CLERK'S STAMP

COURT FILE NUMBER	1601-11552
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	NATIONAL BANK OF CANADA, IN ITS CAPACITY AS ADMINISTRATIVE AGENT UNDER THAT CERTAIN AMENDED AND RESTATED CREDIT AGREEMENT DATED JANUARY 15, 2016, AS AMENDED
RESPONDENT	TWIN BUTTE ENERGY LTD.
DOCUMENT	**BENCH BRIEF OF THE *AD HOC* COMMITTEE (for the Application to be heard by the Honourable Madam Justice Horner at 10:00 a.m. on Thursday, April 27, 2017)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500, 855 – 2nd Street S.W. Calgary, Alberta T2P 4K7 Attention: Chris Simard/Alexis Teasdale Tel No.: 403-298-4485/3067 Fax No.: 403-265-7219 Client File No. 76739.1

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I. INTRODUCTION

1. The *Ad Hoc* Committee (as defined in the April 19, 2017 Affidavit of Mike Maguire, hereinafter the "**Maguire Affidavit**") is filing this short Bench Brief to provide to this Honourable Court some relevant authorities for the purposes of the *Ad Hoc* Committee's application at 2:00 p.m. on Thursday, April 27, 2017 (the "**Application**").

II. FACTS

2. The facts relevant to the Application are set out in the Maguire Affidavit.

III. ISSUE

3. The issue to be determined in the Application is whether it is just and equitable that all Debentureholders (as defined in the Maguire Affidavit) should share equally and *pro rata*, the professional costs incurred by the *Ad Hoc* Committee.

IV. ANALYSIS

4. Canadian Courts have frequently ordered that insolvent estates bear the costs of representative professionals, who act for the benefit of large groups of creditors or stakeholders. There are numerous insolvency cases in which representative professionals were appointed, both under the *Companies' Creditors Arrangement Act*[1] and also in receiverships.[2]

5. In this case, the Order sought would only impact the Debentureholders. No other class of creditors would be affected, because the proposal of the *Ad Hoc* Committee is that the professional fees incurred by them be paid "off the top" of any distribution or distributions to the Debentureholders. The payment of those fees would not affect the quantum of distributions to any other creditors or creditor classes. The *Ad Hoc* Committee respectfully submits that the Order sought is just and equitable in the circumstances, on the basis of the well-established

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[1] *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 at paras. 10-16 **[TAB 1]**; *Nortel Networks Corp., Re*, 2009 CarswellOnt 3530 at paras. 11, 16 **[TAB 2]**; *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 at para. 7 **[TAB 3]**; *Catalyst Paper Corp., Re* 2012 BCSC 451, 2012 CarswellBC 883 **[TAB 4]**; *Target Canada Co.*, Re, 2015 ONSC 303, 2015 CarswellOnt 620 at paras. 60-61 **[TAB 5]**

[2] *Ontario (Securities Commission) v. New Life Capital Corp.*, 2011 ONSC 7296, 2011 **[TAB 6]**; *Calder v. KPMG LLP*, 2012 QCCS 4008, 2012 CarswellQue 8461 **[TAB 7]**; *Winwin Capital Management, LLC (Receiver of) v. Oversea Chinese Fund Limited Partnership*, 2014 ONCA 662 **[TAB 8]**; *Redstone Investment Corp. (Receiver of), Re*, 2016 ONSC 4453, 2016 CarswellOnt 15863 at para. 3 **[TAB 9]**

principle that creditors who have the same rights and entitlements against a debtor company or estate, should be treated equally.[3]

V. RELIEF SOUGHT

6. The *Ad Hoc* Committee seeks the granting of the Order sought, in the form attached to its Application filed on April 19, 2017.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 25th day of April, 2017.

BENNETT JONES LLP

Estimated Time for Argument: 20 minutes

Per: _____

Chris Simard and Alexis Teasdale
Counsel for the *Ad Hoc* Committee

[3] *Nortel Networks Corp., Re*, 2014 ONSC 5274 at paras. 12, 14 **[TAB 10]**; *Nortel Networks Corp., Re*, 2015 ONCA 681, 2015 CarswellOnt 15461 at paras. 14, 23, 24 **[TAB 11]**

TABLE OF AUTHORITIES

1. *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028
2. *Nortel Networks Corp., Re*, 2009 CarswellOnt 3530
3. *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169
4. *Catalyst Paper Corp., Re* 2012 BCSC 451, 2012 CarswellBC 883
5. *Target Canada Co.*, Re, 2015 ONSC 303, 2015 CarswellOnt 620
6. *Ontario (Securities Commission) v. New Life Capital Corp.*, 2011 ONSC 7296, 2011
7. *Calder v. KPMG LLP*, 2012 QCCS 4008, 2012 CarswellQue 8461
8. *Winwin Capital Management, LLC (Receiver of) v. Oversea Chinese Fund Limited Partnership*, 2014 ONCA 662
9. *Redstone Investment Corp. (Receiver of), Re*, 2016 ONSC 4453, 2016 CarswellOnt 15863
10. *Nortel Networks Corp., Re*, 2014 ONSC 5274
11. *Nortel Networks Corp., Re*, 2015 ONCA 681, 2015 CarswellOnt 15461

TAB 1

2009 CarswellOnt 3028
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3028, [2009] O.J. No. 2166, 177 A.C.W.S. (3d) 634, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: April 20, 2009
Judgment: May 27, 2009 *
Docket: 09-CL-7950

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees
Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Alan Mersky, Derrick Tay for Applicants
Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay
M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Gurantee Fund
Leanne Williams for Flextronics Telecom Systems Ltd.
Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.
Gail Misra for Communication, Energy and Paperworkers Union of Canada
J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services
Mark Zigler, S. Philpott for Certain Former Employees of Nortel
G.H. Finlayson for Informal Nortel Noteholders Group
A. Kauffman for Export Development Canada
Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Procedure
XIX.2.a.iv Miscellaneous

Headnote

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

Appointment of representative counsel — Telecommunication company entered protection under Companies' Creditors Arrangement Act — Telecommunications company ceased paying former employees with unsecured claims — Several groups of employees claimed entitlement to assets of company, including current working employees, and pensioners — Several law firms maintained that different classes should be established representing employees with different interests, with different legal representatives for each — Five law firms brought motions regarding representation — Law firm KM appointed representative for all potential classes of employee — Court has broad power to appoint representative counsel — Employees and retirees were vulnerable creditors, and had little means to pursue claims beyond representative counsel — No party denied choice of counsel as employees entitled to obtain individual counsel — No current conflict of interest between pensioned and non-pensioned employees — Many classes of employee had similar interest in pension plan — Claims under pension, to extend it was funded, not affected by CCAA proceedings — Pension claims by terminated employees creating conflict with other claims was only hypothetical — All former employees had community of interest.

Table of Authorities

Cases considered by *Morawetz J.*:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered

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

Statutes considered:

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

s. 11 — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 10 — referred to

R. 10.01 — considered

R. 12.07 — considered

MOTIONS regarding appointment of counsel in proceedings under *Companies' Creditors Arrangement Act*.

Morawetz J.:

1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

2 This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

3 The proposed representative counsel are:

> (i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.
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> (ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.
>
> (iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.
>
> (iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

4 At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

5 Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

6 The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

7 The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

8 The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

9 These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

10 The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

11 Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

12 In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

13 In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

14 I am in agreement with these general submissions.

15 The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

16 In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

18 The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

(a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:

(b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and

(c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

19 Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

20 Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

21 J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

22 Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

23 The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

24 Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

25 Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

26 Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

27 As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

28 At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

29 Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

30 Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

31 Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

32 Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

(c) Layoff and Severance Payments

33 The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;

(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and

(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

34 The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

35 At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;

(b) the Health Care Plan;

(c) the Pension Plan and Health Care Plan as a survivor of a former employee;

(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;

(e) severance and termination pay ; and

(f) TRA payments.

36 The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

38 Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

39 The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

40 They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

41 In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

42 The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

43 The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

44 Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

46 Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

47 KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

48 KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

49 KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

50 KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

51 Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

52 With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

53 To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

54 It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

55 A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

56 In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

57 The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

58 In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

59 Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

60 Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

61 In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

62 Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Stelco Inc., Re*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Stelco Inc., Re*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Canadian Airlines Corp., Re* and articulated the following factors to be considered in the assessment of the "commonality of interest".

> In summary, the case has established the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

Stelco Inc., Re (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), para 31.

63 I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

64 As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment,

restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

65 The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

66 The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

67 I would ask that counsel prepare a form of order for my consideration.

Order accordingly.

Footnotes

* Additional reasons at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3530 (Ont. S.C.J. [Commercial List]).

TAB 2

2009 CarswellOnt 3530
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3530, [2009] O.J. No. 2529, 177 A.C.W.S. (3d) 875, 55 C.B.R. (5th) 114, 75 C.C.P.B. 220

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

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (Applicants)

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Morawetz J.

Judgment: June 17, 2009
Docket: 09-CL-7950

Proceedings: additional reasons to *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List])

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees
Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Alan Mersky, Derrick Tay for Applicants
Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for The Nortel Terminated Canadian Employees Owed Termination and Severance Pay
M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Guarantee Fund
Leanne Williams for Flextronics Telecom Systems Ltd.
Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.
Gail Misra for Communication, Energy and Paperworkers Union of Canada
J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services
Mark Zigler, S. Philpott for Certain Former Employees of Nortel
G.H. Finlayson for Informal Nortel Noteholders Group
A. Kauffman for Export Development Canada
Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Procedure
XIX.2.a.iv Miscellaneous

Headnote

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

Appointment of representative counsel — Telecommunication company entered protection under Companies' Creditors Arrangement Act — Telecommunications company ceased paying former employees with unsecured claims — Several groups of employees claimed entitlement to assets of company, including current working employees, and pensioners — Several law firms maintained that different classes should be established representing employees with different interests, with different legal representatives for each, including law firm NS who sought to represent certain former non-unionized employees and be co-counsel for continuing employees — Five law firms brought motions regarding representation — Law firm KM appointed representative for all potential classes of employee — Court has broad power to appoint representative counsel — Employees and retirees were vulnerable creditors, and had little means to pursue claims beyond representative counsel — No party denied choice of counsel as employees entitled to obtain individual counsel — No current conflict of interest between pensioned and non-pensioned employees — Many classes of employee had similar interest in pension plan — Claims under pension, to extend it was funded, not affected by CCAA proceedings — Pension claims by terminated employees creating conflict with other claims was only hypothetical — All former employees had community of interest — At request of NS, further submissions made regarding representation by KM — No alteration to representation order necessary — Overriding objective of appointing representative counsel was to ensure representation — KM capable of representing employees with interest in transitional retirement allowance — Claims for bonus in 2008 year not unique to continuing employees and KM was capable of providing representation — Future claims were hypothetical.

Table of Authorities

Statutes considered:

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

ADDITIONAL REASONS to judgment reported at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]), respecting terms of representation order.

Morawetz J.:

1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as Representative Counsel with reasons to follow.

2 Reasons were released on May 27, 2009.

3 The motion of Messrs. Sproule, Archibald and Campbell was granted and Koskie Minsky was appointed as Representative Counsel.

4 The motions to appoint Nelligan O'Brien and Shibley Righton, Juroviesky and Ricci and the CAW as Representative Counsel were dismissed.

5 On June 1, 2009, correspondence was received from Ms. Janice B. Payne of Nelligan O'Brien Payne. Her letter reads as follows:

I am writing on behalf of the Nortel Continuing Canadian Employees Committee ("NCCE").

On May 20, 2009 Your Honour dismissed the NCCE's motion for a representation order with reasons to follow. On May 27, 2009, the Reasons for Your Honour's decision were released but they do not appear to contain any explanation or reasons for the decision to dismiss the NCCE's motion. The NCCE respectfully requests reasons for your decision to dismiss its motion.

