, the Respondents then in existence quickly moved to value the shares held by Gibson through his holding company, 864789. They ceased consulting with or issuing dividends and profits to the Applicants, on the basis that 864789 had ceased to be a shareholder by virtue of Section 9. It was only after the refusal to accept payment on the Respondents' terms (which conflicted at least in part with the agreement) that the agreement provisions became, according to the Respondents, either inapplicable or unenforceable.

[58] I therefore conclude that oppressive conduct was committed not only by Enterprises but also by its director, Haas. Some of the conduct was facilitated by the related corporations, Leasing and ACT, as well as another related corporation (ACT 2006) which received the assets on wind-up of Leasing and ACT.

4. Given my determinations in relation to the above issues, which of the Applicants are entitled to a remedy pursuant to Section 242 of the *ABCA*, and what is the appropriate remedy in the circumstances of this case?

[59] The Respondents had argued that the Applicants' failure to exercise 864789's dissent rights under s. 191 of the *ABCA* disentitled it from pursuing any remedy under Section 242. Under Section 191 a shareholder may dissent if the corporation resolves to sell all or substantially all of its assets, as Haas Leasing did in this case. The Applicants took the position that exercise of the dissent rights at the time of the special meeting would have been inconsistent with their position that 864789 had ceased to be a shareholder pursuant to Section 9 of the USA.

[60] A similar issue arose in ***Brant Investments v. KeepRite***. Under the *Ontario Business Corporations Act* a shareholder has dissent rights similar to those set out in Section 191, as well as oppression remedies similar to those set out in Section 242. The issue is whether a shareholder is entitled to pursue both remedies. The Court concluded that a shareholder may pursue either or both of these remedies. The same conclusion was reached in the ***Alberta Treasury Branches*** case. This issue was also considered in ***IGM Resources***, with the Court concluding that:

> ... if a claimant has two parallel remedies, the claimant is generally entitled to elect which one to pursue.

[61] 864789 is clearly entitled to a remedy pursuant to Section 242 of the *ABCA*. The position taken by Enterprises, ACT, Leasing and Haas following 864789's refusal to accept the cheque tendered to it and the actions taken thereafter have resulted not only in 864789 having failed to receive payment to which it was entitled, the windup-of Leasing has rendered the shares valueless and created a significant impediment in the Applicant's ability to recover on any judgment they might obtain. Ordering the completion of a purchase of nonexistent shares in a nonexistent corporation is no longer a viable alternative. This potential remedy, otherwise available pursuant to Subsection 242(3)(g) of the *ABCA*, was eliminated by the Respondents at the same time that they frustrated the Applicants' obtaining of an order restraining the directors and shareholders of the Respondent corporations from winding-up the Respondent corporations or conducting any transactions outside of the ordinary course of business. Similarly, the original relief requested included a request for an order appointing a receiver or receiver/manager of Leasing and ACT, a remedy that was also frustrated by the winding-up of those corporations on the eve of the hearing of the related motion.

[62] Subsection 242(3)(l) allows me to order compensation to any aggrieved person. The purpose of such an order is to restore the aggrieved person to the position it would have been in

had the oppression not occurred. In ***McAteer***, two company directors had engaged in a series of oppressive conduct, the corporation became insolvent, and a shareholder brought a claim under Section 242 of the *ABCA*. In discussing the appropriate remedy, the Court stated, at para. 466:

> In this case, there is no value left in DDL to salvage. The only logical remedy to compensate Mason for the improper conduct of McAteer and Billes is to value her interest and to restore her to the position she held at a point in time when the conduct had not yet occurred.

[63] The most appropriate remedy in the case before me is to restore 864789 to the same position it would have been in had the oppressive conduct not occurred. Had Haas not used his position as director to cause Enterprises to breach its contractual obligation to purchase 864789's shares, and had the corporation not then been stripped of its assets and wound up, 864789 would have been in a position to receive the full purchase price of the shares as at August 15, 2005, as originally contemplated by and required under the 2000 USA.

[64] KPMG was familiar with Leasing, as well as the other Haas corporations, and spent several months completing its valuation. It provided a range of values. The only disagreement between the parties at the time was which part of the range should be used in completing the purchase. Enterprises offered the low end and 864789 requested something at the higher end of the range. At the low end of the range, the shares would have been purchased at approximately $270,000; at the high end of the range, for approximately $333,000. Although this is a fairly tight range, the parties did not have an opportunity to present any evidence or argument in support of a particular value in the context of this application. Therefore an assessment will be required for such purpose.

[65] There are other claims outstanding between the parties, although they were not discussed at length before me. One involved disputes over the shareholder loan account and, in particular, questions arising out of the construction of a garage at the Gibson residence and a car purchase. As the Respondent pointed out repeatedly, Mr. Gibson was not the shareholder. It appears Mr. Gibson’s alleged personal loan was treated as a loan made to 864789 and was taken into account when the share value was established by KPMG, although this is not entirely clear from the materials and there was some question about the status of this issue at the application. In addition, in the Statement of Claim Gibson brought an action for wrongful dismissal, which I assume remains to be dealt with. These claims cannot be resolved in this application.

[66] However, should Gibson be successful in obtaining any further judgment against one or more of Leasing, ACT or Haas, recovery would be frustrated as a result of the oppressive conduct referred to earlier in this judgment. Therefore, although Gibson satisfies the definition of a complainant (on the basis of the reasoning adopted in the cases referred to earlier in this judgment) his entitlement to a remedy has not yet been established. The only appropriate remedy to grant to him, pending the obtaining by him of any judgment to which he might be entitled, is to require the posting of security. The Applicants suggested that an order restraining the Respondent corporations still in existence from conducting business out of the ordinary course

would be appropriate in light of past oppressive conduct. The posting of security will allow the remaining corporate Defendants to continue with their operations while at the same time ensuring that the winding-up of Leasing and ACT will not render any such judgment valueless. Given the claims advanced by the Applicants, $600,000 is a reasonable amount.

Conclusion

[67] In the result:

1. The Applicants are granted a declaration, pursuant to Section 242 of the *ABCA*, that the affairs of Leasing and ACT were carried on in a manner that was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of, the Applicants;

2. 864789 will be granted judgment against Leasing and Haas, with interest thereon from August 15, 2005, in an amount to be determined at an assessment. Counsel should contact my assistant to arrange for the assessment to be scheduled before me at the earliest available date; and

3. Enterprises and Haas, or either of them, are ordered to post security in the amount of $600,000, by no later than November 9, 2008. The Respondents may apply to have the amount reduced by any payment made on the judgment granted herein or upon a resolution of the remaining matters in dispute by way of either trial or agreement.

[68] If the parties are unable to agree on costs in relation to this application, they may speak to the matter following the conclusion of the assessment or may contact my assistant to arrange for a separate application to address the issue.

Heard on the 23rd day of May, 2008.
Dated at the City of Edmonton, Alberta this 9th day of September, 2008.

D.L. Shelley
J.C.Q.B.A.

Appearances:

N. J. Pollock, Q.C.
for the Plaintiffs

E. R. Feehan
for the Defendants

TAB 17

Court of Appeal for British Columbia
Safarik v. Ocean Fisheries Ltd.
Date: 1996-01-19

D. Barry Kirkham, Q.C., for appellant Ocean Fisheries Limited.

Stephen J. Mulhall and Stephen Antle, for respondent Gordon William Safarik.

Keith A. Bowman and Samantha Ip, for respondents Edward John Safarik, Edward Anthony Safarik, Murray Robert Safarik and Douglas Richard Safarik.

William C. Kaplan and Nicole L. Hunter, for intervenors.

(Docs. Vancouver CA017791, CA018274, CA018007)

January 19, 1996. Supplementary reasons of the court were delivered by

[1] SOUTHIN J.A.:– The first issue now to be decided is whether this Court should order a winding-up or, by virtue of s. 296 of the *Company Act,* R.S.B.C. 1979, c. 59, make one of the orders authorized under s. 224.

[2] The orders authorized by s. 224 are these:

> … without limiting the generality of the foregoing, the court may
>
> (*a*) direct or prohibit any act or cancel or vary any transaction or resolution;
>
> (*b*) regulate the conduct of the company's affairs in future;
>
> (*c*) provide for the purchase of the shares of any member of the company by another member of the company, or by the company;
>
> (*d*) in the case of a purchase by the company, reduce the company's capital or otherwise;
>
> (*e*) appoint a receiver or receiver manager;
>
> (*f*) order that the company be wound up under Part 9;
>
> (*g*) authorize or direct that proceedings be commenced in the name of the company against any party on the terms the court directs;
>
> (*h*) require the company to produce financial statements;
>
> (*i*) order the company to compensate an aggrieved person; and
>
> (*j*) direct rectification of any record of the company.

[3] The parties seek, respectively, these orders:

> *Gordon William Safarik on his cross-appeal*
>
> (a) if Ocean Fisheries Limited's lenders consent in writing by 30 days from the date of the judgment of this court as provided in clause 7.03 of the agreement dated May 15, 1989 between the lenders and the appellant Ocean Fisheries Limited, Ocean Fisheries Limited shall purchase the shares of the respondent Gordon Safarik in Ocean Fisheries Limited for $22,260,000 plus interest at 12.75% per annum from June 30, 1989 to the date of payment, by 60 days from the date of the judgment of this court;

> (b) if Ocean Fisheries Limited's lenders do not consent in writing as set out above, the respondents Edward John Safarik, Edward Anthony Safarik, Murray Robert Safarik and Douglas Richard Safarik shall purchase Gordon Safarik's shares in Ocean Fisheries Limited for $22,260,000 plus interest at 12.75% from June 30, 1989 to the date of payment, by 120 days from the date of the judgment of this court;

(He also seeks certain ancillary orders which I need not quote.)

For reasons of the peculiarities of the *Income Tax Act,* Mr. Gordon Safarik, if he is to sell his shares to the company, wishes first to transfer them to a holding company.

Alternatively, he seeks what might be called a buy/sell order under which he may have the opportunity of purchasing the shares of the individual respondents at the price per share at which they are willing to purchase his shares:

> *Ocean Fisheries Limited*
>
> 92. An order that Gordon be compensated at the rate of $60,000 to $120,000 per year in lieu of a winding up.
>
> 93. In the alternative, an order that Ocean purchase Gordon's shares on the terms proposed herein, without interest, if the lenders approve, and if the lenders do not approve, an order that the company be wound up.
>
> 94. An order awarding Ocean recover the costs of trial or that each party bear its own costs.
>
> 95. An order directing the letter of credit be returned to Ocean immediately.
>
> 96. An order that Ocean recover its costs of this appeal, or an order that Ocean recover 50% of its costs of the appeal from Gordon and pay 50% of Gordon's costs. (An order that each party pay its own costs is not reasonable because the costs of the Appeal Books and Transcripts represent 90% of the costs of this appeal and Ocean has wholly paid for the Appeal Books and Transcripts.)

The terms proposed appear to be that the shares should be valued as of the date of the winding-up order or, alternatively, as of the date when the judge below ought to have pronounced a winding-up order, a price which appears to be substantially less than that fixed by the learned trial judge. The price fixed by the learned trial judge was founded on his conclusions as to the value of the shares as of the date upon which the petition in the court below was filed:

> *Intervenors*
>
> 73. An order that Gordon be compensated at the rate of $60,000 - 120,000 per year so long as Gordon owns his preferred shares and so long as the Ocean is in a position to make payments in these amounts to its shareholders.
>
> 74. In the alternative, either:
>
> a. an order that the shareholders purchase Gordon's shares; or
>
> b. an order that, subject to the Lenders' right as referred to in paragraphs 69 and 70, there be a buy-sell order as proposed in Gordon's Reply Factum.

Edward John Safarik et al

a. An order that it would not be just and equitable to wind up Ocean, and that Gordon's Petition stand dismissed.

b. Alternatively an order that Ocean purchase Gordon's shares at the Court determined fair value, subject to the consent of Ocean's lenders.

c. Alternatively, an order made with the Personal Respondent's consent that they purchase Gordon's shares at a value of $500,000.

d. Alternatively an order setting aside the purchase order and substituting an order for payment of between $60,000 and $120,000 per year to Gordon so long as he holds his current shareholding in Ocean.

e. Costs to the Personal Respondents of the Appeal.

[4] It was open to Mr. Bowman, who was not heard on behalf of the individual respondents at the original hearing in June last, to submit at the hearing on the 11th December that the petition should be dismissed or, alternatively, that no order should be made against his clients. He said all that could properly be said but he did not succeed in persuading me that the original conclusion of this Court that Mr. Gordon Safarik was entitled to some remedy was in error.

[5] The orders sought by Mr. Gordon Safarik, insofar as they contemplate a share purchase of his shares at $22,000,000, are not appropriate simply because we have found here neither oppression nor unfairly prejudicial conduct within the meaning of the introductory paragraph of s. 224.