6 It is my understanding that the formal order relating to the endorsement of May 27, 2009 has yet to be taken out.

7 The purpose of this endorsement is to address the issue raised by Ms. Payne

8 At the outset, it is noted that Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") were proposed to be appointed as co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA Filing Date. This group was referred to as the Recently Severed Canadian Nortel Employees ("RSCNE"). In addition, NS sought to be appointed as co-counsel to the continuing employees of Nortel. This group was referred to as the NCCE. I assume that NS was of the view that there was no conflict in representing both the RSCNE and the NCCE. This is referenced in the April 6, 2009 affidavit of Mr. Levitt and a common factum was filed by NS.

9 The distinction between the RSCNE and the NCCE is recognized at paragraphs [19] and [20] of my reasons.

10 The request for supplementary reasons was put forth solely by the NCCE.

11 The grounds for the NCCE motion were:

(a) the representation order will permit and facilitate proper representation for those former non-unionized employees to whom Nortel owes severance and/or pay in lieu of reasonable notice.

(b) members of the NCCE class have interests which conflict with the interests of former employees in receipt of a pension from Nortel.

(c) there have already been changes made to the terms and conditions of employment of current employees, and future changes are anticipated.

12 In support of the motion, affidavits were filed by Kent Felske, Dany Sylvain and Steven Levitt.

13 The affidavit of Mr. Felske describes what he considers to be three existing claims of current Nortel employees that will need to be determined in the CCAA process.

14 The first claim arises out of the cancellation of the Transitional Retirement Allowance ("TRA"). The second claim arises out of Nortel's announcement that they will not make any payments for bonuses earned in 2008 and the third claim relates to amendments to pension plan (accumulation of benefits 2008 and forward). Mr. Felske also references other future claims.

15 In my endorsement at paragraph [13] reference is made to the Koskie Minsky factum which set forth the rationale behind a representative order. I indicated that I was in agreement with the general submissions as set forth.

16 In my view, the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process.

Claim for TRA

17 The issue of the TRA is referenced at paragraph [30] of my endorsement. At paragraph [35] it is noted that the group that sought the appointment of Koskie Minsky includes members who have an interest in and/or are entitled to TRA payments. The issue of any conflict of interest between various employee groups, including those entitled to TRA payments, is addressed at paragraphs [37], [44], [51], [52] and [56].

18 In my view, the position of continuing employees who may have an interest in a TRA, can be represented by Koskie Minsky. The claims of the NCCE for TRA are not dissimilar from that of former employees.

Claim for 2008 Bonus

19 With respect to claims of continuing employees for bonuses earned in 2008, the reference in the affidavit of Mr. Felske reads as follows:

> Second, Nortel has announced that it will not make any payments for bonuses earned in 2008.

20 In my view, there is nothing to suggest that this type of claim is unique to continuing employees and, it seems to me, that the interests of continuing employees can be adequately represented by Koskie Minsky.

Amendments to Pension Plan

21 With respect to amendments to pension plan, the Koskie Minsky group includes pension plan members and it seems to me that the interests of members can be represented by Koskie Minsky.

Future Claims

22 At paragraph 17 of his affidavit, Mr. Felske refers to other future claims of current employees. In my view, Representative Counsel should be addressing actual issues and actual claims as opposed to hypotheticals. In the event that the situation changes, it is open to any party to bring a motion for appropriate relief.

Directions

23 In my endorsement, I determined that the process could be best served by having one firm put forth arguments on behalf of all employees as opposed to subdividing the employee group.

24 I see no basis to alter this finding. In my view, the interests of members of the NCCE can be represented by Koskie Minsky. To the extent that members wish to opt out of the Koskie Minsky group, they are, of course, free to do so.

Order accordingly.

TAB 3

2009 CarswellOnt 6169
Ontario Superior Court of Justice [Commercial List]

Fraser Papers Inc., Re

2009 CarswellOnt 6169, [2009] O.J. No. 4287, 181 A.C.W.S. (3d) 256

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H.LLC (collectively, the "Applicants" or "Fraser Papers")

Pepall J.

Judgment: September 17, 2009
Docket: CV-09-8241-OOCL

Counsel: M. Barrack, D.J. Miller for Applicants
R. Chadwick, C. Costa for Monitor
D. Wray, J. Kugler for Communications, Energy and Paper Workers Union of Canada
D. Wray, J. Kugler (Agent) for Pink Larkin
C. Sinclair for United Steelworkers
T. McRae, S. Levitt for Steering Committee of Fraser Papers' Salaried Retirees Committee
M.P. Gottlieb, S. Campbell for Committee for Salaried Employees and Retirees
M. Sims for Her Majesty the Queen in Right of the Province of New Brunswick as represented by the Minister of Business of New Brunswick
Chriss Burr for CIT Business Credit Canada Inc.
D. Chernos for Brookfield Asset Management Inc.

Subject: Insolvency; Civil Practice and Procedure

Headnote

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

Table of Authorities

Cases considered by *Pepall J.*:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

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

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to

Chapter 15 — referred to

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

s. 11 — referred to

Employee Retirement Income Security Act, 1974, 29 U.S.C.
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

***Pepall J.*:**

Relief Requested

1 There are four motions before me that request the appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of the Applicants ("Fraser Papers"). With the exception of the motion of the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (the "USW"), all motions include a request that Fraser Papers pay the fees and disbursements of representative counsel.

2 The motions are brought by the following moving parties:

(a) the USW who seeks to represent its former members. It already represents its current members.

(b) the Communications Energy and Paperworkers Union of Canada (the "CEP") who also seeks to represent its former members. It too already represents its current members.

(c) the Steering Committee of Fraser Papers' Salaried Retirees Committee who request that Nelligan O'Brian Payne LLP and Shibley Righton LLP ("Nelligan/Shibley") be appointed to act for all non-unionized retirees and their successors.

(d) the Committee of Salaried Employees and Retirees who request that Davies Ward Phillips & Vineberg LLP ("Davies") be appointed to act for all unrepresented employees, be they active or retired, and their successors.

3 A third union, the CMAW, did not bring a motion but Mr. Wray, counsel for the CEP, acted as agent for CMAW's counsel, Pink Larkin on these motions. He advised that the CMAW will represent its current members but not its retirees who are approximately 25 in number.[1] These retirees therefore would only be encompassed by the Davies proposed retainer.

Discussion

4 The Applicants employ approximately 2,500 personnel. They are located in Canada and the U.S. A substantial majority is unionized. Of the 2,500, 1,729 employees participate in five defined benefit pension plans. In addition,

3,246 retirees receive benefits from these plans. Fraser Papers maintains certain other plans and benefits including supplementary employee retirement programmes ("SERPs").

5 On June 18, 2009, the Applicants obtained an Initial Order pursuant to the provisions of the *CCAA*. On July 13, 2009, the U.S. Bankruptcy Court for the District of Delaware designated these proceedings as foreign main proceedings pursuant to Chapter 15 of the U.S. Bankruptcy Code.

6 Fraser Papers is insolvent and is under significant financial pressure. Absent the DIP financing, a restructuring would be impossible. The Applicants have not generated positive cash flow from operations for three years. Their largest unsecured claims relate to the pension plans and the SERPs. Their accrued pension benefit obligations in these plans and the SERPs exceed the value of the plan assets by approximately USD $171.5 million as at December 31, 2008.

7 Representative counsel should be appointed in this case and I have jurisdiction to do so. Section 11 of the *CCAA* and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. No one challenges either of these propositions. The employees and retirees not otherwise represented are a vulnerable group who require assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favours the granting of such an order and it is in the interests of justice to do so. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

(A) USW and CEP Motions

8 Dealing firstly with the motions brought by the unions, the USW is the exclusive bargaining agent for the unionized employees of the Applicants working in Madawaska, Maine and Berlin- Gorham, New Hampshire. Personnel at these facilities participate in a defined benefit pension plan and a defined contribution pension plan. The U.S. law applicable to pension plans is the *Employee Retirement Income Security Act of 1974* ("ERISA")[2]. The evidence filed by the USW suggests that a labour organization that negotiated a pension plan has a role in legal proceedings involving termination of that plan. If voluntary, consent of the union is required and if involuntary, an order of the bankruptcy court under the appropriate provisions of U.S. bankruptcy law is necessary. The USW has extensive experience representing the rights of employees and retirees in these sorts of proceedings. It is also noteworthy that, although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. Bankruptcy Code provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.

9 In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.

10 Although CEP plays no role in Fraser Papers' U.S. operations, with that exception, for similar reasons and in the interests of consistency, the CEP should be appointed as the representative for its former members who are retirees subject to the aforementioned opt out provision. The Monitor and the Applicants are supportive of this position. Counsel for the CEP indicated that while it is unclear as a matter of law that the union is bound to represent former members in circumstances such as those facing Fraser Papers, the CEP would represent them with or without funding. Given Fraser Papers' insolvency, it seems to me that funding by the Applicants should only be provided for the benefit of those who otherwise would have no legal representation. The request for funding by CEP is refused.

(b) NelliganlShibley and Davies

11 Turning to the requests of the Steering Committee of Fraser Papers Salaried Retirees Committee which favours the appointment of Nelligan/Shibley and the Committee for Salaried Employees and Retirees which favours Davies, firstly commonality of interest should be considered. In *Nortel Networks Corp., Re*[3], Morawetz J. applied the Court of Appeal's decision in *Stelco Inc., Re*[4] and the decision of *Canadian Airlines Corp., Re*[5] to enumerate the following principles applicable to an assessment of commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.

2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.

3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.

4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.

5. Absent bad faith, the motivations of creditors to approve or disapprove [of the plan] are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

12 Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official languages; and estimated costs.

13 Davies is proposing to represent all unrepresented employees, former employees and their successors. In my view, there is a commonality of interest amongst the members of this group. In essence, they engage unsecured obligations. Arguably those proposed to be represented by the unions could also be included, and indeed absent a change of position by the CMAW, former members of the CMAW will be. That said, for the reasons outlined above, I am satisfied in this case that it is desirable to have the unions act for their members and former members if so willing. Indeed, no one took an opposing position.

14 I am not persuaded that there is a need for separate representation as advocated by the Committee supporting the Nelligan/Shibley retainer. Appointing only Davies avoids excessive fragmentation and duplication and minimizes costs. In addition, no one will be excluded unless he or she so desires. Davies is also the only counsel whose retainer would extend to the CMAW retirees.

15 Davies has already received a broad mandate in that it has close to 700 retainers from employees in each facet of Fraser Papers' operations and from all current and former employee groups. It has the necessary legal expertise and has offices in Toronto, Montreal and New York. It also has the necessary language capability.

16 In contrast, Nelligan/Shibley is only proposing to represent retirees. It has a mandate of approximately 211 retirees. Clearly it has the requisite legal and language expertise but does not have the benefit associated with having offices in as many relevant jurisdictions. One may reasonably conclude from the evidence before me that the proposed fee structure would be less than that advanced by Davies although the scope of the retainer is more limited. Davies' appointment is not diminished because initially they were identified by the Applicants as appropriate counsel unlike Nelligan/Shibley whose group grew organically to use its counsel's terminology. Nor am I persuaded that Davies will be enfeebled as a result of the composition of the Steering Committee or due to past unrelated retainers by Brookfield Asset Management Inc. The Monitor supports the appointment of Davies as do the Applicants and the DIP lenders.

17 In the event that a real as opposed to a hypothetical or speculative conflict arises at some point in the future, parties may seek directions from the Court. As with the unions, the order appointing Davies will allow anyone to opt out of the representation.