[6] When a member of a company is a victim of corporate wrong-doing, by which in this context I mean conduct which is either illegal or, by reasonable standards, dishonest, it may be right to fix the value of the shares as of the date of the exclusion. That is not this case. There were no breaches of the Articles of Association. There was no dishonesty. This was a case of brothers who ultimately could not get on together. The differences which arose here were deeply rooted. Conduct which, if engaged in by strangers, might fairly deserve opprobrium does not necessarily deserve it in the case of intra-family disputes.

[7] Ought there to be a winding up? So far as I could deduce at the hearing, no party really wants a winding-up order.

[8] Mr. Mulhall does not ask for one.

[9] Mr. Kirkham opposes it thus:

42. Gordon submits that the purpose of the order to be made by this Court should be to "remedy matters complained of" by Gordon. This is an erroneous interpretation of the *Company Act.*

43. Section 224(2) provides that the Court may, "with a view to remedying the matters complained of", make an order to rectify oppressive or unfairly prejudicial conduct. This Court has already determined that there is no oppressive or unfairly prejudicial conduct to be remedied in this case.

44. Section 296, under which the Court is now operating, gives the Court jurisdiction to grant a remedy under section 224 "as [the Court] considers appropriate". Such a remedy is not directed at "remedying the matters complained of". Rather, it is a remedy that flows from the Court's finding pursuant to section 295(3)(a) that it is "just and equitable" that Ocean be wound up. The remedy itself must therefore be one that is just and equitable, meaning just and equitable to all parties, not merely Gordon. Indeed, Southin J.A. said at para. 104:

"In my opinion, a proper consideration is the effect a particular order would have upon the other shareholders and the creditors of the company."

45. Having failed to establish oppression or unfair prejudice, Gordon is not entitled to a remedy that is tailor made to alleviate his hardship or complaint. Rather the order should achieve fairness for all parties. This includes not only the parties before the Court, but also Ocean's employees, fishermen and creditors.

46. Clearly a winding up order is not appropriate. Everyone would lose. An order that Ocean be wound up guarantees that Ocean's assets would be liquidated at the lowest possible price and costs would be substantial.

[10] Counsel for the personal respondents concludes:

If this Court does not grant the Personal Respondents any of the remedies proposed by them or Ocean, then the Personal Respondents reluctantly agree that Ocean should be wound up.

[11] The intervenors, who have security over all the assets of the company, say this:

57. It is the Lenders' submission that an order that Ocean be wound up is inappropriate in the circumstances. That is so from a variety of perspectives.

58. All of the available evidence demonstrates that Ocean is insolvent. Even to the extent that it is arguable that current evidence concerning insolvency is not available, the evidence that is before the Court is so overwhelming of Ocean's past insolvency that the Court cannot, we submit, legitimately conclude that Ocean is solvent today. That consideration alone ought to persuade the Court in determining that a winding up is inappropriate.

59. We have made submissions above concerning the constraints facing the Court in ordering the winding up of an insolvent company. We reiterate those submissions.

60. Furthermore, a consideration of contractual principles and the *Company Act* does not support the remedy of winding up Ocean. An order of winding up specifically constitutes an event of a default under the Loan Agreement. The *Articles* do not contemplate a winding up of Ocean in circumstances of a shareholder wishing to exit Ocean. A consideration of the interests of the various parties referred to in section 295 of the *Company Act,* including Gordon, militate against a winding up. No party before this Court has argued that a winding up is an appropriate remedy save and except Ocean's reference to that remedy as a third alternative relief. It is significant

> that Gordon himself, the initiator of these proceedings, takes the position that a winding up is *not* appropriate.
>
> 61. There are substantial and persuasive reasons why a winding up of Ocean is an inappropriate form of relief. Ocean's Factum indicates the economic dislocation to third parties resulting from a winding up and the Lenders support those submissions. Further, that form of remedy is not able to deliver any "redress" to Gordon or any of the other parties. In the circumstances, an order that Ocean be wound up would be simply a punitive response to a circumstance the Court has already characterized as not blameworthy, which would not return any value to any shareholder, including Gordon. The fact that none of the parties before this Court find that remedy to be among the more appropriate remedies is an adequate indication that the Court ought not apply it.

[12] The intervenors, supported by the company, object, *in limine,* to any order under ss. 295 and 296 on the ground that the company is insolvent. I do not accept that the evidence put before the Court warrants this Court making a finding of insolvency, even if it were legally proper for the Court to address that issue on these appeals. In my opinion, it is not proper to consider that issue on these appeals. If the directors of the company or creditors of the company hold the opinion that the company is a debtor company within the meaning of that phrase in the *Companies' Creditors Arrangement Act* or is "insolvent" within the meaning of the *Winding-up Act* or has committed an act of bankruptcy within the terms of the *Bankruptcy and Insolvency Act,* it or they may proceed under one of those statutory provisions.

[13] It is in such proceedings that such an issue is properly resolved.

[14] In so saying, I am quite aware that a company cannot be wound up under the *Company Act* on the ground that it is insolvent. But nothing in the *Company Act* requires the court, before exercising its jurisdiction under s. 295 or s. 296 of the *Company Act,* to determine as a condition precedent to that exercise that the company is not insolvent.

[15] The next question is whether the order made below that the company purchase the shares should be maintained. I think not. To order any company to purchase the shares of a shareholder when the company may be in doubtful financial health is potentially damaging to all the company's unsecured creditors. This is a permissible consideration because what is in issue is an order in lieu of a winding-up and s. 295 gives the creditors a status upon such an application. As to whether unsecured creditors have any position to be considered in a case of oppression or unfairly prejudicial conduct, I make no comment. That is an issue to be dealt with if, as, and when it arises in another case.

[16] For the same reason, it would not be appropriate to require the company to redeem Mr. Gordon Safarik's "B" shares at the redemption amount fixed in accordance with the Articles of Association, either on the terms therein contained or upon some other terms.

[17] It follows that the company's appeal against the order requiring it to purchase the shares must be allowed.

[18] Thus, the choice comes down to some form of order for purchase by the individual shareholders or a compensation order as proposed by Mr. Kirkham.

[19] In my opinion, a compensation order would be unfair to Mr. Gordon Safarik if there is any other solution for he will not have capital to rebuild his financial fortunes.

[20] The individual respondents opposed the making of any order requiring them to purchase, pleading poverty, not in the sense that they are destitute, but in the sense they cannot afford the amount fixed by the learned trial judge.

[21] It may be also that they oppose such an order because, as insiders, they do not consider the shares are worth the amount so fixed.

[22] In a matter of this kind, there is no right answer. Indeed, whatever order is made, there is no victory.

[23] I have concluded that the individual shareholders, because they are insiders and Mr. Gordon Safarik is not, should have the onus put upon them to fix a fair price. I know of no better way to have a man put a fair value on what he owns, he knowing all the facts about its worth, than to require him to say what he will sell it for.

[24] Thus, the principle of the order here is that the individual respondents are to fix the price at which they will sell.

[25] Having said what the principle is, I must now turn to the mechanics.

[26] The first problem is that the shares of the respondents are not all of the same class as the shares of Mr. Gordon Safarik. Mr. Edward Safarik, Sr. owns "A" preference shares with a fixed redemption value of $1.1 million which carry with them one-half of the voting rights, the other one-half being allocated to the common shares. The "B" preference shares have no voting rights and are not redeemable unless the company has sufficient net assets to redeem the "A" shares.

[27] This share structure creates these problems:

1. Mr. Gordon Safarik does not own, and therefore, if he cannot or will not buy, cannot sell shares of all the same classes as those of the individual respondents. He has only apples and pears; they have apples, pears and oranges.

2. While shares of Mr. Edward Safarik, Sr. could, in theory, be excluded from the offer, the evidence at the trial leads to the sad conclusion that the estrangement between him and Mr. Gordon Safarik is such that it would be impossible, if Mr. Edward Safarik, Sr. retained his voting rights, for father and son to be in business together.

3. Furthermore, it would not be fair to Mr. Edward Safarik, Sr., for his financial interest in this company which he founded, and which he gave to his sons, to be, if Mr. Gordon Safarik were to buy and turn out to be a poor manager, at any more risk than it now allegedly is. It is quite impossible for this Court to make any assessment of the business risks of Mr. Gordon Safarik taking over the company, if that should happen.

[28] The only workable solution which I have been able to think of is this:

1. The shareholders, other than Mr. Edward Safarik, Sr., within sixty days of entry of judgment, or such further time as the parties may agree upon, shall offer in writing to sell all their common and "B" preference shares at a price per share to be determined by them.

2. Edward Safarik, Sr., shall offer, in writing, within the same time, to sell his "A" preference shares at a price not exceeding the redemption amount.

3. Mr. Gordon Safarik shall have sixty days from the date of delivery of the offer to his solicitors to accept both offers. The purchase price shall be payable sixty days after acceptance in cash. He must accept both or neither.

4. If Mr. Gordon Safarik does not accept, the shareholders, other than Mr. Edward Safarik, Sr., shall purchase Mr. Gordon Safarik's shares at the price per share at which they offered to sell.

[29] During the period while the offer is open for acceptance, Mr. Gordon Safarik shall have full access by himself, or his advisors, to the premises of the company and to all its financial records. He must, of course, give an undertaking that if he does not accept the offer, all information received by him during that investigation will be kept confidential.

[30] In their factum, the intervenor lenders say:

> 68. In paragraphs 58 to 68 of the Reply Factum of Gordon filed November 28, 1995, Gordon advances a "shotgun" proposal that either the shareholders, or Gordon,

> purchase the others shares based upon a determination of "current" share value. It is the Lenders' submission that, subject to the following two qualifications, this proposal is appropriate and ought to be responded to by Ocean and the shareholders.
>
> 69. First, regardless of who purchases the shares, the Lenders will not consent to waiving its security over those shares. Accordingly, if Gordon or another purchaser purchases the shares, they ought only be sold subject to the relevant terms and conditions of the Loan Agreement and the Second Restructuring Agreement which effect those shares. The maintenance of the security arrangements relating to the shares has been a consistent and significant concern of the Lenders since 1989.
>
> 70. Second, the Lenders must also have the opportunity to conduct a "due diligence" on the proposed purchaser if that purchaser is Gordon or another nominee offered on behalf of the shareholders or Gordon, prior to the sale and the transfer of the shares. Pursuant to the Loan Agreement, as now set out in paragraph 8.01(o) of the Second Restructuring Agreement, the Lenders have always been granted the right to consent prior to the transfer of shares. The future of Ocean and the security of the Lenders' debt is dependent upon the continuation of a capable committed management team. The consent to a change of control is intended to allow the Lenders to audit that issue.

[31] While I appreciate, as I indicated in the first reasons for judgment in this matter, dated 20th September, 1995, that the interests of the lenders cannot be disregarded, the lenders have a remedy if Mr. Gordon Safarik purchases and is either unacceptable to them or fails to pledge with them all the shares. There will then be an act of default. What the lenders then do under their security is up to them.

[32] This is quite a different order from the order below which might well have deprived the company of assets to which the lenders, as the holders of an all-encompassing charge, had a prior right. There is, in my opinion, a difference in kind between an order under the *Company Act* requiring the commission of an act of default and an order under the *Company Act* depriving a lender of security.

[33] It is left to counsel to work out the details of this Court's order. If they cannot agree on the form, they may appear before any member of the panel to settle the final wording.

[34] The second issue is costs.

[35] The judgment below provides "… that the respondent Ocean Fisheries Limited shall pay the petitioner 65% of his special costs".

[36] The company seeks to set aside that order. At the original hearing before us, it submitted that even if the order for purchase of the shares was rightly made this order for costs was not.

[37] The judgment does not accurately reflect the learned judge's reasons. What the judge intended was that the petitioner have increased costs pursuant to Appendix "B", Rule 7, calculated as 65% of special costs.

[38] By that rule:

> 7. (1) Where the court determines that for any reason there would be an unjust result if costs were assessed under Scales 1 to 5, the court may, at any time before the assessment has been completed, order that costs be assessed as increased costs under subsection (2).
>
> (2) Where costs are ordered to be assessed as increased costs, the assessing officer shall fix the fees that would have been allowed if an order for special costs had been made under Rule 57(3), and shall then allow 1/2 of those fees, or a higher or lower proportion as the court may order, together with all proper expenses and disbursements.

[39] In his reasons of 7th September, 1993, the learned judge found that an order under any of Scales 1 to 5 would produce an unjust result, apparently on the footing of the submission of Mr. Mulhall which the learned judge set out thus:

> The plaintiff submits that in the circumstances of this case he should be awarded special costs essentially because he has had to pay personally for his costs whereas the personal defendants' costs have been born by Ocean. He refers to the inequity of Ocean (of which he owns 31%) paying the entirety of the costs of the personal defendants if he were to be awarded only ordinary costs.

[40] In his reasons of 7th January, 1994, the learned judge did not expand on why such an order would produce an unjust result. He addressed only the question of whether the increased costs should be 50% of special costs or some greater percentage.

[41] It is not necessary to determine whether, if the appeal by the company had been dismissed, this order for costs should nonetheless be set aside as founded on an improper consideration. The appeal of the company having been allowed, the question of costs below is at large.

[42] If the court below had made the order in lieu of a winding-up which this Court has made, what order for costs should it have pronounced? The company has committed no wrong.

[43] Indeed, one can question the propriety of the company, in contradistinction to the respondent shareholders, contesting these proceedings as it did. I infer that the directors considered that the interests of the company and their interests as shareholders were coincident.

[44] The expenditure of company funds to defend proceedings such as this has the ironic result that a petitioning shareholder is, in effect, paying part of the legal bills of his adversary, which does not seem quite right when the petitioner ultimately obtains a remedy.

[45] I shall say no more on that point because, whether it was proper for the directors, on behalf of the company, to instruct counsel, at considerable expense, to defend the proceedings below, and whether it would now be proper for the directors to use the company's funds to indemnify the other respondents for any liability for costs, is not before us.

[46] In my opinion, as this was truly a contest between shareholders, the petitioner should recover his costs below, not from the company, but from the personal respondents. In light of the difficulty of the matter, I consider Scale 5 is appropriate. I see nothing in these proceedings in light of the present result to warrant an application of Appendix "B", Rule 7.

[47] Finally, there is the question of the costs of these two appeals and the cross-appeal. On the whole, Mr. Gordon Safarik has been successful in maintaining his right to a remedy, albeit not to the remedy he obtained below. He was not successful on his cross-appeal. He will therefore have, in this Court, against the company and the personal respondents, one-half of his costs, also on Scale 5. There will be no costs to the intervenors.

Order accordingly.

TAB 18

Bankruptcy No. 1243 **2002 SKQB 238**
Estate No. 019503 J.C.R.

IN THE QUEEN'S BENCH

PROVINCE OF SASKATCHEWAN

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF KEITH STUART ANSTEAD

Keith Stuart Anstead, bankrupt

David D. Kowalishen, for the bankrupt

Fred C. Zinkhan, for the objecting creditor, 572002 Saskatchewan Ltd.

James P. Kroczynski, for the objecting creditor, Royal Bank of Canada

G. Martin Eakins and Laura L. Ryback, KPMG Inc., Trustee

JUDGMENT **MAURICE J. HERAUF, Q.C.**
June 4, 2002 Registrar in Bankruptcy

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[1] Two creditors and the trustee objected to the discharge of the bankrupt. The date of bankruptcy was July 28, 1994. The causes of bankruptcy are "over extension of credit and large debt owing to Revenue Canada." Canada Customs and Revenue Agency initially objected to the discharge but withdrew the objection just prior to the discharge hearing. Apparently, Canada Customs and Revenue Agency was able to collect most of its debt through the sale of the bankrupt's property in British Columbia.

[2] Both objecting creditors listed a myriad of facts under s. 173.(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") which would preclude the granting of an absolute order of discharge. I do not intend to repeat their submissions as I am satisfied that, at the very least, the bankrupt was not forthright with the information he provided to the trustee. The failure to disclose assets to the trustee has perpetuated the lack of trust between all parties. As a result the discharge has been delayed for years. The bankrupt bears the majority of responsibility for what has transpired with respect to the bankruptcy.

[3] The bankrupt and his former spouse have been subjected to an extensive s. 163 examination. Incidentally, I was invited by counsel to read the eight volumes of evidence and undertakings. I decline to do so. Counsel can refer the court to questions and answers that they perceive to be relevant to the issues. Reading hundreds of pages of transcript and reviewing dozens of undertakings that may not be relevant is not a particularly useful exercise.

[4] In any event, even if I was not satisfied that a fact or facts has been proved under s. 173, I would exercise my discretion under s. 172 and impose a conditional order on the basis of surplus income. A discussion of the appropriate terms for the conditional order will come later.

[5] Counsel for the bankrupt raised two preliminary objections to the opposition of 572002 Saskatchewan Ltd. The first related to the timeliness of the objection. The objection was filed in March, 2001, which is almost seven years after the date of assignment. The answer is found in s. 170.(7) of the *BIA*. The automatic provisions for

discharge were no longer applicable as two creditors and the trustee had objected to the bankrupt's discharge. Section 170.(7) provides authority for any creditor who has proved a claim to give notice of the intended opposition "at or before the time appointed for the hearing for the application for discharge."

[6] The second objection relates to the validity of the claim of 572002 Saskatchewan Ltd. Counsel for the bankrupt questions whether the trustee followed the procedure in the legislation to determine whether the claim is provable and if so, to value it. In order to answer this concern a review of the claim is necessary.

[7] The claim relates to a lawsuit alleging a breach of a restrictive covenant agreement. 572002 Saskatchewan Ltd. is one of the plaintiffs and the bankrupt is one of the named defendants. The statement of claim was issued on March 28, 1989. The bankrupt filed a statement of defence on May 1, 1989. The litigation did not proceed beyond examinations for discovery.

[8] The relief requested by the plaintiffs in the claim was judgment for $10,000.00 for loss of income, judgment for punitive and exemplary damages, injunctive relief and costs. Since the matter did not proceed to trial none of the issues were determined.

[9] Based upon the litigation, 572002 Saskatchewan Ltd. filed a proof of claim for $615,600.00 with the following breakdown:

Lost profits of $40,000 per year for 13 years	$520,000.00		
Purchased Goodwill		$ 20,000.00	
Legal fees incurred	$ 30,000.00		
Prejudgment interest		$ 45,600.00	$615,600.00

[10] Counsel for 572002 Saskatchewan Ltd. contends that the claim is not contingent; that the claim was accepted by the trustee as a provable claim and the issue concerning the claim cannot be raised at the discharge hearing. In essence, the bankrupt should follow the procedure set out in s. 135.(5) of the *BIA*. See *Re McNary* (2001), 24 C.B.R. (4th) 218 (Sask. Q.B.).

[11] The bankrupt submits that the claim is contingent and that the trustee did not follow the procedure set out in s. 121.(2) and s. 135.(1.1) of the *BIA*. The bankrupt maintains that he raised this issue a number of times with the trustee but that nothing was ever done. The bankrupt admits that he did not bring an application to "expunge or reduce a proof of claim" as provided for in s. 135.(5) of the *BIA*.

[12] The trustee's position is that the claims are neither accepted or rejected but are relevant only for the purpose of dividends.

[13] Firstly, I disagree with counsel for 572002 Saskatchewan Ltd. that its claim is not contingent. A contingent claim is one which has not accrued and which is dependent on some future event that may never happen. See *Gardner* v. *Newton* (1916), 29 D.L.R. 276 (Man. K.B.). The claim of 572002 Saskatchewan Ltd. is a contingent claim.

[14] Secondly, I am a bit perplexed by the position taken by the trustee. I agree that in situations where there are no objections and no dividends the valuation of a contingent claim may be academic. However, in hotly contested bankruptcies where there is a potential for dividends it is crucial that the trustee follow the statutory procedures to deal with contingent claims. This becomes even more apparent when the claim in issue represents the largest, by far, of any creditor. Failure by the trustee to comply with statutory provisions does a disservice to the bankrupt, the creditors and does nothing to

foster confidence in the bankruptcy process. In fairness to the current trustees, it must be mentioned that they have only recently become involved with the file.

[15] Having said this, the logical way to proceed with this matter is simply to state that I am mindful of what the claim of 572002 Saskatchewan Ltd. constitutes and how it came about.

[16] I will start the brief discussion as to the appropriate terms of the order by setting out the recommendations of the parties. The objecting creditors recommend a conditional order requiring payment of $100,000 payable at the rate of $1,666.66 per month for five years. The trustee recommends a conditional order requiring payment of $3,000.00 for surplus income. The bankrupt proposed an absolute discharge but, as already mentioned, an absolute order of discharge is not available.

[17] I note that the bankrupt's credibility is a major factor in the bankruptcy. It is difficult to make any pronouncements concerning credibility on affidavit evidence alone. The bankrupt was present in court. Counsel for both objecting creditors declined the opportunity to examine the bankrupt under oath.

[18] Simply put, I have not been presented with cogent evidence that would persuade me that the recommendation of the trustee is not sustainable. I realize that I am not bound by the recommendation and may come to my own conclusion. In this particular case, however, the recommendation was put forward by the trustee after an examination of the bankrupt's income tax returns and other financial information. On the other hand, the evidence of the objecting creditor is conjecture as to what the income of the bankrupt should be.

[19] In conclusion there will be a conditional order of discharge requiring the bankrupt to pay $3,000.00 to the trustee for the benefit of the unsecured creditors. Once paid an absolute order of discharge will issue. There will be no order as to costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 4th day of June, A.D. 2002.

Registrar in Bankruptcy

TAB 19

CITATION: Cash Store Financial Services (Re), 2014 ONSC 4326
COURT FILE NO.: CV-14-10518-00CL
DATE: 2014-08-05

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES, THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. doing business as "THE TITLE STORE"

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks*, for the Chief Restructuring Officer of the Applicants

Heather Meredith, for the FTI Canada Consulting Canada Inc., Monitor

Robert W. Staley and *Raj S. Sahni* and *Jonathan Bell*, for 0678786 B.C. Ltd.

Alan Merskey and *Orestes Pasparakis*, for Coliseum Capital Partners LP, Coliseum Capital Partners II LP, Blackwell Partners LLC, Alta Fundamental Advisors Master LP and the Ad Hoc Committee of Cash Store Noteholders in their representative capacities as DIP Lenders, First Lien Noteholders and Holders of Senior Secured Notes

Brendan O'Neill, for the Ad Hoc Committee of Cash Store Noteholders

Andrew Hatnay, *James Harnum* and *Adrian Scotchmer*, for Tim Yeoman,

Brett Harrison, for Trimor Annuity Focus LP, No. 5

HEARD: June 11 and June 16, 2014

ENDORSEMENT

Introduction

[1] Cash Store (as defined below) is a payday lending company operating under CCAA protection.

[2] Cash Store is not a conventional lender. When operating in the "normal course", Cash Store acts as a broker charging a fee of 23% of funds advanced, paid by its customers with the fee being taken directly off the loan proceeds.

[3] On paper, Cash Store obtains funding from sources which include a number of third party lenders ("TPLs"). On paper, these TPLs provide Cash Store with funds which Cash Store, as broker, then lends to Cash Store customers. On paper, the loans are assigned to the TPLs. On paper, the TPLs "own" all payments received from the customers. These payments are comprised of principal and interest. Interest is charged at a rate of 59% per annum. On paper, Cash Store is required to keep TPL funds segregated. On paper, the operating model leads to a conclusion that the relationship between TPLs and Cash Store is not a debtor-creditor relationship, but is one where Cash Store functions as a broker.

[4] However, the manner in which Cash Store business operations were conducted differed substantially from that set out "on paper". Specifically, interest payments did not flow to the TPLs at the contract rate of 59% - or even at 59% less a bad debt expense, or after an allowance for impaired loans. Rather, Cash Store would make "voluntary payments" or "retention payments" at the rate of 17.5% (in some cases 20%) to the TPLs as "an inducement" to ensure the continued support of the TPLs.

[5] Payments received from Cash Store customers were used in the operations of Cash Store. Cash Store did not keep payments that it received from its customers in a segregated account for TPLs. The TPLs did not audit the accounts of Cash Store.

[6] Cash Store breached a number of contractual agreements. Cash Store defaulted on its obligations. The management team of Cash Store has departed and Cash Store has filed for protection under the CCAA. The parties that provided Cash Store with funds are now trying to recover those funds.

[7] At the core of this motion is a dispute over whether these TPLs loaned their funds *to Cash Store*, which in turn made its own loans to its customers; or whether the funds were loaned by the TPLs *to Cash Store's clients*, with Cash Store merely operating as a broker. If the conclusion is the former, the TPLs must stand in line as creditors of Cash Store. If the latter is true, the TPLs argue they, and not Cash Store, are the beneficial owners of certain funds in the possession of Cash Store and of certain outstanding loans.

[8] The circumstances, and the relief sought on this motion, are set out below. I begin with the relief sought by the various parties on the motion and cross motion. I then set out the relevant history of the CCAA proceedings, followed by the positions of the respective parties. Finally, I turn to an analysis of the issues.

I. <u>Relief Sought</u>

[9] 0678786 B.C. Ltd. (formerly the McCann Family Holding Corporation) ("McCann") is a TPL and brings this motion for a declaration that the following property (collectively, the "McCann Property"), including, without limitation, the McCann Loans as defined in the order of April 30, 2014 is owned by McCann free of any interests or claims of any creditor:

a. Any loans made in the name of any third party lender and brokered by the Cash Store Inc. and 1693926 Alberta Ltd. (collectively, "Cash Store") on behalf of their customers (“Customers”) using funds made available by McCann for that purpose (the “McCann Funds”);

b. Any advances originated by Cash Store and subsequently purchased with the McCann Funds;

c. Any loans or advances originated by Cash Store and subsequently assigned to McCann as capital protection or otherwise (together with (a) and (b) above, the “McCann Loans”);

d. Any amounts received by Cash Store from its customers in repayment of the McCann Loans (the “McCann Receipts”);

e. Any accounts receivable in respect of the McCann Loans (the “McCann Accounts Receivable”); and

f. The McCann Funds.