18 Unlike the unions, absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding is ordered to be provided by Fraser Papers. Again, the funding request is supported by the Monitor, the Applicants and the DIP lenders.

19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the insolvent Applicants. I will leave it to the Monitor to address what an appropriate reduction would be and this no doubt will be addressed very briefly in a subsequent Monitor's report.

Summary

20 In summary, the USW, CEP and Davies representation requests are granted. Only the Davies funding request is granted. The motion relating to Nelligan/ Shibley is dismissed. Counsel submitted proposed orders without prejudice to the Applicants to make submissions. Counsel should confer on the appropriate form of orders and then a representative may attend before me at a 9:30 appointment to have them approved and signed.

Footnotes

1 This is contrary to the contents of paragraph 24 of the Monitor's 4th Report but, being more recent, I accept counsel's oral representation as being accurate.

2 29 U.S.C.

3 (Ont. S.C.J. [Commercial List]).

4 (2005), 15 C.B.R. (5th) 307 (Ont. C.A.)

5 (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.).

TAB 4

2012 BCSC 451
British Columbia Supreme Court

Catalyst Paper Corp., Re

2012 CarswellBC 883, 2012 BCSC 451, 2012 C.E.B. & P.G.R. 8481 (headnote only), [2012] B.C.W.L.D. 4214, [2012] B.C.W.L.D. 4307, 214 A.C.W.S. (3d) 331, 89 C.B.R. (5th) 292, 98 C.C.P.B. 1

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44

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

In the Matter of Catalyst Paper Corporation and the Petitioners Listed in Schedule "A" (Petitioners)

Sewell J.

Heard: February 23, 2012
Judgment: March 28, 2012
Docket: Vancouver S120712

Counsel: P.L. Rubin, K. Burns, A. Purgas for Petitioners
K.M. Jackson for Monitor
J.R. Sandrelli, S. Kukulowicz, R. Jacobs for A Representative Group of 2016 Noteholders
M. Buttery for Powell River Energy Inc., Quadrant Investments Ltd., TimberWest Forest Corp.
R.J. Kaardal, A. Glen for Catalyst TimberWest Retired Salaried Employees Association
V. Sinha for Wells Fargo Bank NA
T. Louman-Gardiner, M. Wagner for Representative Group of 2014 Unsecured Noteholders and Certain 2016 Noteholders
J. Cockbill for JPMorgan Chase Bank, N.A.
S. Quelch for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2688
K. Esaw for Canexus Corp., Casco Inc.
R. Patryluk, G. Benchetrit for Wilmington Trust, National Association
D. McKinnon for Ad Hoc Committee of 2014 Noteholders
A. Kaplan, M. Prokosh, D. Yiokaris, J. Harnum for Catalyst Salaried Employees and Pensioner Committee
D. Bobert for CEP Unions - Locals 1, 76 (Powell River), 592, 686 (Port Alberni), 1132 (Crofton), 630, 1123 (Campbell River
C. Gordon for PPWC Local 2
S. Wilkinson for Superintendent of Pensions
H. Ferris for Board of Directors of Catalyst
K. McElcheran for Perella Weinberg Partners LP
K. Rowan, Q.C. for Wajax Industries

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Pensions

IV Miscellaneous

Headnote

Pensions --- Miscellaneous

Company entered protection under Companies' Creditors Arrangement Act — Employees' association appointed counsel for employee creditors with regards to pension benefits — Certain employee creditors brought application that law firm act as counsel for employee creditors — Application dismissed — Most pressing issue for group of employee creditors was protection of benefits — Significant majority of employee creditors wished to keep employees' association in charge of proceedings — Current counsel was experienced in pension matters — Nothing showed current counsel had not protected interests of group — Priority on funds granted regarding claims of employee creditors was made with eye towards keeping business stable and was not failure to represent employee creditors — Choice of counsel should be left in hands of employees' association — Membership of group represented by employees' association clarified as plan former members, persons entitled to or in receipt of survivor benefits and designated beneficiaries of former members.

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

Company entered protection under Companies' Creditors Arrangement Act — Employees' association appointed counsel for employee creditors with regards to pension benefits — Certain employee creditors brought application that law firm act as counsel for employee creditors — Application dismissed — Most pressing issue for group of employee creditors was protection of benefits — Significant majority of employee creditors wished to keep employees' association in charge of proceedings — Current counsel was experienced in pension matters — Nothing showed current counsel had not protected interests of group — Priority on funds granted regarding claims of employee creditors was made with eye towards keeping business stable and was not failure to represent employee creditors — Choice of counsel should be left in hands of employees' association — Membership of group represented by employees' association clarified as plan former members, persons entitled to or in receipt of survivor benefits and designated beneficiaries of former members.

Table of Authorities

Cases considered by *Sewell J.*:

Indalex Ltd., Re (2011), 2011 CarswellOnt 2458, 2011 ONCA 265, 2011 C.E.B. & P.G.R. 8433, 104 O.R. (3d) 641, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 89 C.C.P.B. 39 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 81.5 [en. 2005, c. 47, s. 67] — referred to

s. 81.6 [en. 2005, c. 47, s. 67] — referred to

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

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

s. 11 — referred to

Pension Benefits Standards Act, R.S.B.C. 1996, c. 352
Generally — referred to

s. 1(1) "former member" — considered

s. 1(1) "member" — considered

s. 6 — referred to

APPLICATION by certain employees for change of counsel in proceedings under *Companies' Creditors Arrangement Act.*

***Sewell J.*:**

1 On February 23, 2012, a group of current, former and retired employees of the Petitioners (the "CSE&P Committee") applied for an order amending the Amended and Restated Initial Order of February 3, 2012 (the "R.I.A.") by removing paragraph 84 of the R.I.A. and replacing it with the following:

(a) Ronald Gary McCaig, Jeff Whittaker, Janice Young, Peter Flynn, Patricia Dwornik, and Francesca Pomeroy (the "CSE&P Committee"), acting on their own behalf and on behalf of the Catalyst Salaried Employees & Pensioners group are, until further Order of this Court, entitled to make representations to the Court as, and be, the authorized representatives of Canadian employed or resident persons, and in particular:

(i) all current non-unionized employees of Catalyst Pulp Operations Limited, Catalyst Pulp Sales Inc., Pacifica Poplars Ltd., Catalyst Pulp and Paper Sales Inc., Elk Falls Pulp and Paper Limited, Catalyst Paper Energy Holdings Inc., 0606890 B.C. Ltd., Catalyst Paper Recycling Inc., Catalyst Paper Recycling Inc., Catalyst Paper (Snowflake) Inc., Catalyst Paper Holdings Inc., Pacific Papers U.S. Inc., Pacifica Poplars Inc., Pacifica Papers Sales Inc., Catalyst Paper (USA) Inc. or the Apache Railway Company (collectively "Catalyst") or any person claiming an interest under or on behalf of such employees;

(ii) all active, deferred vested and retired members of the Catalyst Paper Corporation Retirement Plan for Salaried Employees (Reg. No. 85400-1), the Catalyst Paper Corporation Retirement Plan "A" (Reg. No. 85944-1) and/or the Catalyst Paper Corporation Retirement Plan "C" (Reg. No. 55234) (collectively, the "Catalyst Pension Plans"), or any person claiming an interest under the Catalyst Pension Plans; and

(iii) all non-unionized current and former employees of Catalyst and its predecessors with an entitlement under any other unregistered supplementary pension benefit, post-retirement benefit, health and dental benefit, life insurance benefit, long term disability benefit, short term disability benefit, death and dismemberment benefit or any other employee benefit sponsored by Catalyst or one of its predecessors (collectively "OPEBs"), or any person claiming an interest under an OPEB under or on behalf of such employees and former employees.

(collectively, the "Employee Creditors").

(b) Counsel to the CSE&P Committee will be considered an "Assistant" pursuant to paragraph 8(c) of the Amended and Restated Initial Order.

2 By memorandum dated March 5, 2012 I informed the parties that the application was dismissed with reasons to follow. These are those reasons.

Background

3 On January 31, 2012 the Court granted protection (the Initial Order) to the Petitioners pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The Initial Order was applied for in some haste because until a few days prior to January 31 it appeared that the Petitioners would be able to reorganize their affairs by means of a plan of arrangement pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). However, certain conditions precedent to the proposed *CBCA* plan of arrangement were not met and these proceedings resulted.

4 *The Initial Order was amended and restated by the R.I.A. Paragraph 12(c) of* the R.I.A. authorized and directed the Petitioners to make all normal employer cost contributions to defined benefit and defined contribution pension plans. Paragraph 12(d) authorized but did not require the Petitioners to make the special payments to pension plans set out in a letter from the Superintendant of Pensions (the "Superintendent") dated December 14, 2011 (the "Extension Letter") but prohibited the Petitioners from making any special or catch up payments on an accelerated basis without further court order made on notice to the D.I.P. Agent, to the Steering Committee for the 2016 Noteholders, and to counsel for the Ad Hoc Noteholders.(terms are as capitalized in R.I.A.)

5 The Extension Letter authorized the Petitioners to fund solvency deficiencies in the Petitioners' defined benefit pension plans nos. P085400-1 and P085994-1 (the "Defined Benefit Plans") over a seven year period, thereby extending the five year period within which such solvency deficiencies would otherwise have had to be funded pursuant to requirements of the *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 (the *PBSA*). It was therefore of significant benefit to the Petitioners' liquidity. However, the Extension Letter contained a provision that if the Petitioners filed for protection under the *CCAA*, it would be rescinded and all contributions and payments to the Defined Benefit Plans would be considered to be due and owing in accordance with s. 6 of the *PBSA*.

6 At an early stage of these proceedings I was informed that the Petitioners, representatives of the 2016 noteholders, the Superintendant, the D.I.P. lender and the Catalyst Timberwest Retired Salaried Employees Association ("RSEA") as representative of pension beneficiaries of the Defined Benefits Plans were in discussions to address the consequences of the *CCAA* filing. I was not provided with details of those discussions but was informed that one of the topics under discussion was the applicability and implications to this proceeding of the Ontario Court of Appeal decision in *Indalex Ltd., Re*, 2011 ONCA 265 (Ont. C.A.) (*Indalex*).

7 On February 7, 2012, I was informed that the parties referred to in the preceding paragraph had reached an agreement to resolve these issues. The essential points of this agreement were that the Petitioners agreed to make additional payments of $550,000 on March 18 and April 15, 2012 to the trustees of the Defined Benefit Plans and the Superintendent waived her right to rescind the Extension Letter.

8 By order dated the same date, on the application of the Petitioners I made an order amending the R.I.A. to give effect to the settlement. I recognized RSEA as authorized representative of pension beneficiaries under Pension Plan no. P085994-1. This is by far the larger of the Deferral Benefit Plans. At that time I proceeded on the basis that these arrangements were acceptable to the secured creditors, including the D.I.P. lenders and the 2016 noteholders, as well as the 2014 noteholders. It was implicit in that agreement that the pension beneficiaries agreed that the D.I.P. lender's security would rank in priority to any rights of the pension beneficiaries, including rights under the *PBSA* and under any fiduciary claim against the Petitioners and its management. Counsel for the applicants on this application attended that hearing by telephone and did not oppose the relief sought or seek to adjourn the application.

9 On February 14, the Petitioners applied for a final order granting the D.I.P. financing a priority charge on the working capital assets of the Petitioners, and granting the D.I.P. lenders' charge priority over any deemed trust under

the *PBSA*, any claim in respect of breach of fiduciary duty and any future charge that might arise under ss. 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* (*B.I.A.*).

10 The provision granting priority over any claim for breach of fiduciary duty was sought to address any issue that might arise pursuant to *Indalex*. Counsel for the applicants on this application attended that hearing and sought an order adjourning the application to February 23, the same date on which this application was heard.