[10] Trimor Annuity Focus Limited Partnership No. 5 (“Trimor”) is also a TPL and brings a similar motion for a declaration that the following property (the “Trimor Property”) is owned by Trimor free of any interests or claims of any creditor of the Applicants:

a. Any loans made in the name of Trimor and brokered by the Cash Store on behalf of their Customers using funds made available by Trimor for that purpose (the “Trimor Funds”);

b. Any advances originated by Cash Store and subsequently purchased with the Trimor Funds;

c. Any loans and advances originated by Cash Store and subsequently assigned to Trimor as capital protection or otherwise (together with (a) and (b) above, the “Trimor Loans”);

d. Any amounts received by Cash Store from its Customers in repayment of the Trimor Loans (the “Trimor Receipts”);

e. Any accounts receivable in respect of the Trimor Loans (the “Trimor Accounts Receivable”); and

f. The Trimor Funds.

[11] The lenders under the Applicants’ amended and restated Debtor and Possession Term Sheet, dated May 16, 2014, (collectively, the “DIP Lenders”) bring a cross-motion for a declaration that:

i. the Applicants are the beneficial owners of funds described as "Trimor Funds", "McCann Funds", "Trimor Receipts" and "McCann Receipts" (collectively, the "Disputed Post-Filing Receipts") in the Fresh as Amended Notice of Motion of Trimor and the Fresh as Amended Notice of Motion of McCann (collectively, the "TPL Notices of Motion");

ii. the following transactions constitute preferences under applicable legislation:

   1. the designation by the Applicants of any advances or loans, including brokered loans, as advances or loan in the names of Trimor or McCann; and

   2. any assignment, whether as capital protection or otherwise, by the Applicants to Trimor or McCann, or in their names, of non-brokered loans made in the names of the Applicants (collectively, the "Reviewable Transactions").

iii. The Reviewable Transactions shall be reversed such that the Applicants are the beneficial owners of the assets described as "Trimor Loans", "Trimor Accounts Receivable", "McCann Loans" and "McCann Accounts Receivable" in the TPL Notices of Motion;

iv. Neither Trimor nor McCann shall take any steps to collect any advances or loans made to the Applicants' Customers, irrespective of whether such loans or advances have been designated in the name of Trimor or McCann or otherwise assigned to Trimor or McCann by the Applicants, and any recoveries or collections on such advances or loans by Trimor or McCann shall be deemed to be held in trust for the Applicants;

v. In the alternative to (ii) through (iv) above, declaring that no steps be taken by Trimor or McCann to assert an interest in, collect, or otherwise recover any of the advance or loans made to the Applicants' Customers, whether in the names of Trimor or McCann or otherwise, unless the Monitor determines not to challenge the Reviewable Transactions.

II. Background of CCAA Proceedings

[12] On April 14, 2014, an initial order (the "Initial Order") was granted pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), to the Cash Store Financial Services Inc. ("CSF"), Cash Store Inc., TCS Cash Store Inc., Instaloans Inc., 7252331 Canada Inc., 5515433 Manito Inc. and 1693926 Alberta Ltd. doing business as "The Title Store"

(collectively, the "Applicants" or "Cash Store"), providing protections to the Applicants under the CCAA, and appointing FTI Consulting Canada Inc. as monitor (the "Monitor").

[13] On April 15, 2014, an amended and restated Initial Order (the "Amended and Restated Initial Order") was granted, which, among other things, approved an interim CCAA credit facility (the "Initial DIP") by Coliseum Capital LP, Coliseum Capital Partners II LP, and Blackwell Partners LLC (collectively, "Coliseum"), and appointed Blue Tree Advisors Inc. as Chief Restructuring Officer of the Applicants (the "CRO").

[14] On April 20, 2014, an order was granted providing certain protections for third party lenders ("TPLs") (McCann and Trimor are TPLs) specifically relating to repayments of loans bearing the name of, attributable to, or assigned to, McCann and Trimor and requiring the Applicants to maintain the $3 million minimum cash balance (the "Additional TPL Protection Order").

[15] On May 13, 2014, the court granted an order (the "May 13 Order"), which extended the stay to May 16, 2014, approved a key employee retention plan and related charge, approved the cessation of the Applicants' brokered loan business (the "Broker Business") in all jurisdictions in which it was then carried out, and authorized the CRO, in consultation with the Monitor, to conduct an orderly cessation of such business.

[16] On May 17, 2014, an order was granted extending the stay and approving an amended and restated term sheet providing for a DIP Facility by the following lenders (together, the "DIP Lenders"): Coliseum, Alta Fundamental Advisors, LLC, and certain members of the Ad Hoc Committee (the "Ad Hoc Committee") of the Applicants' 11½% Senior Secured Notes (the "Notes").

[17] The TPL protections and provisions of the Additional TPL Protection Order provide as follows:

a. A charge in favour of the TPLs (the "TPL Charge") in the amount of Cash Store's cash on hand as of the effective time of the Initial Order, as security for any valid trust or other proprietary claim of a TPL to such cash on hand;

b. A declaration that the TPLs' entitlement to TPL brokered loans in existence at the effective time of the Initial Order (the "TPL Brokered Loans") is to be determined based on the legal rights as they existed immediately prior to the effective time, and that post-filing treatment of receipts is not relevant to determination of the TPLs alleged entitlement to or ownership of and will not prevent the TPLs from arguing that segregation would have been required by them, but for the Initial Order; and

c. Restrictions on the treatment of post-filing receipts and new TPL Brokered Loans and requirements to keep certain minimum cash balances.

III. Facts

a. Monitor's Reports

[18] As the Monitor noted in the pre-filing report, according to the Applicants the TPLs had provided approximately $42 million of funding (the "TPL Funds") over time in relation to various brokered loans. The original $42 million could be accounted for as follows:

a. Restricted cash (TPL Funds received by Cash Store that are not redeployed to other broker customers as referenced on Cash Store's financial statements), estimated to be approximately $14.7 million as at March 31, 2014; and

b. Amounts on loan to Customers pursuant to the Broker Agreements (defined therein) of which approximately $8.5 million were "historic bad loans" which the Monitor understood were outstanding since at least 2012, unlikely to be recovered and all brokered with Trimor.

[19] The Monitor is of the understanding that the relief sought by Trimor and McCann relates specifically to TPL Brokered Loans that existed immediately prior to the commencement of the CCAA proceedings and amounts collected by Cash Store in relation to the Brokered Loans after the commencement of the CCAA proceedings (the "TPL Post-Filing Receipts").

[20] The Monitor also noted that the question of ownership of the TPL Brokered Loans and the specific relief sought on this motion may have broader implications on the question of compliance with regulatory restrictions and on potential class action claims arising therefrom.

[21] The Monitor compiled and updated data relevant to these foregoing issues.

[22] As of April 13, 2014 (the day before the Initial Order), TPL Brokered Loans in the following value were recorded in the Applicants' books and records:

a. $5.7 million of McCann loans, which included:

i. 673 loans with a total face value of $449,000 that were written off prior to April 13, 2014 all of which had been Cash Store direct loans that had been assigned to McCann; and

ii. 7,855 line of credit loans in Ontario with a face value of $5.26 million, all of which had been written in Trimor's name and subsequently transferred to McCann

b. $16.8 million of Trimor loans, which included:

i. $4.4 million in loans that were written off prior to April 13, 2014, which included $2,155,464 of loans that had been Cash Store direct loans that had been assigned to Trimor;

ii. $12.4 million of brokered loans that had not been written off that had been written in Trimor's name;

c. $799,114 in loans in the name of other TPL Lenders of which $292,021 were written off prior to April 13, 2014.

[23] The brokered line of credit product was discontinued in Ontario as at February 12, 2014 and no TPL Brokered Loans were made in Ontario during the CCAA proceedings.

[24] New TPL Brokered Loans were made by the Applicants outside Ontario after the Initial Order (pursuant to the Amended and Restated Initial Order and additional TPL Protections Order) until May 12, 2014 when the Applicants ceased the broker business. The Monitor understands that, during this time, TPL Brokered Loans totalling $5,911,141 were made in the name of Trimor, with no new TPL Brokered Loans made in the name of McCann.

[25] As at May 31, 2014, TPL Brokered Loans in the following value were recorded in the Applicants' books and records.

a. McCann: $4,274,924 of which $242,614 have been written off;

b. Trimor: $13,288,913 of which $3,059,224 have been written off;

c. Other TPL: $649,060 of which $266,823 have been written off.

[26] Trimor post-additional TPL Protection Order loans (*i.e.* loans made after the date of the additional TPL Protection Order and before the business broker ceased in the name of Trimor for which a declaration had been made that Trimor is the owner) totalled $2,520,540.

TPL Post-Filing Receipts

[27] After the additional TPL Protection Order was issued, segregated accounts were opened to maintain the McCann Post-Filing Receipts and the Post-Filing Trimor Ontario Receipts. After the broker business ceased, the Post-Filing Trimor Non-Ontario Receipts were also deposited into the Trimor account for post-filing receipts.

[28] The Monitor reported the following amounts in the segregated accounts as of May 6, 2014:

a. McCann Post-Filing Receipts of $699,558

b. Post-Filing Trimor Ontario Receipts of $690,380.

[29] The balances in the segregated accounts as of May 27, 2014 were as follows:

a. McCann Post-Filing Receipts of $927,774

b. Post-Filing Trimor Ontario Receipts and Post-Filing Trimor Non-Ontario Receipts of $2,092,824.

[30] The balances in the segregated accounts as of June 4, 2014 were as follows:

a. McCann Post-Filing Receipts of $1,236,053

b. Post-Filing Trimor Ontario Receipts and Post-Filing Trimor Non-Ontario Receipts of $2,686,089

c. Other TPL Lender Receipts of $175,788.

The Monitor's Position on the Reviewable Transactions

[31] The cross motion by the DIP Lenders seeks a declaration that any designation of TPL Brokered Loans in the name of Trimor or McCann and any assignment of non-brokered loans to Trimor or McCann are preferences pursuant to the CCAA and/or provincial legislation.

[32] The Monitor has advised the DIP Lenders that it is of the view that it is the Monitor who has standing to proceed with such a challenge using the provisions of the CCAA (absent an order equivalent to a *Bankruptcy and Insolvency Act* s. 38 Order authorizing the DIP Lenders to do so) and that, at this time, the Monitor is not bringing a preference or transfer at under value application. The Monitor advised that it continues to investigate relevant facts and is evaluating the merits of such an application, together with its assessment of other transactions made prior to the Initial Order.

[33] The Monitor does not take a position on the DIP Lenders' motion pursuant to provincial reviewable transaction legislation.

[34] McCann has requested that its legal and other professional fees incurred in or in connection with the CCAA proceeding be paid by the Applicants and be included in the Administration Charge. The Monitor notes that Trimor (which has not made a similar request for relief) does not have its legal or professional fees listed in the Administration Charge although Trimor's legal counsel (McMillan LLP) is listed in the Amended and Restated Initial Order among counsel whose reasonable fees and disbursements the Applicants "shall also be entitled to pay". The Monitor is of the understanding that this was included on the understanding that the Applicants would not fund any Trimor fees for challenges made by Trimor against the Applicants.

[35] The Monitor notes that it is mindful of the limited resources available in the CCAA proceedings and that any party requesting coverage of fees pursuant to the Administration Charge must establish that such coverage would be necessary for their effective participation in proceedings under s. 11.52 of the CCAA.

b. Submissions of TPLs

[36] McCann and Trimor take the position that they entrusted millions of dollars to the Applicants for the sole purpose of brokering loans between the TPLs and Borrowers and at all times, the TPLs retained ownership of their funds and of all the loans ultimately brokered with those funds or otherwise purchased by or assigned to the TPLs. They also take the position that they own any accounts receivable in respect of their loans in any amounts actually received by the Applicants from their customers in repayment of the loan. The TPLs take the position that this arrangement was memorialized in written broker agreements.

[37] The fundamental problem with this position, as I discuss in the next section, is that the written agreements did not accord with reality.

[38] McCann requests a declaration that, among other things, McCann is the sole legal and beneficial owner of these funds, loans and receivables, as reflected in its broker agreement. Trimor takes the same position with respect to the funds it made available to the Applicants under its broker agreement.

[39] The TPLs take issue with the position being taken by the DIP Lenders to declare that the TPLs' property belongs to the Applicants. The TPLs submit that the DIP Lenders do not articulate any plausible legal theory in support of their request but rather, they simply insist that the TPLs are mere unsecured creditors.