11 I granted the order sought on February 14, 2012 because of the critical importance to the Petitioners of being able to access additional credit under the D.I.P. facility without further delay. Pursuant to paragraph 42 of the R.I.A. the amount available to be drawn under the D.I.P. facility was limited to $40,000,000 until certain condition precedents were met, one such condition being the granting of super priority to the D.I.P. lenders' charge. I was also of the view that the concerns of pension beneficiaries had been addressed to the satisfaction of their representative by the February 7, 2012 Order, which, as I have indicated, was not opposed by any party, including the present applicants.

12 I did, however, permit the applicants to make this application, which was heard on February 23, 2012.

13 Counsel for the applicants began his submission by submitting that I should approach these applications as a hearing *de novo* of the representation issue notwithstanding the February 7, 2012 Order.

14 Counsel then made seven points in support of the applications:

> 1. The applicants represent a ground up, grass roots group that is representative of a broad cross section of unorganized employees, former employees and persons with pension rights that had heretofore not been represented.
>
> 2. The relationship of the applicants and those they represent to the firm of Koskie Minsky is direct in that it is proposed that there be a direct solicitor client relationship between each member of the group and the firm.
>
> 3. Koskie Minsky has recognized experience and expertise in representing similar classes of creditors in other *CCAA* proceedings and with respect to pension issues generally.
>
> 4. The definition of persons interested in protecting pension rights contained in the February 7, 2012 Order was imprecise and ambiguous.
>
> 5. The proposed group for which representation was sought was a particularly vulnerable one.
>
> 6. There is a social benefit in having this group represented by counsel and by the efficiency of having one counsel represent it.
>
> 7. There was no prejudice to any one, and in particular no prejudice to RSEA, because RSEA could opt out of the representation order and had the resources to retain counsel to represent it.

15 With regard to the nature of this application, I agree that the fact that RSEA was named as representative of pension beneficiaries in the February 7 order should not deprive the applicants of the ability to argue these applications on the merits. I therefore intend to approach the applications not on the basis that the applicants must show why RSEA should be displaced but on the basis of what order would be in the best interests of the affected group. However, in assessing this question I will have regard to what has transpired to date and in particular to whether RSEA has acted in an effective and efficient manner in representing the interests of pension beneficiaries to date. I also think it appropriate to take into account the additional cost of having a new firm familiarize itself with the circumstances of this proceeding.

16 RSEA's position is that it represents a significant majority of pension beneficiaries, that it has expertise and experience both in financial matters and matters relating to the Petitioners and the British Columbia forest industry, that it has chosen capable counsel and that it has demonstrated the ability to effectively represent the interests of pension

beneficiaries. It also submits that the group that the applicants propose to represent is overly broad and that there are actual and potential conflicts within that group that make it inappropriate for them to have a single representative.

17 I do not think it is necessary to deal with each the seven points made by the applicants. In my view the critical issues are whether the orders sought are necessary to ensure fair and adequate representation of the group sought to be represented and whether the applicants had established that they have a mandate to represent the group as defined in the application.

18 The applicants have failed to persuade me that they should be designated as the authorized representative of the groups identified in the notice of application. The most pressing and important issue facing this group at present is the protection of their position as beneficiaries of the Defined Benefit Plans. While it is clear that all salaried employees enrolled in the Defined Benefit Plans have an interest in their future, I am persuaded that it is the current pensioners that have the most pressing and immediate interest in that issue.

19 The material filed on these applications shows that a significant majority of the current pensioners wish to have RSEA continue to represent their interests. The affidavit of Alan Statham states that as of February 21, 2012, 432 members and 4 non members of RSEA had delivered written authorizations to the board of RSEA authorizing it to represent their interests in this proceeding. While I agree that numbers alone should not be determinative of who is best placed to represent a group, the authorizations provided to RSEA do indicate a significant level of support for the actions it has taken to date.

20 I also accept that RSEA has a long history of dealing with pension issues and with Catalyst and its predecessors and that the board of RSEA has substantial experience in the British Columbia forestry sector as well as in financial management.

21 Given the substantial support that the board of RSEA has from its members it is likely that if I were to grant the applications there would be more affected retirees who opt out of the representation than remain within it.

22 In his submissions the applicants' counsel was very critical of the amendments to paragraph 55 of the R.I.A. that were granted in the February 14, 2012 Order granting the charges priority over pension claims. The thrust of the submission was that the priority granted to the charges over deemed trusts and claims for claims for breach of fiduciary duty were extremely onerous and unfair to pension beneficiaries. The implication of this was that RSEA had not adequately or effectively represented the interests of pension beneficiaries in the proceedings leading up to the making of that order.

23 I can see no basis for the criticism or the implication. The priority granted by paragraph 55 must be considered in the context of the overall objective of this proceeding; to permit the Petitioners to remain in business on a stable and sustainable financial foundation for the benefit of all stakeholders including pension beneficiaries. Nothing in the record of these proceedings leads to the conclusion that RSEA has not effectively and prudently represented the interests of pension beneficiaries.

24 I have also been persuaded that the governance structure of RSEA and the arrangement whereby its counsel has a single instructing client is a more efficient and effective means of representation of pension beneficiaries than the ad hoc committee and direct individual representation model proposed by the applicants.

25 I am satisfied that both law firms are well qualified to act in this matter. Koskie Minsky is well known for its expertise in *CCAA* and pension matters. However Hunter Litigation is well known to this Court as respected counsel with considerable experience in matters involving the British Columbia forest industry. I also note that while the applicants seek an order appointing Koskie Minsky as representative counsel, the existing order leaves the choice of counsel in RSEA's hands. Generally, I think it preferable to leave the choice of counsel up to a representative group rather than having the Court impose one. RSEA's demonstrated ability to retain and instruct counsel of its choice is a factor that favours continuing its representation of pension beneficiaries.

26 I am however satisfied the group which RSEA was authorized to represent was not adequately defined or inclusive of all pension beneficiaries. The group for which RSEA was entitled to make representations and be the authorized representative of in the February 7, 2012 Order was identified as "pension beneficiaries of the Company's Salaried Plan."

27 In his submissions, counsel for RSEA confirmed that he did not purport to represent current salaried employees of the Petitioners who have rights under the Defined Benefit Plans.

28 I agree that the group that RSEA represents does not capture all those persons who have a direct interest in the Defined Benefit Plans. It does not include current employees who have vested rights but are not yet receiving benefits from the plan. There are former salaried employees who have vested deferred rights under the Defined Benefit Plans who are not represented by RSEA.

29 In the course of argument it also emerged that the descriptions of the various beneficiaries used by both parties were not consistent with the definitions contained in the *PBSA*. The *PBSA* defines such beneficiaries as follows:

> **"member"** means, in relation to a pension plan that has not been terminated, an employee, and in the case of a multi-employer plan includes a former employee,
>
> (a) who has made contributions to the plan or on whose behalf an employer was required by the plan to make contributions, and
>
> (b) who has not terminated membership or begun receiving a pension;
>
> **"former member"** means, in relation to a pension plan, an employee or former employee
>
> (a) whose membership has been terminated,
>
> (b) who has begun receiving a pension, or
>
> (c) whose plan has been terminated,
>
> and who retains a present or future entitlement to receive a benefit under the plan.

30 It can be seen from these definitions that RSEA considers that it represents plan former members but not plan members. Counsel for the applicants correctly points out that plan members have a real and substantial interest in the Defined Benefit Plans but do not have any authorized representative in these proceedings. He submits that it is unjust that they lack representation.

31 I can see the force of the applicants' counsel's submission in this regard. However I must consider the application that is actually before me. That application seeks to displace RSEA as the authorized representative of pension beneficiaries which under the *PBSA* definitions include plan former members. It would not be appropriate for me to make a representation order for a smaller class than was applied for.

32 When I was preparing these reasons, I had intended to indicate that I would consider a renewed application from the applicants to represent plan members. However, events have overtaken the necessity for such an application. On March 8, 2012, I made an order authorizing the Petitioners to make payments to the Catalyst Salaried Employees and Pensioners Group on account of their legal costs in *CCAA* matters in this proceeding. That order makes it unnecessary for me to consider a further application for representation of plan members.

33 I am persuaded, however, by the submissions made by counsel for the Superintendant of Pensions that my order appointing RSEA should be amended to make it clear what group it is in fact representing. The definition of the group proposed by counsel is as follows:

Plan former members, persons entitled to or in receipt of survivor benefits and designated beneficiaries of former members.

34 I accept that this is an accurate description of the group represented by RSEA, and is expressed in terms consistent with the definitions contained in the *PBSA*. I consider that I have the jurisdiction under s. 11 of the *CCAA* to make a remedial order clarifying the group that RSEA is authorized to represent. My order of February 7, 2012 is varied accordingly to substitute the above description for the words pension beneficiaries in paragraph 84(a) of the R.I.A.

35 In all other respects the application is dismissed.

Application dismissed.

TAB 5

2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J. No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

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

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

Morawetz R.S.J.

Heard: January 15, 2015
Judgment: January 16, 2015
Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz for Target Corporation
Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")
Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust
Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

Subject: Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.vi Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA)

— Application granted — Initial order granted — Stay of proceedings granted — Stay extended to certain limited partnerships, which were related to or carried on operations integral to applicants' business — Stay of proceedings extended to rights of third party tenants against landlords that arose out of insolvency — Stay extended to T Co. and its U.S. subsidiaries in relation to claims derivative of claims against Canadian operations.

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

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — It was appropriate to grant broad relief to ensure status quo was maintained — Applicants were all insolvent — Although there was no prospect restructured "going concern" solution would result, use of CCAA protection was appropriate in circumstances — Creation of employee trust to cover payments to employees was approved — Key employee retention program (KERP) and charge as security for KERP payments were approved — Appointment of Employee Representative Counsel was approved — DIP Lenders' Charge and DIP Facility were approved — Administration charge and Directors' and Officers' charge approved.

Table of Authorities

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

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — considered

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

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

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

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

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

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

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

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A. G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

U.S. Steel Canada Inc., Re (2014), 2014 ONSC 6145, 2014 CarswellOnt 16465 (Ont. S.C.J.) — considered

Statutes considered:

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

s. 2 "insolvent person" — considered

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

s. 11 — considered

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

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

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

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

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

s. 36 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

Words and phrases considered:

insolvent

"Insolvent" is not expressly defined in the [*Companies' Creditors Arrangement Act* (CCAA)]. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act* . . . or if it is "insolvent" as described in Stelco Inc. (Re), [2004] O.J. No. 1257, [Stelco], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

APPLICATION for relief under *Companies' Creditors Arrangement Act*.

Morawetz R.S.J.:

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

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

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

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

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

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

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

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

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) Should the stay be extended to the Partnerships?

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

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

d) Should the Court approve protections for employees?

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

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

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

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

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

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

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

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

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

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

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

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

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

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

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

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

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

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

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

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

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

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

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

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the

same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

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

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

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

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

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

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

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

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

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

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined

with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

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

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)*], and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

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

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

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

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

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

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

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

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

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

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

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

a) Logistics and supply chain providers;

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

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

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

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

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

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

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

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

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

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

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

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

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

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

c. Whether there is an unwarranted duplication of roles;

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

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

f. The position of the Monitor.

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

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

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

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

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

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

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

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

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

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

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

Application granted.

End of Document

TAB 6

2011 ONSC 7296
Ontario Superior Court of Justice [Commercial List]

Ontario (Securities Commission) v. New Life Capital Corp.