[40] Further, the TPLs take issue with the DIP Lenders' preference arguments which they say are intended to attack ordinary course transactions between the Applicants and the TPLs. McCann submits that this issue is not properly before the Court as the right to impugn a transaction as a preference or transfer at undervalue belongs to the Monitor, and the Monitor has not challenged any of the transactions in question. The TPLs also take the position that the period for reviewing transactions as possible preferences has lapsed and, in any event, the evidence makes clear that the impugned transactions do not constitute preferences or transfers at undervalue. Rather, the TPLs take the position that TPL property is, and always has been, understood and intended to be, the property of the TPLs. They take the position that the transaction were not intended to prefer, defraud or otherwise hinder the Applicants' other creditors and the TPLs did not knowingly participate in any fraudulent scheme or preference.

The Broker Agreements

[41] The position of the TPLs is founded on various broker agreements.

[42] On June 18, 2012, McCann and Cash Store executed a broker agreement ("Broker Agreement"). McCann takes the position that, as financier, it made $13,350,000 in funds available (the "McCann Funds") to Cash Store, as broker, for the sole purpose of Cash Store brokering loans (the "McCann Loans") between McCann and Cash Store's customers (the "Customers").

[43] Before the McCann Funds could be loaned out, the Broker Agreement provided that Cash Store was required to ensure that extensive loan criteria were met or to obtain specific approval from McCann. Further, the McCann Funds were to be used for no other purpose. This requirement is set out in Article 2.10 of the Broker Agreement:

> 2.10 Usage of Loan Advances
>
> For greater certainty, funds, from time to time, advanced to broker from financier are solely intended to be utilized for the purposes of making advances to broker customers on financiers' behalf as contemplated hereunder. The broker agrees that any funds not otherwise being held by the broker as a "float" in anticipation of loan approvals shall not, without the consent of financier, be advanced or utilized for any other purpose.

Representations Allegedly Made to McCann

[44] McCann contends that in discussions leading up to the Broker Agreement's execution, and while Cash Store was administering the McCann Funds on McCann's behalf, it was expressed to be important to McCann that its funds be kept separate and apart from Cash Store Financial's general operating funds in accordance with the Broker Agreement. McCann takes the position that Cash Store Financial assured it that the McCann Funds were – and could continue to be – segregated at all times. McCann alleges that Cash Store represented to McCann, and it was a term of the Broker Agreement, that all of the McCann Funds would be placed in a "designated broker bank account", which would be separate and apart from Cash Store Financial's general operating account.

[45] McCann also takes the position that it understood McCann owned both the McCann Funds and the McCann Loans and that its accounts would be administered on a segregated basis from Cash Store's funds and be pooled safely with other "broker only" monies.

[46] In his affidavit, Mr. Murray McCann, former president of McCann, states that a number of account statements were received from Cash Store and that the "funding excess/deficiency" on the statements provided a summary of the McCann Loans. Mr. McCann goes on to state that when the McCann Funds exceeded the amount deployed as loans to customers, Cash Store described the undeployed monies as the "funding excess/deficiency". McCann states that at all times he understood this amount to be held separate and apart from Cash Store's other accounts in accordance with the Broker Agreement and McCann's instructions. Further, he states that Cash Store's public disclosure always showed the McCann Funds as McCann's property, not the property of Cash Store or Cash Store Financial.

[47] As recently as mid-March 2014, Mr. McCann states that Mr. Carlstrom, Vice President, Financial Reporting for Cash Store Financial, provided assurances to McCann that undeployed portions of the McCann Funds were secure and remained available to McCann and that Cash Store was administering McCann's property in accordance with the Broker Agreement.

Additional Submissions of McCann

[48] McCann takes the position that under the Broker Agreement, McCann owned loans made in the name of TPLs which were brokered by Cash Store on behalf of the customers using funds made available by McCann. In addition, McCann takes the position that it also owned advances originated by Cash Store which were subsequently purchased with the McCann Funds, and certain loans and advances originated by Cash Store which were subsequently assigned to McCann as capital protection or otherwise. McCann takes the position that it was entitled to receive a stated rate of 59% interest under these loans from the customers.

[49] McCann acknowledges that the McCann Loans were, by their nature, risky and accordingly, Cash Store historically made inducement payments to TPLs – referred to by Cash Store as "retention payments" – to induce TPLs to continue to make their funds available to Cash Store, which, in turn, enabled Cash Store to earn Broker Fees. In other words, these payments were intended to ensure that the TPLs were receiving a return commensurate with the considerable risk they were assuming. These "inducement payments" or "retention payments" were made by Cash Store on a monthly basis.

[50] Until March 2014, McCann states that it received monthly statements indicating the cash that McCann had made available to Cash Store and the amount that was deployed in loans to customers.

[51] In the Carlstrom affidavit, Mr. Carlstrom acknowledged that the so-called "restricted cash" in Cash Store's bank accounts totalled $12,961,000 as at February 28, 2014. However, by close of business on April 11, 2014, this amount had dwindled to approximately $2.9 million.

[52] McCann takes issue with Cash Store's disclosure of events when they moved for the Initial Order. Specifically, McCann contends that Mr. Carlstrom did not disclose in his affidavit that, in breach of the Broker Agreement and without the knowledge or consent of McCann, and contrary to the multiple representations made to McCann, Cash Store had misappropriated the TPLs monies and spent them on the Applicants' operating and professional costs leading up to the CCAA filing.

[53] McCann takes the position that the Special Committee must have made the decision to use the McCann Funds knowing that Cash Store and Cash Store Financial were acting in breach of the Broker Agreement and that they had misrepresented that McCann's monies had been properly segregated.

[54] McCann states that it is undisputed that Cash Store received approximately $42 million of TPL monies to broker but, in the Monitor's pre-filing report, the Monitor reported that only $18.66 million of brokered loans were outstanding and that Cash Store had only $2.94 million cash on hand. Combined, these two figures equal $21.6 million, which results in the remaining $20.4 million being misappropriated.

Increased Risk Created by the May 13 Order

[55] Subsequent to the granting of the Initial Order, McCann complains that the order of May 13, 2014 (the "May 13th Order") put the TPLs at further risk. The May 13th Order approved the cessation of the Applicants brokered loan business in all jurisdictions in which they operated that business. Also, the Chief Restructuring Officer (the "CRO"), in consultation with the Monitor, was authorized to take steps to conduct an orderly cessation of that business.

[56] The TPLs contend that not only did they not agree to allow their monies and receivables to be held and used by an insolvent Cash Store, the May 13th Order puts the TPLs in even greater jeopardy as it purports to create charges against the TPLs' property and treat it as if it is the Applicants' property.

[57] Paragraph 13 of the May 13th Order provides that the TPL charge is capped at $2.94 million and ranks third (*pari passu* the DIP Lenders) after the Administration Charge and the Director's Charge (up to a maximum of $1,250,000). They contend that this increases the risk that the costs of these proceedings would be paid out of the TPLs' remaining monies, after many millions of dollars of TPL Funds were already misappropriated by Cash Store for payment of costs not authorized by the TPLs leading up to the CCAA filing.

Trimor's Submissions

[58] Counsel to Trimor supported the submissions of counsel to McCann, as applicable to Trimor.

[59] Trimor transferred funds totalling $27,002,000 to Cash Store under the Broker Agreements for the sole purpose of brokering loans to customers (the "Trimor Funds").

[60] Trimor is a party to the following broker agreements with Cash Store (the "Broker Agreements"):

a. Broker Agreement between Trimor and Cash Store dated February 1, 2012 and made as of June 5, 2012;

b. Broker Agreement between Trimor and 1693926 Alberta Ltd. dated September 24, 2012 and made as of June 5, 2012.

[61] The Broker Agreements are similar (if not identical) to the broker agreements that Cash Store entered into with other TPLs, including McCann.

[62] Trimor takes the position that when Trimor funds were deployed as loans to customers, the creditor or lender is Trimor and Cash Store takes a brokerage fee. The supporting agreements and disclosure statements signed by customers named Trimor as the credit grantor and the customer as the borrower for the Trimor Loans.

[63] Trimor contends that the TPLs, including Trimor, only made the TPL Funds available as a result of representations that the Funds were segregated, held in trust, and used only for a specific purpose.

[64] Trimor contends that if the interest received by the TPLs was less than 17% of the TPL Funds, Cash Store would make a payment to bring cash received up to 17.5% (a "Retention Payment") and that Cash Store made the Retention Payments as an inducement to ensure that TPLs were receiving a return that was commensurate with the risk of lending.

[65] In January 2012, Cash Store offered $132.5 million in Senior Secured Notes due in 2017 through a private placement (the "Secured Note Offering"). Cash Store's offering circular dated January 12, 2012 (the "Circular") for the Secured Note Offering advised potential investors that Cash Store "currently acts primarily as a broker of short-term advances between our customers and third party lenders, the effect of which is that the loan portfolio we service is not financed on our balance sheets".

[66] These statements were repeated in financial statements. Trimor further contends that in its Circular, Cash Store advised potential purchasers of its bond that "we have made the decision to voluntarily make retention payments to the third party lenders as consideration for continuing to advance funds to our customers" and that "the decision has been made to voluntarily make retention payments to the Lenders to lessen the impact of loan losses experienced by the third party lenders".

[67] Trimor further contends that the DIP Lenders/Bond Holders were well aware of this practice and took no issue with it. However, this statement, which was made at paragraph 27 of the Factum, is not referenced to the evidence in the record.

[68] Similar to McCann, the Broker Agreements for Trimor provide that all funds advanced by Trimor were to be held in a designated broker bank account, which is a Cash Store bank account that is "designated by [Cash Store] for the purposes of temporarily receiving funds from [Trimor] … before they are advanced to a [customer]". Trimor further contends that until January 2014 a separate bank account was used for the deposit of TPL Funds, including the Trimor receipts and the payment of Retention Funds.

[69] Trimor also contends that it received assurances from Cash Store that it would treat the Trimor Funds as being held in trust for Trimor's benefit.

[70] Trimor takes the position that since the CRO has determined, in consultation with the Monitor, that it is necessary and appropriate to implement a cessation of the brokered loan business and cease brokering new loans in all jurisdictions in which Cash Store operates, that Cash Store's intention to cease all brokered loan operations effectively terminates the Broker Agreements. In turn, Trimor now has the option to allow the Applicants to continue to administer the Trimor Loans, transfer their administration to a new service provider, or sell the Trimor Loans to a third party.

[71] Trimor contends that they will be seriously prejudiced if the Trimor Loans are not transferred to their control.

[72] On this motion, Trimor asks the Court to confirm Trimor's ownership of the Trimor Loans and receipts and to allow Trimor or its agent to assume administration of the Trimor Loans to maximize realizations in accordance with Trimor's contractual rights.

c. **Submissions of the DIP Lenders**

[73] Not surprisingly, the DIP Lenders, supported by the Ad Hoc Committee of Cash Store Noteholders (the "Committee") disagree with the position being taken by both McCann and Trimor. The TPLs base their claim upon the framework of the Broker Agreements. The DIP Lenders take the position that the TPLs' actual practices with Cash Store established that the TPSs varied the Broker Agreements, and in fact, entered into a debtor/creditor, or lending relationship with Cash Store. The focus of the inquiry is, in my view, whether the actual practices followed by the parties had the effect of varying the Broker Agreements.

[74] The DIP Lenders point out that the TPLs received a fixed rate of return on funds provided to Cash Store and did not directly bear the collection risk of any individual customer loan made by Cash Store.

[75] In addition, the DIP Lenders take the position that the funds advanced by the TPLs were comingled with Cash Store's general operating cash from which customer loans were made and there was no way to determine which funds belonged to the TPLs or which loans were made with funds advanced by the TPLs. The DIP Lenders take the position that it is uncontradicted that the funds were comingled and used from general operating accounts.

[76] Simply put, the position of the DIP Lenders is that of the TPLs became creditors and consented to Cash Store having use of all funds received back from customers and they became, in fact, lenders to Cash Store. As a result, Cash Store continues to be entitled to all funds received back from customers. The DIP Lenders contend that the TPLs sought and received the benefit of gratuitous retention payments and capital protections paid by Cash Store and, in so doing, they avoided the risk of their putative broker relationship. They also became creditors. Consequently, the TPLs are not entitled to disavow that creditor relationship and return to the status of broker.

[77] The DIP Lenders recognize that an understanding of the true nature of the relationship between Cash Store and the TPLs starts with the Broker Agreements. However, from their standpoint, it is necessary to review actual practice.

[78] The DIP Lenders concede that had the TPLs chosen to strictly follow their Broker Agreements, they could have had the benefit of specific fund recognition.

[79] The Broker Agreements contain a section entitled "Loan Funding by Financier" that details the means by which the financier (the TPL) can provide the money used by Cash Store to make loans to customers. Those means include payments made:

a. By wire transfer of funds to the designated broker bank account (for redirection/payment to, or for the benefit of, the broker customer); and

b. By cheque drawn by financier payable to broker (Cash Store) for deposit to the designated broker bank account (for redirection/payment to, or for the benefit of the, the broker customer).

[80] Further, the Broker Agreements go on to define "designated broker bank account" as:

> … the bank account of broker designated by broker for the purposes of temporarily receiving funds from financier (if loans are made by financier way [sic] of cash advances) before they are advanced to a broker customer (…).

[81] With respect to receipts, the Broker Agreements entitle the TPL to designate a bank account for receipt of funds directly from Cash Store customers:

> "Designated financier bank account" means, the bank branch and account designated by financier from time to time where (and into which) deposits of cash and cheques received from broker customers, in respect of such financier funded loans, are to be cleared (deposited) from time to time …"

[82] The Broker Agreements also grant the TPLs the opportunity to audit the records of Cash Store. The DIP Lenders take the position that the TPLs did not exercise those rights. Instead, they chose to accept variations to these agreements by which they benefited.

[83] As detailed in their factum at paragraph 16, the DIP Lenders describe the basis on which the third party lending business of Cash Store actually functioned:

a. The TPLs provided Cash Store with initial tranches of funds;

b. The funds were lent to Cash Store customers, in the name of the TPL (in Trimor's case, but not McCann's);

c. Cash Store customers, if not in default, repaid the borrowed funds to Cash Store, together with interest of 59%;

d. Cash Store deposited the returned funds and interest to a general account;

e. Cash Store made voluntary payments to the TPLs from Cash Store general revenue, in order to ensure that the TPLs received a fixed 17.5% return;

f. Cash Store provided voluntary "capital protection" to the TPLs, insulating them for customer credit risk;

g. Cash Store made new loans to customers, from the general account, in the name of the TPL; and

h. Cash Store recorded a receivable for the TPL, with respect to the re-lent funds.

[84] The DIP Lenders point out that Trimor and McCann were treated differently under the loan documentation. Specifically, when a customer took out a loan that was to be designated as being made on behalf of Trimor, the loan documentation explicitly stated that Trimor was the lender. When a customer took out a loan that was designated as being made on behalf of McCann, the documentation made no such specification. Rather, the loans listed another party as lender, and were then transferred into McCann's name.

[85] The DIP Lenders also point out that each of the processes described above were accepted by the TPLs, with the disputed exception of the general account comingling.

[86] The DIP Lenders recognize that on their surface the Broker Agreements contemplate a pass-through principal-broker arrangement. However, the practices adopted by the parties with regard to payments made by Cash Store to the TPLs reflected a different reality. The DIP Lenders reference Mr. McCann's email correspondence to Cash Store in which, from their standpoint, it was recognized that the TPLs, in substance, loaned funds to Cash Store and the TPLs were creditors of Cash Store. In an email dated March 14, 2014, Mr. J. Murray McCann stated to Mr. Gordon Reykdal as follows:

> Good morning Gord,
>
> I look forward to our call today and our visit in about a week.
>
> You mentioned that you were meeting with Steve and Craig this morning to discuss our loan to back stop Ontario payday loan customers and the requirements for funds in regulated provinces. We have attempted to redeploy the funds in Ontario since they are no longer being used to backstop payday loans there but so far with no success. Those funds are no longer secured by the payday creditors and the funds from those accounts collected were to be credited to us. It appears that those funds were credited to the account of Cash Store in contravention of our mutual understanding and agreement.
>
> Because the funds we have loaned are from a foundation it is even more important that we not place those funds at risk. As you know we went to considerable effort and legal cost to get the opinion and comfort that we required to assure that funds loaned to Cash Store were an ok investment because they were secured by loans and the promise of Cash Store for proper accounting of those loans. Now that the loans that supported our loans were collected we must ask for repayment. Should Cash Store require further loans as backup to payday loans in regulated provinces and secure those loans with payday loans, as in the past, we will be happy to make

funds available. We are happy with the return received from Cash Store and look forward to continuing our relationship for a very long time.

Please be assured that the interest Cash Store is paying us is going to very worthwhile causes that rely on our funding. We can never let them down. That is the main reason that we make sure that any agreements we enter into on their behalf is never at risk. On the other hand we will always live up to our side of the agreement.

I look forward to our call later today.

Cheers,
Murray

[87] On April 12, 2014, Mr. J. Murray McCann sent another email to Mr. Reykdal as follows:

Good afternoon Gord,

I have attempted to contact you on numerous occasions and have left messages on your cell, office phone with Sandy. Attempting to keep a creditor and friend in the dark by ceasing all communication is neither the way to treat a friend nor a creditor. As mentioned to you, on more than one occasion, the funds Rent Cash is improperly holding are used to support a large school, orphanage and girls residence in Zambia. Without those funds teachers, caregivers, food suppliers etc. cannot be paid and our school of 400 students will have to close. I told you this before and you assured me that Rent Cash was looking after our money diligently and there was no need to worry.

Please Gord do what you know is right and release our funds so that they can continue to be used for the good purposes they have been used for. You know that the money is not Rent Cash's and have stated that on many occasions and even as late as 2 weeks ago when we visited at your club and your home in Scottsdale. You, as president, promised and assured that all was well and our funds were being held by Rent Cash for our benefit.

Please contact me.

Sincerely,
Murray

[88] The DIP Lenders contend that, in reality, the TPLs were effectively guaranteed a rate of return of 17.5% of the advances (though it appears that Trimor earned interest at a rate of 20% prior to May 2011). Further, notwithstanding the actual fluctuations of payments of interest and principle seen by Cash Store's customers, the monthly reconciliations and interest schedule forwarded by Cash Store to each TPL calculate a simple return of 17.5% on the total principal advanced by each TPL.

[89] In order to make this guarantee possible, the DIP Lenders contend that Cash Store made "retention payments" each month. The retention payments effectively made up any shortfall between actual amounts recovered from customers and the 17.5% interest owed to the TPLs. They reference comments of Ms. Erin Armstrong, former Chief Operating Officer of Trimor who stated that these retention payments were in fact a "top up" to make sure Trimor received its expected interest payment each month.

[90] Up to April 2014, Cash Store's retention payments or "top up" ensured that McCann received total interest payments of $3,353,696.92 and Trimor received total interest payments of $7,839,676.14.

[91] The DIP Lenders also argued that in addition to compensating the TPLs with routine retention payments, Cash Store indemnified the TPLs for customer loan losses through use of a capital protection scheme to help the TPLs maintain the broad principal behind their loan portfolios. They contend that that scheme had two components:

a. An expensing mechanism, whereby Cash Store would credit the TPLs with a book entry in the amount of any losses suffered by the TPLs on brokered loans that remain unpaid after 90 days. This protected the TPLs' advances of principal from being eroded by bad loans; and

b. A purchasing mechanism (in Ontario and Manitoba), whereby Cash Store purchased past-due brokered loan fees at face value from the TPLs.

[92] As referenced in the PwC Report, in the summary of Trimor's holdings, the lines of credit assigned to Trimor were broken up by length outstanding, and with zero percent of Trimor's loans having been held for longer than 90 days. As such, the DIP Lenders contend that Cash Store had acquired all of Trimor's bad debt, insulating it completely from the credit risk of the PayDay lending products. The DIP Lenders contend that instead, the TPLs took on the risk of Cash Store's insolvency, and the concomitant effect on these gratuitous mechanisms.

[93] According to the DIP Lenders the simple fact is that in each and every month of the TPLs' relationship with Cash Store, each TPL earned its constant rate of return and experienced little or no erosion of its "restricted cash". In so doing, they converted their Broker Agreements into lending agreements.

[94] Further, the DIP Lenders point out that it was always Cash Store's practice to hold funds related to third party lending activities in its own corporate accounts, comingled with all of its other cash. The DIP Lenders note that this practice was, in Cash Store's view, well known to the TPLs and fully disclosed to the Court on the CCAA filing. The DIP Lenders point out that the TPLs first claimed to believe that the funds were held in accounts designated to be used solely to receive each individual TPL's advances as set out in the Broker Agreements – notwithstanding that the TPLs were aware of and benefited from other "extra contractual" arrangements. The DIP Lenders point out that that evidence varied somewhat under cross-examination and in light of contemporaneous documentary evidence.

[95] For example, in her affidavit, Ms. Fawcett stated that a segregated bank account was represented to be in use:

> As indicated in my prior Affidavit, it was represented to me and Mr. McCann at the time the Broker Agreement was entered into, and it is a term of the Broker Agreement, that all Restricted Cash would be placed in a Designated Broker Bank Account, which would be separate and apart from Cash Store Financial's general operating account.

[96] However, as pointed out by the DIP Lenders, Ms. Fawcett was aware that McCann Funds had been comingled with other funds. They referenced an email sent by Ms. Fawcett to Mr. Michael Zvonkovic, former CFO of Cash Store on July 19, 2012 where Ms. Fawcett asked whether McCann's Funds were actually maintained in an individual segregated account:

> On the Broker Agreement funds, so you keep a separate "designated broker bank account" for each financier such that all of the loans made using our funds are paid from and returned to that account, as well as all related interest and fees?

[97] In response, Mr. Zvonkovic stated:

> In the new agreement, we've tried to combine all these accounts and not to have a designated broker bank account. Your funds specifically would be tracked separately via our accounting system.

[98] The DIP Lenders point out that Ms. Fawcett, on cross-examination, stated that it was always her understanding that the designated broker bank account was to be used to hold the funds provided by or received by all TPLs, and not merely those related to McCann.

[99] The DIP Lenders point out that Trimor, for its part, asserted that it was assured its funds would be held in trust:

> … [Cash Store] consistently assured Trimor that Trimor's funds were not used for any purpose other than advancing loans in accordance with the Broker Agreement. In addition [Cash Store] assured Trimor that it would treat the Trimor funds as being held in trust for Trimor's benefit.

[100] On cross-examination, Ms. Armstrong stated that:

a. This statement was made regarding an earlier form of broker agreement which did contain trust language; and

b. The current Broker Agreement contained no such trust language whatsoever.

Restricted Cash and Assigned Loans

[101] The DIP Lenders also contend that a review of the monthly reconciliation process undertaken by Cash Store for the benefit of the TPLs suggested that the funds advanced by the TPLs were not segregated from Cash Store's general funds.

[102] The affidavit of Mr. Carlstrom points out that if the overall cash balance in Cash Store accounts fell below the recorded balance of theoretical restricted cash, Cash Store would assign its non-brokered loans to the TPLs to offset this deficiency. When made, these offsets were set out in each of the monthly reconciliations provided by Cash Store, and were distinguished from purchases of loan portfolios or other loans designated to the TPLs.

[103] Accordingly, from the standpoint of the DIP Lenders, the TPLs understood or ought to have understood that Cash Store would sometimes assign receivables for the benefit of the TPL rather than use TPL advances to actually make or purchase customer loans.

IV. Analysis

The Preference Issue and Cash Store's Insolvency

Cash Store's Insolvency

[104] The DIP Lenders contend that based upon book values, the value of Cash Store's liabilities exceeded the value of Cash Store's assets as at September 30, 2013 and the insolvency became increasingly severe and by December 31, 2013, Cash Store's liabilities exceeded assets on a book value basis by over $8 million.

[105] The DIP Lenders raise the issue of whether the designation or assignment of loans in the name of the TPLs was a preference.

[106] In my view, these issues are not properly before the court at this time. The issue properly before the court is the question of ownership of the funds advanced by the TPLs.

[107] In arriving at this conclusion, I am in agreement with the submissions put forth by counsel to McCann.

[108] Under ss. 95 and 96 of the *Bankruptcy and Insolvency Act* ("BIA"), a trustee in bankruptcy has the right to challenge a payment or transaction as a preference or transfer under value. Section 36.1 of the CCAA extends this right to a CCAA monitor. It does not extend it to individual creditors of the CCAA debtor.

[109] At this point, the Monitor is currently reviewing transactions involving the TPLs. The Monitor has not reported its findings in this regard. The right of the Monitor to challenge these transactions has not been the subject of any assignment to a specific creditor of the type contemplated by s. 38 of the BIA.

[110] In the absence of some form of assignment of the Monitor's rights, which has yet to take place, I have reached the conclusion that the DIP Lenders are not in a position to challenge transactions as preferences or transfers at under value pursuant to the provisions of the CCAA.

[111] With respect to the potential challenge under the *Fraudulent Conveyances Act*, or *Assignments and Preferences Act*, there is a degree overlap with respect to the statutory test and the remedies provided by these statutes and the use of the preference and transfer at undervalue provisions of the BIA and the CCAA.

[112] With respect to challenges under the *Assignments and Preferences Act*, an inquiry has to be undertaken as to whether or not the debtor was insolvent at the time of the transaction. The specific date of insolvency of Cash Store has not, in my view, been fully explored in the record. Rather, the record has focussed on the nature of the relationship between the TPLs and Cash Store which will be the subject of further discussion below. It seems to me that if the DIP Lenders wish to pursue the issue of whether certain transactions were preferential in nature, a formal trial of the issue will have to be directed on this point.

[113] Similarly, in considering whether a designation or assignment of loans in the names of the TPLs were fraudulent conveyances, the focus of the inquiry has to be on the intention of the parties. I am not satisfied that the record before me would enable such an inquiry to be undertaken. Again, it would seem more appropriate to address this issue through the direction of a formal trial of the issue.

[114] In summary, the Monitor can report further with respect to its inquiries on this issue and the DIP Lenders shall have the opportunity to revisit the issues arising out of the *Assignments and Preferences Act* and the *Fraudulent Conveyances Act* at a future date.