2011 CarswellOnt 15472, 2011 ONSC 7296, 211 A.C.W.S. (3d) 556

Ontario Securities Commission, (Applicant) and New Life Capital Corp. et al., (Respondents)

C. Campbell J.

Heard: November 29, 2011
Judgment: December 8, 2011
Docket: 08-CL-7832

Counsel: James Grant, Danny Nunes, for Receiver
Kevin McEicheran, Heather Meredith — Representative Counsel

Subject: Corporate and Commercial; Securities

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

II Commissions and exchanges
II.3 Investigations

Headnote
Securities --- Commissions and exchanges — Investigations

Costs for receiver.

Table of Authorities

Cases considered by *C. Campbell J.*:

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — followed

Pandya v. Simpson (2006), 2006 CarswellOnt 3482 (Ont. S.C.J. [Commercial List]) — referred to

C. Campbell J.:

1 The Court has before it motions on behalf of the Receiver and Manager of New Life Capital Corp. ("New Life") and its counsel and on behalf of Representative Counsel for investors for approval of fees and disbursements.

2 The Court is aware that the quantum of fees and disbursements of the Receiver and its counsel, which together exceed $2.0 million, and of Representative Counsel of $75,000, might appear excessive.

3 I have examined the detail of the accounts and am aware from regular reporting to the Court of the work done by the Receiver and all counsel.

4 The Receiver was appointed at the request of the Ontario Securities Commission ("OSC") and I am satisfied that their review plus that of Representative Counsel along with my own that in the circumstances the fees be regarded as fair and reasonable.

5 This Receivership became necessary by virtue of what to date has been shown as an elaborate and sophisticated fraud, which has not only lost much of the investors' monies but made its loss difficult to trace and with little prospect for recovery.

6 Much of the time spent by individuals who are experienced and diligent did not prove productive in terms of recovery. The professionals charged at less than their usual billing rates given the public duty aspect of their retainers and did in my view pursue their duties of investigation and recovery with diligence notwithstanding the lack of success.

7 I accept the direction from the authorities, *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.), see also *Pandya v. Simpson* [2006 CarswellOnt 3482 (Ont. S.C.J. [Commercial List])], 2006 CanLII 19443, that in determining the fairness and reasonableness of fees, the Court should not simply look at the hours involved or hourly rate employed, but consider whether they are reasonable given one or more criteria such as cost v. benefit, effort v. recovery but further given the underlying mandate.

8 In this case, I am satisfied that those involved should not be penalized since recovery is small when the mandate was to investigate a fraud and uncover assets if possible. I am satisfied that the time was well spent and the rates charged reasonable, which are approved in terms of the Orders signed.

End of Document

TAB 7

2012 QCCS 4008
Quebec Superior Court

Calder v.KPMG, l.l.p.

2012 CarswellQue 8461, 2012 QCCS 4008, 226 A.C.W.S. (3d) 369, EYB 2012-210436

Sheila Calder, Petitioner v. KPMG LLP, Respondent and RSM Richter Inc. Me Jean Fontaine, Mis en cause

De Wever J.C.S.

Heard: July 25, 2012
Judgment: July 26, 2012
Docket: C.S.Qué.Montréal 500-06-000434-080

Counsel: Me Normand Painchaud, Me Marie-Éve Porlier, Petitioner Sheila Calder
Me Luc Giroux, Me Alexandre Boileau, for KPMG LLP
Me Avram Fishman, for Mis en cause RSM Richter Inc.

Subject: Civil Practice and Procedure

De Wever J.C.S.:

JUDGMENT

1 The Petitioner presents a motion (the Motion) asking the Court to render a Judgment (a) allowing for a discontinuance of the class action proceedings brought by her against Respondent, (b) ordering certain conditions and (c) approving class counsel fees and disbursements.

2 *CONSIDERING* the allegations in the Motion and the Exhibits filed with the Motion, namely:

- Exhibits R-1 to R-20;
- Affidavit of Raymond Massi dated April 18th, 2012;
- Affidavit of Raymond Massi Dated July 24rd, 2012 (Exhibit R-21).

3 *CONSIDERING* the representations of Counsel for all parties;

4 *CONSIDERING* that the Respondent and the Mis en cause consent to this Motion;

5 *CONSIDERING* that the Mis en cause RSM Richter Inc. (the "*Receiver*"), was appointed Receiver of all of the assets, undertakings and properties of Olympus United Funds Corporation / Corporation de Fonds Unis Olympus (the "*Company*"), as well as of Gestion de Placements Norshield (Canada) Ltee / Norshield Asset Management (Canada) Ltd., Norshield Investment Partners Holdings Ltd. / Gestion des Partenaires d'Investissement Norshield Ltee, Olympus United Funds Holdings Corporation, Olympus United Bank and Trust SCC, Group Olympus United Inc. / Olympus United Group Inc. (collectively, the "*Initial Group*"), Honeybee Software Technologies Inc. / Les Technologies de Logiciels Honeybee Inc. ("*Honeybee*") (formerly Norshield Investment Corporation / Corporation d'Investissement Norshield ("*NIC*")) and Norshield Capital Management Corporation / Corporation Gestion de l'Actif Norshield ("*NCM*") (collectively the "*Norshield Companies*");

6 *CONSIDERING* that the Mis en cause Me Jean Fontaine (Mis en cause *Fontaine*), was appointed Representative Counsel to the Retail Investors in the receivership;

7 *CONSIDERING* that, as per the Amended Motion to Institute a Class Action, the Petitioner sought to obtain authorisation to institute a class action for the benefit of the following persons:

> "All Canadian retail investors who incurred an investment loss in Olympus United Funds Corporation (Canada) by reason of their outstanding share capital allotment in the said mutual fund company not having been fully redeemed as of the date of the appointment of its the receiver RSM Richter Inc. on June 29th 2005";

8 *CONSIDERING* that Petitioner was initially represented by Me Peter G. McLarnon until August 23, 2011 when the Court stated that Petitioner was no longer represented by an attorney;

9 *CONSIDERING* that on January 13, 2012, the law firm of Sylvestre, Fafard, Painchaud appeared on behalf of Petitioner;

10 *CONSIDERING* that, meanwhile, on November 30th, 2011, a Plan of Compromise and Arrangement (the "*CCAA Plan*"), Exhibit R-8, was initiated in the Ontario Superior Court of Justice (Commercial List) pursuant to the *Companies' Creditors Arrangement Act* (R.S.C. 1985, c. C-36) (the "*CCAA*");

11 *CONSIDERING* the Sanction Order rendered on March 19th 2012 by the Ontario Superior Court of Justice (Commercial List), sanctioning the CCAA Plan, Exhibit R-19;

12 *CONSIDERING* that the Minutes of Settlement ("*Minutes of Settlement*") dated July 27, 2011, attached hereto as confidential *Exhibit R-10*, were submitted to and reviewed by class counsel;

13 *CONSIDERING* that the CCAA Plan and Minutes of Settlement were supported by Mis en cause Fontaine;

14 *CONSIDERING* that, as per the CCAA Plan and the Minutes of Settlement, subject to the present Motion to discontinue being granted with prejudice, KPMG is prepared, without admission of liability or wrongdoing, to make a payment of CAD$7,500,000 (the "*Settlement Amount*") to the Receiver for distribution to the Creditors holding Proven Claims;

15 *CONSIDERING* that, *inter alia*:

i) 1 797 persons were Retail Investors in funds of the Olympus United Funds Corporation (Olympus Funds);

ii) A Retail Investor is any person who invested in funds in, with or through Olympus Funds;

iii) Retail Investors and members of the proposed class action are the same group of persons;

iv) 1 497 Retail Investors currently hold Proven Claims;

v) A minimum of 38 persons filed Proofs of Claim after the first Claims v Bar Date and after the ultimate Claims Bar Date;

vi) Without including the 38 late Proofs of Claim, the CCAA Plan benefits 83.3% of the total potential members of the class action;

vii) If the 38 late Proofs of Claim are included, 85.4% of the total potential members of the class action would benefit from the CCAA Plan;

16 *CONSIDERING* that, on December 7th and 8th, 2011, a notice of date, time and location of the Approval Meeting, with a letter of instructions and a copy of the CCAA Plan, Exhibit R-15, was sent by the Receiver, by mail, to 1 424 Creditors holding Proven Claims, plus 371 other Retail Investors;

17 *CONSIDERING* that, on February 3, 2012, a reminding letter, Exhibit R-16, was sent by the Receiver, by mail, to 1 500 Creditors holding Proven Claims;

18 *CONSIDERING* that, on December 17, 2011, February 22 and February 23, 2012, the Receiver also published notices of the Approval Meeting in the Globe & Mail, The Gazette, La Presse and the Vancouver Sun, Exhibit R-17 en liasse;

19 *CONSIDERING* that:

i) At the Approval Meeting, the CCAA Plan was approved by Creditors representing a 96.39% majority in number and 95.33% majority in value of Proven Claims held by the voting Creditors;

ii) The CCAA Plan was also approved by Creditors representing a 93.33% majority in number and 86.87% majority in value of Unconfirmed Voting Claims;

iii) Petitioner voted in favour of the resolution to approve the CCAA Plan;

iv) A total of 1 024 Creditors having Proven Claims voted at the Approval Meeting, representing 68.3% in number and 72.7% in value of all Creditors having Proven Claims;

20 *CONSIDERING* that the Respondent and the Mis en cause agree to abide by the following conditions:

i) Respondent will provide to class counsel any and all financial statements it consulted in order to produce and deliver First Horizon Holdings Limited's and Olympus United Funds Corporation's 2000 to 2003 financial statements;

ii) Respondent and Receiver will retain any and all documents and information pertaining to KPMG's mandate with respect to First Horizon Holdings Limited and Olympus United Funds Corporation until a final judgment is rendered in the putative class action against Royal Bank of Canada, RBC Dominion Securities Limited, RBC Dominion Securities Inc. and RBC Capital Markets Corporation in this Court's file 500-06-000435-087;

iii) Mis en cause Fontaine will present a motion in the Ontario Superior Court of Justice for directions as to the determination by the Court of which late Proofs of Claim should be accepted for the purpose of the distribution of the proceeds according to the CCAA Plan; Receiver shall not oppose said motion; hearing of said motion will either take place prior to the distribution of funds by the Receiver or funds will be withheld from distribution so that these creditors will not be prejudiced by a distribution of the Settlement Amount;

iv) Receiver will provide class counsel and this Court with a detailed report confirming final distribution of the proceeds according to the CCAA Plan;

21 *CONSIDERING* that Respondent and Receiver are prepared to contribute 50 000 $ plus applicable taxes in order to cover current class counsel fees and disbursements incurred in the present file;

22 *CONSIDERING* that said class counsel fees and disbursements are reasonable in the present circumstances;

FOR THESE REASONS, THE COURT:

23 *GRANTS* the Motion;

24 *ORDERS* that unless indicated otherwise, the defined terms used in this Judgment have the same meaning as that ascribed to them in the CCAA Plan (Exhibit R-8);

25 *DECLARES* that the CCAA Plan is fair and reasonable and in the best interests of the members of the proposed class in the Proposed Class Action;

26 *DISCONTINUES* with prejudice Petitioner's Amended Motion to Institute Class Action Proceedings upon the following conditions:

i) The Respondent and the Receiver proceed with the execution and delivery of all transaction documents required by the CCAA Plan;

ii) The Respondent pays the Settlement Amount to the Receiver in order for the later to proceed with the distribution according to the CCAA Plan;

iii) The Respondent provides to class counsel any and all financial statements it consulted in order to produce and deliver First Horizon Holdings Limited's and Olympus United Funds Corporation's 2000 to 2003 financial statements;

iv) The Respondent and the Receiver retain any and all documents and information pertaining to KPMG's mandate with respect to First Horizon Holdings Limited and Olympus United Funds Corporation until a final judgment is rendered in the putative class action against Royal Bank of Canada, RBC Dominion Securities Limited, RBC Dominion Securities Inc. and RBC Capital Markets Corporation in this Court's file 500-06-000435-087;

v) Mis en cause Fontaine presents a Motion in the Ontario Superior Court of Justice for directions as to the determination by the Court of which late Proofs of Claim should be accepted for the purpose of the distribution of the proceeds according to the CCAA Plan; said hearing shall take place prior to the distribution of funds by the Receiver, or funds shall be withheld from distribution so that these creditors will not be prejudiced by a distribution of the Settlement Amount;

vi) The Receiver provides this Court with a detailed report confirming final distribution of the proceeds according to the CCAA Plan;

27 *ORDERS* the Respondent and the Receiver to pay directly to class counsel, without affecting the distribution of the Settlement Amount provided by the CCAA Plan, fees and disbursements in the amount of $50 000 plus applicable taxes.