[115] The cross-motion of the DIP Lenders is accordingly dismissed, without prejudice for the DIP Lenders to renew their motion taking into account the foregoing comments.

Status of and Funds Advanced by McCann/Trimor

[116] Both McCann and Trimor made significant amounts of money available to the Applicants. The Broker Agreements expressly provides that McCann and Trimor own the funds, loans and receivables. McCann and Trimor requested declarations in respect of the funds each made available to the Applicants, that McCann and Trimor are the legal and beneficial owners of these funds, loans and receivables, as reflected in the Broker Agreements.

[117] The DIP Lenders take the position that the TPLs do not have a proprietary right to the funds, but rather, the TPLs are creditors of Cash Store.

[118] In order to determine the issue, it is necessary to examine the relationship as originally set out in the Broker Agreements and to trace the relationship between the Applicants and the TPLs subsequent to the execution of the Broker Agreements.

[119] The Broker Agreements expressly recognize that ownership of TPL property was intended to remain with the TPLs.

[120] The TPLs advanced funds to Cash Store for the purpose of enabling Cash Store to broker loans to its customers. At the outset, the TPLs understood that their funds were segregated from Cash Store's operating funds. This was provided for in the Broker Agreements and was confirmed in certain representations made by Cash Store and Cash Store Financial that TPL Funds would be maintained in a designated TPL account.

[121] The TPLs take the position that even if the Funds had been co-mingled with Cash Store's operating funds in breach of the Broker Agreement and without their knowledge, the TPL Funds have always been accounted for separately. Further, they take the position that Cash Store's creditors could always discern the amount of the TPL Funds that were deployed as loans to customers or held as a float for future loans.

[122] However, in practice, the Funds were not segregated from Cash Store's operating funds. The funds were co-mingled with Cash Store's operating funds. The TPLs may disagree based on the documents and what they were led to believe, but the TPLs' internal knowledge and belief does not determine the issue. Rather, the determining fact is that the Funds were co-mingled with Cash Store funds in the operating account. As such, regardless of what the TPLs believed, there was one account and it is not possible to identify the source of the funds.

[123] It is also necessary to look at the basis upon which the relationship between the TPLs and Cash Store developed. Pursuant to the Broker Agreements, the TPLs would provide funding to Cash Store and Cash Store would broker loans to its customers. The customers would pay a rate of interest of 59%. The interest payments were to flow through to the TPLs. However, in reality, this did not happen. By their nature, the type and quality of the loans made to Cash Store customers would be characterized as high-risk loans. There was a significant default rate. The practice developed that Cash Store would effectively provide a rate of return equivalent to 17.5% per annum to the TPLs and Cash Store made "voluntary payments" to the TPLs in this amount.

[124] It is also clear that the TPLs were aware that they were receiving this 17.5% payment. Indeed, such a payment was expected. The TPLs received monthly payments at a 17.5% rate of return and regardless of the status of the brokered loans obtained by Cash Store, the TPLs received their 17.5% and were insulated from any credit risk as a result of the capital protections used by Cash Store.

[125] During the period of time that Cash Store was making these payments of 17.5% to the TPLs, there is no evidence of any complaint being made by the TPLs to Cash Store. Rather, these payments were accepted by the TPLs and for all intents and purposes, gave the appearance of an "ordinary course" payment. There is no evidence that the TPLs ever took steps to challenge why interest at 59% was not being received. To state the obvious, this interest rate differential of 41.5% (less an amount to be written off as bad loans) is significant. It raises a question for which there is no recorded explanation, namely why were the TPLs apparently content to receive a return of 17.5%, when customers of Cash Store, borrowing funds supposedly

belonging to the TPLs, were paying 59% interest, in addition to Cash Store's brokerage fee. The inescapable conclusion is that the relationship as between the TPLs and Cash Store was such that the 59% interest payments were never expected to flow through to the TPLs. It also raises another question, namely whether the operations of Cash Store complied with payday loan regulations generally. I note, however, that this question is not before me on this motion.

[126] From the standpoint of the DIP Lenders, this ongoing payment equivalent to 17.5% of outstanding amounts is significant and leads me to a finding that the relationship between the TPLs and Cash Store was debtor-creditor relationship and that the payments which are equivalent to 17.5% of outstanding funding reflect a payment of interest. A payment of interest is clearly inconsistent with the position being put forth by the TPLs, namely that there was no debtor-creditor relationship.

[127] In this case, I have reached the conclusions that the parties did alter the relationship from what was set out in the Broker Agreements. I am satisfied that the evidence establishes that, in practice, the TPL business of Cash Store involved:

a. making of loans by Cash Store to retail customers that were either designated as being made on behalf of a TPL or assigned to a TPL (see references at footnote 59 of DIP Lenders Factum);

b. receipt of repaid retail loans and interest back into Cash Store's general accounts (see references at footnote 60); and

c. Cash Store paying the TPLs a guaranteed interest rate of 17.5% (see references at footnote 61).

[128] The presence of an "entire agreement" clause in the Broker Agreement does not assist the TPLs. The "entire agreement" clause has application with respect to various arrangements and agreements entered into by parties up to the time of entering into an agreement with such a clause. However, it does not follow that the parties cannot modify their arrangements subsequent to the execution of the Broker Agreement.

[129] As noted in the submissions of counsel to the DIP Lenders, notwithstanding the presence of a "non-waiver" clause in the contract, parties can still waive their contractual rights by election. Specific reference was made to *Barkley's Bank PLC* v. *Devonshire Trust (Trustee of)*, 2011 ONSC 5008, where Newbould J. explained the presence of an non-waiver clause is "not the end of the matter", going on to quote Swinton J.'s reasons in *Fitkid (York) Inc.* v. *1277633 Ontario Limited* (2002), O.J. No. 3959 (SCJ) as follows:

> Even where there is a term in the lease governing waiver, the cases on waiver indicate that courts look at the conduct of the landlord to determine whether it has elected not to terminate the lease in the circumstances after the right of forfeiture arises.

V. Disposition

[130] I conclude that the relationship as between the TPLs and Cash Store is one of debtor and creditor.

[131] The consequences of this finding is that the motion of the TPLs is dismissed. The TPLs are creditors of Cash Store.

[132] An order shall issue that the Applicants are the beneficial owners of funds described as the Disputed Post-Filing Receipts in the TPL Notices of Motion and neither Trimor nor McCann shall take any steps to collect any advances or loans made to the Applicants' customers, irrespective of whether such loans or advances have been designated in the name of Trimor or McCann or otherwise assigned to Trimor or McCann by the Applicants, and any recoveries or collections on such advances or loans by Trimor or McCann shall be deemed to be held in trust for the Applicants.

[133] With respect to McCann's request that its professional fees in connection with the CCAA proceeding be paid by the Applicants and be included in the Administration Charge, the treatment accorded to Trimor outlined in [34] should also be provided to McCann.

MORAWETZ R.S.J.

Date: August 5, 2014

TAB 20

Business Corporations Act, RSA 2000, c B-9

Current version: in force since Jun 13, 2016

Link to the latest version: http://canlii.ca/t/81qq
Stable link to this version: http://canlii.ca/t/52rht
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BUSINESS CORPORATIONS ACT

Chapter B–9

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Part 1
Interpretation and Application

Definitions

1 In this Act,

(a) "affairs" means the relationships among a corporation, its affiliates and the shareholders, directors and officers of those bodies corporate, but does not include the business carried on by those bodies corporate;

(b) "affiliate" means an affiliated body corporate within the meaning of section 2(1);

(c) "Alberta company" means a body corporate incorporated and registered under the *Companies Act* or any of its predecessors;

(d) "articles" means the original or restated articles of incorporation, articles of amendment, articles of amalgamation, articles of continuance, articles of reorganization, articles of arrangement, articles of dissolution and articles of revival and includes an amendment to any of them;

(e) "associate", when used to indicate a relationship with any person, means

(i) a body corporate of which that person beneficially owns or controls, directly or indirectly, shares or securities currently convertible into shares carrying more than 10% of the voting rights under all circumstances or under any circumstances that have occurred and are continuing, or a currently exercisable option or right to purchase those shares or those convertible securities,

(ii) a partner of that person acting on behalf of the partnership of which they are partners,

(iii) a trust or estate in which that person has a substantial interest or in respect of which that person serves as a trustee or in a similar capacity,

(iv) a spouse or adult interdependent partner of that person, or

(b) an order giving directions for the conduct of the action;

(c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary;

(d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

1981 cB‑15 s233

Relief by Court on the ground of oppression or unfairness

242(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver‑manager;

(c) an order to regulate a corporation's affairs by amending the articles or bylaws;

(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;

(e) an order directing an issue or exchange of securities;

(f) an order appointing directors in place of or in addition to all or any of the directors then in office;

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 244;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting permission to the applicant to

(i) bring an action in the name and on behalf of the corporation or any of its subsidiaries, or

(ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

(4) This section does not confer on the Court power to revoke a certificate of amalgamation.

(5) If an order made under this section directs an amendment of the articles or bylaws of a corporation, no other amendment to the articles or bylaws may be made without the consent of the Court, until the Court otherwise orders.

(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in the prescribed form to the Registrar together with the documents required by sections 20 and 113, if applicable.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles is effected under this section.

(8) An applicant under this section may apply in the alternative under section 215(1)(a) for an order for the liquidation and dissolution of the corporation.

RSA 2000 cB‑9 s242;2014 c13 s49

Court approval of stay, dismissal, discontinuance or settlement

243(1) An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of the corporation or the subsidiary, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 215, 241 or 242.

(2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the Court given on any terms the Court thinks fit and, if the Court determines that the interests of any complainant may be substantially affected by the stay, discontinuance, settlement or dismissal, the Court may order any party to the application or action to give notice to the complainant.

(3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

(4) In an application made or an action brought or intervened in under this Part, the Court may at any time order the corporation or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for the interim costs on final disposition of the application or action.

1981 cB‑15 s235

Court order to rectify records

244(1) If the name of a person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, the registers or other records of a corporation, the corporation, a security holder of the corporation or any aggrieved person may apply to the Court for an order that the registers or records be rectified.

(2) If the corporation is a distributing corporation, an applicant under this section shall file notice of the application with the Executive Director.

(3) In connection with an application under this section, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order requiring the registers or other records of the corporation to be rectified;

(b) an order restraining the corporation from calling or holding a meeting of shareholders or paying a dividend before the rectification;

(c) an order determining the right of a party to the proceedings to have the party’s name entered or retained in, or deleted or omitted from, the registers or records of the corporation, whether the issue arises between two or more security holders or alleged security holders, or between the corporation and any security holders or alleged security holders;

(d) an order compensating a party who has incurred a loss.

1981 cB‑15 s236;1988 c7 s3;1995 c28 s64

TAB 21

CANADA

CONSOLIDATION

Companies' Creditors Arrangement Act

R.S.C., 1985, c. C-36

Current to October 26, 2016

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available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has 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.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

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 proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

R.S., 1985, c. C-36, s. 19; 1996, c. 6, s. 167; 2005, c. 47, s. 131; 2007, c. 36, s. 69.

b) toute indemnité accordée en justice dans une affaire civile :

(i) pour des lésions corporelles causées intentionnellement ou pour agression sexuelle,

(ii) pour décès découlant d'un acte visé au sous-alinéa (i);

c) toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors que la compagnie agissait, au Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire;

d) toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation de la compagnie qui découle d'une réclamation relative à des capitaux propres;

e) toute dette relative aux intérêts dus à l'égard d'une somme visée à l'un des alinéas a) à d).

L.R. (1985), ch. C-36, art. 19; 1996, ch. 6, art. 167; 2005, ch. 47, art. 131; 2007, ch. 36, art. 69.

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) 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*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings

Détermination du montant de la réclamation

20 (1) Pour l'application de la présente loi, le montant de la réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :

a) le montant d'une réclamation non garantie est celui :

(i) dans le cas d'une compagnie en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, dont la preuve a été établie en conformité avec cette loi,

(ii) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue sous le régime de la *Loi sur la faillite et l'insolvabilité*, dont la preuve a été établie en conformité avec cette loi,

(iii) dans le cas de toute autre compagnie, dont la preuve peut être établie sous le régime de la *Loi sur la faillite et l'insolvabilité*, mais si le montant ainsi prouvable n'est pas admis par la compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier;

b) le montant d'une réclamation garantie est celui dont la preuve pourrait être établie sous le régime de la *Loi sur la faillite et l'insolvabilité* si la réclamation n'était pas garantie, mais ce montant, s'il n'est pas under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

admis par la compagnie, est, dans le cas où celle-ci est assujettie à une procédure pendante sous le régime de la *Loi sur les liquidations et les restructurations* ou de la *Loi sur la faillite et l'insolvabilité*, établi par preuve de la même manière qu'une réclamation non garantie sous le régime de l'une ou l'autre de ces lois, selon le cas, et, s'il s'agit de toute autre compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

R.S., 1985, c. C-36, s. 20; 2005, c. 47, s. 131; 2007, c. 36, s. 70.