THE WHOLE without costs.

End of Document

TAB 8

2014 ONCA 662
Ontario Court of Appeal

Winwin Capital Management, LLC (Receiver of) v. Oversea Chinese Fund Limited Partnership

2014 CarswellOnt 12895, 2014 ONCA 662, 244 A.C.W.S. (3d) 267

Tom Tong, Receiver for Winwin Capital Management, LLC, Winwin Capital Limited Partnership, J.O.R. & Associates, LLC, Winwin Capital Partners, LP, and Bluejay Investment, LLC D/B/A Vintage International Investment, LLC, Respondents and Oversea Chinese Fund Limited Partnership and Weizhen Tang & Associates Inc., Weizhen Tang Corp. and Weizhen Tang, Appellants (Moving Party)

R.G. Juriansz J.A., H.S. LaForme J.A., P. Lauwers J.A.

Heard: September 17, 2014
Judgment: September 17, 2014
Docket: CA M43810 (C58107)

Counsel: Weizhen Tang, for himself
Alex Zavaglia, for Respondents

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XXIII Practice on appeal
XXIII.6 Time to appeal
XXIII.6.b Extension of time
XXIII.6.b.iv Miscellaneous

Headnote

Civil practice and procedure --- Practice on appeal — Time to appeal — Extension of time — Miscellaneous

Appellant brought motion to extend time to perfect appeal — Chambers judge dismissed motion — Appellant brought motion to review chambers judge's decision on basis that he was not able to meet timeline because he was incarcerated and had spent two months in segregated custody — Motion dismissed — Appeal was without merit and had no prospect of success — Appellant sought to advance other issues that were beyond scope of appeal.

MOTION by appellant to review decision dismissing his motion to extend time to perfect his appeal.

Per curiam:

1 The moving party, Mr. Tang, seeks to review the in-chambers decision of Cronk J.A., dismissing his motion to extend the time to perfect his appeal.

2 On March 25, 2014, Hoy A.C.J.O granted an extension for perfection to May 13, 2014. She noted that Mr. Tang had agreed to the extended timeframe and remarked that there should be no further adjournment. Mr. Tang did not perfect his appeal by May 13, 2014 and instead sought a further extension of time, which Cronk J.A. refused.

3 Before us, Mr. Tang explains that he was unable to meet the extended timeline because he is incarcerated and had spent two months in segregated custody.

4 Accepting that is so, we would nevertheless dismiss this motion. The appeal is without merit. The appeal is taken from the decision of Newbould J., before whom the only issue was the reasonableness of the fees and disbursements submitted by representative counsel. Mr. Tang has no prospects on succeeding on the appeal of Newbould J.'s decision. From his submissions, it is apparent that Mr. Tang seeks to advance other issues that are beyond the scope of the appeal.

5 The motion is dismissed.

6 Costs in favour of the respondent are fixed in the amount of $5,000.00, all inclusive.

Motion dismissed.

End of Document

TAB 9

2016 ONSC 4453
Ontario Superior Court of Justice

Redstone Investment Corp. (Receiver of), Re

2016 CarswellOnt 15863, 2016 ONSC 4453, 271 A.C.W.S. (3d) 248, 40 C.B.R. (6th) 181

IN THE MATTER OF THE RECEIVER OF REDSTONE INVESTMENT CORPORATION AND REDSTONE CAPITAL COROPRATION

AND IN THE MATTER OF A MOTION PURSUANT TO SECTION 101
OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

G.B. Morawetz J.

Judgment: October 5, 2016 *
Docket: CV-14-10495-00CL

Counsel: Ian Aversa, Jeremy Nemers, for Grant Thornton Limited., in its capacity as Receiver and Manager of Redstone Investment Corporation, Redstone Capital Corporation and 1710814 Ontario Inc. o/a Redstone Management Services
Justin Fogarty, Pavle Masic, for RIC Investors
Grant Moffat, Kyla Mahar, for RCC Investors
Harvey Chaiton, Doug Bourassa, for RMS Investors

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XX Miscellaneous

Headnote
Bankruptcy and insolvency --- Miscellaneous

Substantive consolidation — Court appointed receiver over three corporate entities, RI Co., RC Co. and 171 Inc. — Received assigned RI Co. and RC Co. into bankruptcy — RC Co. Investors had priority for any receivership funds over RI Co. Investors by virtue of agreement under which RC Co. was secured creditor of RI Co. — Receiver brought motion to determine whether estates of three companies should be substantively consolidated — Motion dismissed — Extraordinary remedy of substantive consolidation was not appropriate — Elements of consolidation were not present — Assets were held separately — Audited financial statements existed for RI Co. and RC Co. — Governing loan documents clearly set out that companies were separate and that obligations of RI Co. to RC Co. were subject to general security agreement — There was no unity of interest in ownership — Creditor's motivation for investing is not relevant to considerations set out in test for substantial consolidation — There would be significant financial prejudice to creditors of RC Co. if substantive consolidation were ordered.

Table of Authorities

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

Atlantic Yarns Inc., Re (2008), 2008 NBQB 144, 2008 CarswellNB 195, 42 C.B.R. (5th) 107, 333 N.B.R. (2d) 143, 855 A.P.R. 143, 2008 NBBR 144 (N.B. Q.B.) — referred to

Bacic v. Millennium Educational & Research Charitable Foundation (2014), 2014 ONSC 5875, 2014 CarswellOnt 14545, 19 C.B.R. (6th) 286 (Ont. S.C.J.) — referred to

Baker & Getty Financial Services Inc., Re (1987), 78 B.R. 139 (U.S. Bankr. N.D. Ohio) — considered

Chemical Bank New York Trust Co. v. Kheel (1966), 369 F.2d 845 (U.S. C.A. 2nd Cir.) — considered

D'Addario v. Ernst & Young Inc. (2014), 2014 ABQB 474, 2014 CarswellAlta 1424, 18 C.B.R. (6th) 189, (sub nom. *Envision Engineering & Contracting Inc. (Bankrupt), Re)* 595 A.R. 153 (Alta. Q.B.) — considered

Eastgroup Properties v. Southern Motel Assoc., Ltd. (1991), 935 F.2d 245, Bankr. L. Rep. P 74, 055 (U.S. C.A. 11th Cir.) — referred to

In re Augiel/Restivo Baking Co., Ltd. (1988), 860 F.2d 515, Bankr. L. Rep. P 72, 482 (U.S. C.A. 2nd Cir.) — considered

In re Auto-Train Corp., Inc. (1987), 810 F.2d 270, Bankr. L. Rep. P 71, 618 (U.S. Ct. App.) — considered

In re Owens Corning (2005), 419 F.3d 195, Bankr. L. Rep. P 80, 343 (U.S. C.A. 3rd Cir.) — considered

Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — referred to

Northland Properties Ltd., Re (1988), 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257, 73 C.B.R. (N.S.) 146, 1988 CarswellBC 531 (B.C. S.C.) — considered

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

PSINET Ltd., Re (2002), 2002 CarswellOnt 1261, 33 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]) — referred to

Redstone Investment Corp., Re (2016), 2016 ONSC 513, 2016 CarswellOnt 2159 (Ont. S.C.J.) — considered

Sampsell v. Imperial Paper & Color Corp. (1941), 313 U.S. 215 (U.S. Sup. Ct.) — considered

Snider Brothers Inc., Re (1982), 18 B.R. 230 (U.S. Mass.) — considered

Soviero v. Franklin National Bank of Long Island (1964), 328 F.2d 446 (U.S. C.A. 2nd Cir.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

s. 105(a) — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 183(1) — considered

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

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

Words and phrases considered:

substantive consolidation

Under a substantive consolidation, a number of affiliated legal entities, typically corporations, are treated as if they were one entity, resulting in the assets of the various debtors being pooled to create a common fund out of which claims of creditors of all the debtors are jointly satisfied.

MOTION by receiver to determine whether three corporate entities should be substantively consolidated.

G.B. Morawetz J.:

Introduction

1 This motion seeks a determination of whether the estates of three corporate entities — Redstone Investment Corporation ("RIC"), Redstone Capital Corporation ("RCC"), and 1710814 Ontario Inc. o/a Redstone Management Services ("RMS") — should be substantively consolidated.

2 The motion was brought by Grant Thornton Limited in its capacity as court-appointed receiver ("GTL" or the "Receiver") of the property, assets and undertakings of RIC, RCC, and RMS (collectively "Redstone").

3 To facilitate the determination of this issue, Newbould J. granted an order, which, among other things, appointed representative counsel ("RIC Representative Counsel") to represent the interests of parties who hold promissory notes issued by RIC (the "RIC Investors"), representative counsel ("RCC Representative Counsel") to represent the interests of all parties who hold bonds issued by RCC (the "RCC Investors"), and representative counsel ("RMS Representative Counsel") to represent the interests of all parties who invested money with RMS ("RMS Investors").

4 The order of Newbould J. provides that any RIC Investor, RCC Investor, and RMS Investor who is not represented by their respective Representative Counsel will nonetheless be bound by the decision made in respect of this motion.

5 In the absence of substantive consolidation of RIC, RCC, and RMS, the RCC Investors have priority for any receivership funds over the RIC Investors by virtue of an inter-corporate agreement under which RCC is a secured creditor of RIC.

6 The RIC and RMS Investors argue in favour of substantive consolidation; the RCC Investors oppose substantive consolidation; the Receiver put forward an independent legal opinion that it is unlikely substantive consolidation would be ordered in this case.

What is Substantive Consolidation?

7 Under a substantive consolidation, a number of affiliated legal entities, typically corporations, are treated as if they were one entity, resulting in the assets of the various debtors being pooled to create a common fund out of which claims of creditors of all the debtors are jointly satisfied. See: Janis Sarra, "*Corporate Group Insolvencies: Seeing the Forest and the Trees*" (2008) 24 B.F.L.R. 63, at. p. 8.

8 The authority for substantive consolidation of bankrupt estates in Canada lies under the equitable jurisdiction of the Superior Court of Justice granted by s. 183(1) of the *Bankruptcy and Insolvency Act* ("BIA"). See:*A. & F. Baillargeon Express Inc. (Trustee of), Re* [1993] Q.J. No. 884 ("Baillargeon"), at para. 23); *Nortel Networks Corp., Re*, 2015 ONSC 2987 (Ont. S.C.J. [Commercial List]), at para. 216 and *Bacic v. Millennium Educational & Research Charitable Foundation*, 2014 ONSC 5875 (Ont. S.C.J.) .

Background

Procedural History

9 On March 24, 2014, RIC and RCC commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), with GTL appointed as Monitor.

10 On August 8, 2014, the CCAA proceedings were converted to receivership proceedings and GTL was appointed as Receiver of the property, assets and undertakings of RIC and RCC.

11 On August 12, 2014, the Receiver assigned RIC and RCC into bankruptcy. GTL was appointed trustee in bankruptcy of each estate.