Admission des réclamations

(2) Malgré le paragraphe (1), la compagnie peut admettre le montant d'une réclamation aux fins de votation sous réserve du droit de contester la responsabilité quant à la réclamation pour d'autres objets, et la présente loi, la *Loi sur les liquidations et les restructurations* et la *Loi sur la faillite et l'insolvabilité* n'ont pas pour effet d'empêcher un créancier garanti de voter à une assemblée de créanciers garantis ou d'une catégorie de ces derniers à l'égard du montant total d'une réclamation ainsi admis.

L.R. (1985), ch. C-36, art. 20; 2005, ch. 47, art. 131; 2007, ch. 36, art. 70.

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

1997, c. 12, s. 126; 2005, c. 47, s. 131.

Compensation

21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131.

Classes of Creditors

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being

Catégories de créanciers

Établissement des catégories de créanciers

22 (1) La compagnie débitrice peut établir des catégories de créanciers en vue des assemblées qui seront tenues au titre des articles 4 ou 5 relativement à une transaction ou un arrangement la visant; le cas échéant, elle demande au tribunal d'approuver ces catégories avant la tenue des assemblées.

Critères

(2) Pour l'application du paragraphe (1), peuvent faire partie de la même catégorie les créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

a) la nature des créances et obligations donnant lieu à leurs réclamations;

b) la nature et le rang de toute garantie qui s'y rattache;

Miscellaneous

Certain sections of *Winding-up and Restructuring Act* do not apply

41 Sections 65 and 66 of the *Winding-up and Restructuring Act* do not apply to any compromise or arrangement to which this Act applies.

2005, c. 47, s. 131.

Act to be applied conjointly with other Acts

42 The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

2005, c. 47, s. 131.

Claims in foreign currency

43 If a compromise or an arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency as of the date of the initial application in respect of the company unless otherwise provided in the proposed compromise or arrangement.

2005, c. 47, s. 131.

PART IV

Cross-border Insolvencies

Purpose

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- **(a)** cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- **(b)** greater legal certainty for trade and investment;
- **(c)** the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

Dispositions diverses

Inapplicabilité de certains articles de la *Loi sur les liquidations et les restructurations*

41 Les articles 65 et 66 de la *Loi sur les liquidations et les restructurations* ne s'appliquent à aucune transaction ni à aucun arrangement auxquels la présente loi est applicable.

2005, ch. 47, art. 131.

Application concurrente d'autres lois

42 Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

2005, ch. 47, art. 131.

Créances en monnaies étrangères

43 Dans le cas où une transaction ou un arrangement est proposé à l'égard d'une compagnie débitrice, la réclamation visant une créance en devises étrangères doit être convertie en monnaie canadienne au taux en vigueur à la date de la demande initiale, sauf disposition contraire de la transaction ou de l'arrangement.

2005, ch. 47, art. 131.

PARTIE IV

Insolvabilité en contexte international

Objet

Objet

44 La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :

- **a)** assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;
- **b)** garantir une plus grande certitude juridique dans le commerce et les investissements;
- **c)** administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des

TAB 22

Alberta Rules of Court, Alta Reg 124/2010

This regulation replaces Alta Reg 390/1968.

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(Consolidated up to 85/2016)

ALBERTA REGULATION 124/2010

Judicature Act

ALBERTA RULES OF COURT

Part 1
Foundational Rules

Division 1
Purpose and Intention of These Rules

What these rules do

1.1(1) These rules govern the practice and procedure in

(a) the Court of Queen's Bench of Alberta, and

(b) the Court of Appeal of Alberta.

(2) These rules also govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer.

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost−effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

Actions by and against sole proprietors

2.5(1) If a person carries on business or operates as a sole proprietor under a name other than the person's name, the person may bring or be the subject of an action in that name.

(2) If an action is brought by or against a person in the person's business or operating name, a party may serve a notice requiring the person to disclose, in writing, the legal name of the person carrying on the business or operation.

(3) The person on whom the notice to disclose is served must comply with it within 10 days after the date the notice is served.

Representative actions

2.6(1) If numerous persons have a common interest in the subject of an intended claim, one or more of those persons may make or be the subject of a claim or may be authorized by the Court to defend on behalf of or for the benefit of all.

(2) If a certification order is obtained under the *Class Proceedings Act*, an action referred to in subrule (1) may be continued under that Act.

Amendments to pleadings in class proceedings

2.7 After a certification order is made under the *Class Proceedings Act*, a party may amend a pleading only with the Court's permission.

Questioning of class and subclass members

2.8(1) If under *section 18(2)* of the *Class Proceedings Act* the Court requires a class member or subclass member to file and serve an affidavit of records, the Court may do either or both of the following:

(a) limit the purpose and scope of the records to be produced and of questioning;

(b) determine how the evidence obtained may be used.

(2) If a class member or subclass member is questioned under *section 18(2)* of the *Class Proceedings Act*, the Court may do either or both of the following:

(a) limit the purpose and scope of the questioning;

(b) determine how the evidence obtained may be used.

Class proceedings practice and procedure

2.9 Despite any other provision of these rules, the Court may order any practice and procedure it considers appropriate for a class proceeding under the *Class Proceedings Act* to achieve the objects of that Act.

Intervenor status

2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

Division 2
Litigation Representatives

Litigation representative required

2.11 Unless otherwise ordered by the Court, the following individuals or estates must have a litigation representative to bring or defend an action or to continue or to participate in an action, or for an action to be brought or to be continued against them:

(a) an individual under 18 years of age;

(b) an individual declared to be a missing person under *section 7* of the *Public Trustee Act*;

(c) an adult who, in respect of matters relating to a claim in an action, lacks capacity, as defined in the *Adult Guardianship and Trusteeship Act*, to make decisions;

(2) If the Court gives permission for a pleading to be amended, the Court must specify the time period within which the amended pleading must be filed and served.

(3) An order giving permission to amend a pleading under this rule ceases to have effect unless the amended pleading is filed and served within the time specified by the Court.

(4) If the Court directs or allows a pleading to be amended at trial,

(a) the amendment must be recorded in writing by the court clerk, and

(b) no order need be filed.

(5) This rule does not apply to an amendment to a pleading to add, remove, substitute or correct the name of a party to which *rule 3.74* applies.

Costs

3.66(1) Subject to subrule (2), the costs, if any, as a result of an amendment to a pleading are to be borne by the party filing the amendment unless

(a) the amendment is a response to an amended pleading, or

(b) the Court otherwise orders.

(2) The costs of a contested application to amend a pleading are in the discretion of the Court, in accordance with *rule 10.29*.

AR 124/2010 s3.66;122/2012

Close of pleadings

3.67(1) This rule applies to pleadings between the following:

(a) a plaintiff and a defendant;

(b) a plaintiff-by-counterclaim and a defendant−by−counterclaim;

(c) a third party plaintiff and a third party defendant;

(d) a plaintiff and a third party defendant.

(2) Pleadings close when

(a) a reply is filed and served by a plaintiff, plaintiff-by-counterclaim or third party plaintiff, as the case may be, or

(b) the time for filing and serving a reply expires,

whichever is earlier.

(3) The close of pleadings against one party represents the close of pleadings against all parties to that pleading.

Division 5
Significant Deficiencies in Claims

Court options to deal with significant deficiencies

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

(a) that all or any part of a claim or defence be struck out;

(b) that a commencement document or pleading be amended or set aside;

(c) that judgment or an order be entered;

(d) that an action, an application or a proceeding be stayed.

(2) The conditions for the order are one or more of the following:

(a) the Court has no jurisdiction;

(b) a commencement document or pleading discloses no reasonable claim or defence to a claim;

(c) a commencement document or pleading is frivolous, irrelevant or improper;

(d) a commencement document or pleading constitutes an abuse of process;

(e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

(4) The Court may

(a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;

(b) strike out all or any pleadings if a party without sufficient cause does not

(i) serve an affidavit of records in accordance with *rule 5.5*,

(ii) comply with *rule 5.10*, or

(iii) comply with an order under *rule 5.11*.

Division 6
Refining Claims and Changing Parties

Subdivision 1
Joining and Separating Claims and Parties

Joining claims

3.69(1) A party may join 2 or more claims in an action unless the Court otherwise orders.

(2) A party may sue or be sued in different capacities in the same action.

(3) If there is more than one defendant or respondent, it is not necessary for each to have an interest

(a) in all the remedies claimed or sought, or

(b) in each claim included in the action.

Parties joining to bring action

3.70(1) Two or more parties may join to bring an action, and a plaintiff or originating applicant may make a claim against 2 or more persons as defendants or respondents in an action, if

(a) the claim arises out of the same transaction or occurrence or series of transactions or occurrences,

(b) a question of law or fact common to the parties is likely to arise, or

(c) the Court permits.

(2) This rule applies irrespective of the remedy claimed by the plaintiff or originating applicant and whether or not 2 or more plaintiffs or originating applicants seek the same remedy.

Separating claims

3.71(1) When 2 or more claims are made in an action or when 2 or more parties join or are joined in an action, the Court may make an order under this rule if the Court is satisfied that the joined claims or parties, or both, may

(a) unduly complicate or delay the action, or

(b) cause undue prejudice to a party.

(2) The Court may, by order, do one or more of the following:

(a) order separate trials, hearings, applications or other proceedings;

(b) order one or more of the claims to be asserted in another action;

(c) order a party to be compensated by a costs award for having to attend part of a trial, hearing, application or proceeding in which the party has no interest;

(d) excuse a party from having to attend all or part of a trial, hearing, application or proceeding in which the party has no interest.

Consolidation or separation of claims and actions

3.72(1) The Court may order one or more of the following:

(a) that 2 or more claims or actions be consolidated;

(b) that 2 or more claims or actions be tried at the same time or one after the other;

(c) that one or more claims or actions be stayed until another claim or action is determined;

(d) that a claim be asserted as a counterclaim in another action.

(2) An order under subrule (1) may be made for any reason the Court considers appropriate, including, without limitation, that 2 or more claims or actions

(a) have a common question of law or fact, or

(b) arise out of the same transaction or occurrence or series of transactions or occurrences.

Incorrect parties not fatal to actions

3.73(1) No claim or action fails solely because

(a) 2 or more parties join in an action that they should not have joined,

(b) 2 or more parties do not join an action that they could or should have joined, or

(c) a party was incorrectly named as a party or was incorrectly omitted from being named as a party.

(2) If subrule (1) applies, a judgment entered in respect of the action is without prejudice to the rights of persons who were not parties to the action.

Subdivision 2
Changes to Parties

Adding, removing or substituting parties after close of pleadings

3.74(1) After close of pleadings, no person may be added, removed or substituted as a party to an action started by statement of claim except in accordance with this rule.

(2) On application, the Court may order that a person be added, removed or substituted as a party to an action if

(a) in the case of a person to be added or substituted as plaintiff, plaintiff-by-counterclaim or third party plaintiff, the application is made by a person or party and the consent of the person proposed to be added or substituted as a party is filed with the application;

(b) in the case of an application to add or substitute any other party, or to remove or to correct the name of a party, the application is made by a party and the Court is satisfied the order should be made.

(3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

Adding, removing or substituting parties to originating application

3.75(1) In an action started by originating application no party or person may be added or substituted as a party to the action except in accordance with this rule.

(2) On application of a party or person, the Court may order that a person be added or substituted as a party to the action,

(a) in the case of a person to be added or substituted as an originating applicant, if consent of the person proposed to be added or substituted is filed with the application;

TAB 23

Black's Law Dictionary (10th ed. 2014), redemption

REDEMPTION

Bryan A. Garner, Editor in Chief

Preface | Guide | Legal Abbreviations

redemption *n.* (16c) **1.** The act or an instance of reclaiming or regaining possession by paying a specific price. **2.** *Bankruptcy.* A debtor's right to repurchase property from a buyer who obtained the property at a forced sale initiated by a creditor. **3.** *Securities.* The reacquisition of a security by the issuer. • Redemption usu. refers to the repurchase of a bond before maturity, but it may also refer to the repurchase of stock and mutual-fund shares. — Also termed (in reference to stock) *stock redemption*; *stock repurchase*; *share repurchase*; *stock buyback*; *minimum-holding buyback.* **4.** *Property.* The payment of a defaulted mortgage debt by a borrower who does not want to lose the property. — Also termed *dismortgage.* See EQUITY OF REDEMPTION. — **redeemable, redemptive, redemptional** *adj.* — **redeem,** *vb.*

- **statutory redemption** (1851) The statutory right of a defaulting mortgagor to recover property, within a specified period, after a foreclosure or tax sale, by paying the outstanding debt or charges. • The purpose is to protect against the sale of property at a price far less than its value. See REDEMPTION PERIOD.

- **tax redemption** (1867) A taxpayer's recovery of property taken for nonpayment of taxes, accomplished by paying the delinquent taxes and any interest, costs, and penalties.