12 On September 17, 2014, the receivership proceedings were expanded, on motion by the Receiver, to include RMS.

13 A *Mareva* injunction has been in place since April 4, 2014, restraining RMS and Mr. Edmond Chin-Ho So, the founder of the Redstone group of companies, from encumbering the assets of RMS (the "Mareva Order").

Redstone Incorporation and Ownership Structure

14 RMS was incorporated on September 19, 2006, and it is wholly-owned by Mr. So. RMS was used to process loans until the establishment of RIC. Starting March 14, 2012, RMS provided administrative services to RIC and RCC through a Management Services Agreement (the "MSA"). The services provided to RIC included seeking out borrowers, reviewing suitability for investment, carrying out due diligence, and maintaining a register of outstanding RIC Notes.

15 RIC was incorporated in Ontario on September 25, 2009, and is also extra-provincially registered in Alberta. RIC was wholly-owned by Mr. So until January 28, 2014, when he transferred 60% of the shares to Mr. Eric Hansen. RIC carried on business as a commercial lender to Canadian small to medium-sized businesses and entrepreneurs seeking capital on a short-term basis. Loans ranged from $250,000 to $2,000,000 and were payable within 30 days to one year. RIC financed its lending activities by way of a continuous offering of unsecured promissory notes ("RIC Notes") distributed under exemptions from the prospectus requirement.

16 RCC was incorporated on December 15, 2011, for the purpose of raising registered funds that would be transferred to RIC. RCC is owned 40% by Mr. So and 60% by Target Capital Inc. ("TCI"). RCC ownership was set up with TCI in voting control so that investments in RCC would qualify as a "deferred plan investment" under Canadian income tax legislation, making it eligible for registered savings plans.

17 RCC raised capital through a continuous offering of unsecured fixed rate bonds ("RCC Bonds") under the same exemptions from the prospectus requirement as the RIC Notes. RCC would then transfer the capital it obtained from investors to RIC so that RIC could use the amounts to fund new loans to third parties.

Leadership and Business Operations of Redstone

18 Mr. So created the Redstone group of companies with the aim of providing short-term high-interest loans to small and medium-sized Canadian companies. Borrowing clients came to RIC directly, through a referral, or from a bank or accounting firm. After conducting due diligence consisting of an assessment of their financial position and financing needs, loans would be arranged.

19 Mr. So is an experienced and educated participant in securities' markets. His formal education includes completion of three and a half years of a Bachelor of Commerce program at the King's University in Alberta. Upon leaving university, he joined a boutique corporate finance firm, Harris Brown, where he started as a research analyst and ultimately moved into the role of Manager of Finance and Administration. Throughout his employment, he researched target companies, worked in debt lending, and liaised with clients looking for debt or equity financing.

20 Mr. So was the president and chief executive officer ("CEO") of RIC and RCC until January 28, 2014, when he resigned from these roles following his incarceration for unrelated criminal charges. At that time, Mr. Hansen — who had been a consultant providing marketing and investor relations to the Redstone companies since the summer of 2011 — became the sole director and officer of RIC and RCC, until his own resignation on August 8, 2014, when Redstone entered receivership.

21 RIC and RCC shared the same registered office, located at 101 Duncan Mill Road, Suite 400, Toronto, Ontario. Though it had another registered office, RMS used Duncan Mill Road as its principal address.

22 Mr. So had sole signing authority for transfers between the three Redstone entities, though he contends that Mr. Chris Shaule and Mr. Karim Habib, both of whom had acted under him as portfolio analysts for the Redstone companies under contract, did as well. Mr. Shaule was responsible for maintaining the books and records of RIC and RCC. Mr. So himself maintained the books and records of RMS.

23 Mr. Hansen, together with Mr. Shaule and Mr. Habib, engaged in a review of the Redstone companies' financial position starting January 2014. Various financial irregularities came to light, so the Redstone companies and GTL on March 17, 2014, with a view to potentially acting as a court-appointed monitor in a CCAA filing.

The RCC — RIC Loan Agreement and General Security Agreement

24 To facilitate the transfer of funds, RCC and RIC entered into a loan agreement dated January 23, 2012 (the "Loan Agreement"), which provided for a loan between $250,000 and $25,000,000 that would be drawn upon with RCC's pre-approval. The agreement was signed by Mr. So on behalf of both companies. RCC lent RIC approximately $14.5 million under the agreement.

25 As part of this lending arrangement, RIC granted RCC a security interest over all of its property via a General Security Agreement (the "GSA").

26 Mr. So explained on cross-examination that, though he now understands that RCC is the first-ranking secured creditor of RIC due to the GSA, he did not appreciate that the GSA would have this effect until Redstone commenced proceedings under the CCAA in March 2014. This is a point to which I will return later in these reasons.

27 On March 14, 2014, in anticipation of the CCAA proceedings, Mr. Hansen performed a search under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "PPSA") over each of RIC and RCC. The RIC search revealed that RIC had no secured creditors other than TD Bank. The RCC search showed a registration in favour of RIC. Mr. Hansen caused the discharge of the RIC entry against RCC and filed a registration against RIC in RCC's favour. This registration was made prior to the CCAA proceedings.

Redstone Offerings

The Subscription Process

28 RIC Notes and RCC Bonds were issued under a continuous offering made pursuant to exemptions from the prospectus requirement of securities legislation in British Columbia, Alberta, and Ontario. Both RIC and RCC obtained investors under Offering Memoranda ("OM") — documents provided to investors in exempt distributions that set out the business of the company, including liabilities and risk factors. Neither RIC nor RCC are registered in any capacity with securities regulatory authorities.

29 As part of the subscription process, investors acknowledged receipt of the OM and were advised of the risky nature of the investment in the form of a Subscription Agreement delivered to RIC [1] or RCC, [2] depending on the product to which the investors subscribed (i.e., RIC Notes or RCC Bonds). The investors also provided a Representation Letter, in which the investor set out how they qualified for the exemption used to make the purchase. In addition, RCC Investors provided a specific release for TCI. The Subscription Agreement provides, among other information, that "the Subscriber has received and reviewed the Offering Memorandum" in connection with the purchase of the notes.

30 Each one of the RIC and RCC OM contain a section describing risk factors — "ITEM 8 — RISK FACTORS" — that includes the following statements, respectively:

> The purchase of the [RIC Notes] offered hereby is suitable only for sophisticated investors of adequate financial means who can bear the risk of loss associated with an investment in the Company and who have no need for liquidity in this investment. Prospective investors should give careful consideration to the following risk factors in evaluating the merits and suitability of an investment in the Company. The following does not purport to be a comprehensive summary of all the risks associated with an investment in the Company. Rather, the following are only certain particular risks to which the Company is subject. Management urges prospective investors to discuss such risks and other potential risks in detail with their professional advisors prior to making an investment decision.

> The purchase of [RCC Bonds] pursuant to this Offering should only be made after consulting with independent and qualified sources of investment and tax advice. Investment in the Bonds at this time is highly speculative. The Corporation's business involves a high degree of risk, which even a combination of experience, knowledge and careful evaluation may not be able to overcome. Purchasers of Bonds must rely on the ability, expertise, judgement [sic], discretion, integrity and good faith of the management of the Corporation. This Offering is suitable for investors who are willing to rely solely upon the management of the Corporation and who could afford a total loss of their investment.

The RIC Offerings

31 RIC issued seven OMs between 2010 and 2013 for the purpose of obtaining investments and one non-offering OM to amend a prior memorandum for deficient disclosure of the Loan Agreement.

32 The four OMs issued prior to the Loan Agreement advised that RIC may subsequently enter loans that could supersede the RIC Notes. These OMs state, "The [Notes] are unsecured, and as a result (i) are subordinate to any secured debt which the Company now has or may hereafter incur, and (ii) purchasers will have no direct recourse to the assets of the Company or any other collateral."

33 However, the April 2012 OM failed to disclose the Loan Agreement entered earlier that year as a material contract. The non-disclosure contravened the requirements for a distribution under the s. 2.9 OM exemption that had been used to make distributions in Alberta and British Columbia. This led the securities regulators of those two provinces to issue deficiency letters to RIC with respect to the April 2012 OM, as well as make cease trade orders.

34 RIC settled with the securities regulators by issuing a non-offering OM on August 30, 2012 (the "Rescission OM"), which included and disclosed the RCC Loan and gave RIC Investors who subscribed under distributions based

on the April 2012 OM the opportunity to rescind their investments. One investor accepted the rescission offer and the investment was repaid. The correction brought RIC in compliance with the s. 2.9 requirements. The cease trade orders were revoked by both the Alberta and British Columbia securities commissions in October 2012. [3]

35 The amended April 2012 OM and the two subsequent OMs disclose the Loan Agreement and the GSA under material contracts. They also outlined risks related to the notes, including that "[t]he present and after acquired personal property of the Company is secured in favour of RCC pursuant to the terms of the RCC Loan Agreement."

36 Since its inception, RIC has issued 925 notes raising $65,474,000. As of February 28, 2014, approximately $23,340,145 of this is outstanding to RIC Investors.

The RCC Offerings

37 RCC issued two OMs, one in 2012 and the other in 2013. [4] The Loan Agreement is discussed in both OMs: the 2012 OM indicates that RCC intends to enter a loan agreement with RIC and the 2013 OM indicates the agreement has been executed.

38 Both OMs include a summary of loan terms and advise of the risks pertaining to the loan. They indicate that the loan would "be secured by way of a General Security Agreement securing all present and after acquired personal property of RIC in favour of [RCC]." In terms of investment risk with respect to RIC, the OMs indicate that "[a] return on investment for a Subscriber under this Offering is dependent upon RIC's ability to meet its obligations of principal and interest pursuant to the RIC Loan." Further, the risks section explains that "[t]here is no assurance or guarantee that [RCC] will be repaid the RIC Loan in accordance with its terms, if at all, and any failure of RIC pursuant to its payment obligations will directly affect the ability of [RCC] to pay interest and redeem the Bonds."

39 The 2013 RCC OM appends the RIC OM issued March 1, 2013, and advises RCC Investors to review it as it details the risk factors that pertain to RIC's business.

40 Since its inception, RCC has issued 710 bonds raising $16,486,000. All of the bonds were issued after the Loan Agreement was executed. As of February 28, 2014, approximately $16,317,602 of this is outstanding to RCC Investors.

41 It is of note, though perhaps not of consequence, that the RIC and RCC OMs which reference the Loan Agreement misstate the minimum loan amount as $150,000, when the agreement actually provides that the minimum loan amount is $250,000.

Receivership: Redstone Assets and Claims

42 Each of RIC, RCC, and RMS maintained separate financial records and bank accounts. Transfers between the companies have been consistently recorded in their respective books. The Receiver undertook an examination of each company's assets.

43 The assets of RIC as of February 28, 2014, consist of its lending portfolio, which includes 35 accounts with loans totaling approximately $24,648,000. The loans are generally secured against the assets of the borrowers and personal guarantees from their respective shareholders. The sole material asset of RCC is its loan to RIC, which totals $14,260,116. According to the Receiver's investigation, RIC and RCC are owed $8,344,714 by RMS. [5]

44 The claims against each corporation and the Receiver's realizations for each estate as of June 2015 are as follows:

Entity	Claims accepted	Total claim amount	Estate amount
RIC	501	$23,434,146	$16,886,899
RCC	683	$15,849,360	$273,129

RMS	9	$9,854,219	$169,279

45 After disbursements, the Receiver holds $13,776,924. If the priority of RCC Investors is recognized, they would recover approximately 86% of their claims, and the other investors would obtain minimal, if any, recovery. If the Redstone estates are consolidated and the funds divided equally, each investor would recover approximately 28% of their claim.

Law and Argument

46 The RIC and RMS Investors ask me to exercise my equitable discretion and substantively consolidate the estates. The RCC Investors oppose consolidation. Before turning to the parties' interpretation of the facts and their respective arguments, I provide a brief overview of the law surrounding substantive consolidation in Canada and the United States, followed by a description of each party's characterization of the key facts.

47 In determining the appropriateness of substantive consolidation, all counsel referenced *Northland Properties Ltd., Re*, [1988] B.C.J. No. 1210 (B.C. S.C.), affir'd *Northland Properties Ltd., Re*, [1989] B.C.J. No. 63 (B.C. C.A.), where the court stated that in determining whether to impose substantive consolidation, the court must balance the economic prejudice to the creditors resulting from continuing corporate separateness against the economic prejudice caused by consolidation. To establish that substantive consolidation is warranted, it must be shown that the "elements of consolidation" are present, and that the consolidation would prevent a harm or prejudice or would effect a benefit generally. The "elements of consolidation" adopted in *Northland* from United States case law were as follows:

(i) difficulty in segregating assets;

(ii) presence of consolidated financial statements;

(iii) profitability of consolidation at a single location;

(iv) co-mingling of assets and business functions;

(v) unity of interests in ownership;

(vi) existence of inter-corporate loan guarantees; and

(vii) transfer of assets without observing corporate formalities.

Substantive Consolidation in the United States: Three Approaches to Assessing What is Just and Equitable in the Circumstances

48 A brief overview is included to contextualize the approach Canadian courts have adopted thus far, given the relatively limited treatment of this concept in Canada, before addressing the parties' arguments on the application of substantive consolidation to their dispute.

49 In the United States, the determination is made under the courts' equitable jurisdiction, similar to Canada. American courts have taken divergent approaches that has led to the articulation of several tests, the first regarding retaining flexibility but recently indicating that orders should be limited to very specific circumstances.

50 The power of U.S. courts to order substantive consolidation is derived not from explicit statutory provisions but rather from the Bankruptcy Court's general powers in s. 105(a) of the *Bankruptcy Code* "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the *Bankruptcy Code*]". Substantive consolidation has been recognized by the Supreme Court as a power under this section in *Sampsell v. Imperial Paper & Color Corp.* [6] Given its foundation upon an equitable basis, in determining whether to order substantive consolidation

courts are guided by what is just and equitable in the circumstances. Three leading approaches led to the evolution of this determination.

First Approach: Three-Part Test

51 In *In re Auto-Train Corp., Inc.*,[7] the Court of Appeals for the District of Columbia Circuit moved away from relying on a list of factors to ascertain whether there has been an abuse of the corporate form and instead adopted a three-part test for determining whether or not to grant a substantive consolidation request:

1. Is there a substantial identity between the entities to be consolidated?[8]

2. Is consolidation necessary to avoid some harm or to realize some benefit?

3. If a creditor objects and demonstrates that it relied on the separate credit of one of the entities and that it will be prejudiced by the consolidation, will the demonstrated benefits of consolidation heavily outweigh the harm to the objecting creditor?

Second Approach: Two-Part Test with a Focus on Reliance

52 In *In re Augie/Restivo Baking Co., Ltd.*,[9] the Court of Appeals for the Second Circuit departed from previous cases where determinations were made without regard for creditor reliance and were only based on corporate veil principles pertaining to respecting corporate separateness,[10] and instead set a two-part approach with a focus on reliance:

1. Have creditors dealt with the entities as a single economic unit rather than relying on their separate identities in extending credit?

2. Are the affairs of the debtors so entangled that consolidation will benefit all creditors?

Third Approach: Stricter Focus on Prepetition and Postpetition Consequences of Consolidation

53 In *In re Owens Corning*,[11] the Third Circuit elected to set out a stricter approach, rejecting *Auto-Train* as creating "a threshold not sufficiently egregious and too imprecise for easy measure" and disapproving of the checklist approach used in assessing corporate separateness, holding instead that substantive consolidation is appropriate only when an applicant proves either that:

1. Prepetition, the entities for whom consolidation is sought disregarded separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity, or

2. Postpetition, their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.

54 Interestingly, all three approaches referenced above focus on the administrative costs of separating the entities with consequent detrimental effect on all creditors. In the case at bar, this is not a factor as the assets are held separately and the books and records, although they may not be pristine, are such that the Receiver can identify the creditors of each entity.

55 I now return to the investors' key positions on this issue in the context of Redstone's receivership.

Credibility, Relevance and Findings of Facts

RIC Investors

56 In support of their submission that consolidation is appropriate, counsel for the RIC Investors contends that the Redstone companies operated as a single entity that shared business functions, resources, personnel, and cash flow,

and whose assets are intermingled due to inaccurate recordkeeping. RIC Representative Counsel further highlights the following facts:

- Redstone operates a centralized cash management system, with no protocol of any kind regarding the movement of monies between RCC, RIC or RMS — even though the companies have separate bank accounts, the funds flowed between entities to serve operational needs without having any rules, policies or regulations in place in respect of recording inter-company transfers;

- Evidence by Redstone staff that they saw no distinction between how funds were advanced between RCC and RIC or RMS and RIC, and that they treated the companies interchangeably;

- Redstone personnel discovered millions of dollars of unexplained transactions, bearing the hallmark of fraudulent activity;

- The Receiver discovered an error in the RCC accounting ledger — namely, RCC bond purchases between June and September 2012 totalling $713,722 that were not recorded in the RCC accounting ledger, but the funds from which were paid to RCC and then transferred to RIC — that renders unreliable the Receiver's assertion in its Fourth Report that "transfers between bank accounts were recorded in great detail in the books of records of each of RIC and RCC";

- According to the terms of the MSA, all expenses were to be borne by RMS, but in practice RIC generally held the bulk of cash and covered expenses incurred for the benefit of all three companies, such as fees for any market dealers involved in facilitating the sale of RIC Notes or RCC Bonds, accounting and legal fees or salaries for staff;

- Mr. So's evidence that only in 2013 were attempts made to improve recordkeeping within Redstone. Further, the records before late 2013 are not accurate and make it impossible to know the true inter-company balances;

- The RMS books were never subject to an audit, and though Mr. So employed "auditors" in respect of RIC and RCC, no evidence has been produced as to the quality or assurance level of the audits, nor are any reports or working notes included in the record;

- Mr. So's evidence that he viewed the companies as a single entity, which is how he represented them to investors, and he in fact intended, in late 2013, to amalgamate RIC and RCC and wind down RMS, as a part of which the RIC Notes and RCC Bonds would be exchanged for a new and identical security;

- The representations by Mr. So and Redstone personnel to the Exempt Market Dealers (EMD) who promoted Redstone products were that investments in each company would be treated equally. The marketing materials for RIC and RCC distributed to investors were virtually identical, both describing the same investment terms, interest rates, and risks, and both failing to reference any priority for RCC Investors;

- Evidence of investors that they were led to believe RIC, RCC and RMS were interchangeable, and most investors were never informed of the Loan Agreement and GSA.

RMS Investors

57 Counsel to RMS Investors supports the position of the RIC Investors. In particular, RMS points to evidence by RMS and RIC Investors that they were led to believe there was no distinction between RIC and RMS or RIC and RCC. Further, RMS notes that there is no evidence that the RCC Investors relied on their priority position in making their purchases. Counsel also points to the evidence of various Redstone investors and others, who swore they made investments in Redstone and were led to believe that there was no distinction between RIC and RMS. Additionally, some of these investors swore that they were not told that RCC had a priority position and that they either did not receive an OM or only received one after the investments were made. Further, RMS Representative Counsel highlights the following evidence:

• Mr. Farouk Haji, whose affidavit detailed the process an Exempt Market Dealing Representative is required to follow prior to a client undertaking a new trade in an exempt market product, did not discuss whether he advised any clients of the priority position of RCC over RIC;

• There is no evidence from any RCC Investor that they relied on the priority position in making their investments;

• Ms. Cynthia Lewis' second investment in RIC, made in February 2011 in the amount of $540,000, was not treated in accordance with the OM in place at the time: she was first assigned RIC security against the ultimate borrower that was discharged in 2011 without her knowledge, and when her promissory note from RIC matured and rolled over in the February 16, 2012, after having already rolled over a number of times, the replacement note was issued by RMS rather than RIC but the language of the note nonetheless required interest payments from RIC. Ms. Lewis advises that Mr. So explained the rollover to RMS as due to RMS being for "friends and family";

• Mr. Chad MacDonald received a promissory note from RMS and RMS agreed to assign him a portion of the security it obtained from the ultimate borrower, Green Dot Finance Inc. However, the Green Dot loan, which formed the security for the investment and which appeared to be an asset of RIC, was sold for full face value to Maple Brook.

RCC Investors

58 RCC Representative Counsel contends that consolidation would unduly prejudice the RCC Investors' interests as this is not a case where corporate formalities were not maintained or the liabilities were not readily identifiable. They point to the following in support of this position:

• The creditor pools of RIC and RCC are different, the creditors invested in each entity based on distinct OMs prepared on a single-entity basis, and the creditors of each entity are identifiable;

• RIC, RCC and RMS each maintained separate bank accounts. The evidence available to the Receiver and its consultants indicated that Mr. So did not treat each of these as one bank account. Transfers between bank accounts were recorded with great detail in the books and records of RIC and RCC;

• On cross-examination, Mr. So's evidence was that he assumed inter-company transfers were recorded in the books of the respective corporations as either receivables or payables. In addition, he advised staff to make best efforts to ensure the transactions pertaining to an entity stay within that entity and be processed through the correct account. He also advised them to record inter-company transfers where necessary. It was his belief and/or hope that this was undertaken properly;

• The assets of each Redstone corporation are different and identifiable. RIC's assets as of February 28, 2014, consisted of its lending portfolio which included 35 accounts with loans totaling approximately $24.648 million. The loans were all secured against the assets of the underlying borrower, and typically were supported by personal guarantees from shareholders where the borrower was a corporation. RCC's sole material asset is the loan receivable from RIC, on a secured basis in the amount of $14,260,116. The assets of RMS are identified by Mr. So in his sworn affidavit as several loan receivables, office furniture and the like, which he valued at $4,706,510. The assets and liabilities of RMS have been the subject of a forensic review undertaken by GTL in its capacity as Monitor and Receiver;

• RIC and RCC had separate audited and unaudited financial statements and did not prepare consolidated financial statements. The most recent audited financial statements for RIC and RCC were dated August 31, 2012. RMS also maintained separate financial records;

• Note 6 of the audited and unaudited financial statements of RCC attached to the RCC 2013 OM states that the loan from RCC to RIC is secured by way of a GSA on all present and after-acquired property of RIC.

Mr. So's Evidence on Cross-Examination

59 As articulated above, counsel to RCC relies on the evidence of Mr. So to support its position. I have reviewed the affidavits and the transcript of Mr. So's cross-examination and have come to the conclusion that his evidence is unreliable and should be disregarded.

60 In many cases, the answers provided by Mr. So on cross-examination belie the fact that he is highly educated and very experienced in the financial field. Mr. So was asked about the inter-company transfers between each of RMS, RIC and RCC. Mr. So answered that when such inter-corporate transfers occur, there would be an appropriate entry, whether a receivable or payable, in the relevant books and records of those companies.

61 Mr. So was also asked about the Cease Trade Order that related to RCC and RIC. He was asked how the issue was resolved. Mr. So answered as follows:

> While Craig Betham took . . . you know, reformatted both OMs for us. And one of the things at that time was that . . . the original RCC OM was a separate OM that was created. Then, what the regulators wanted us to do, because these two companies are basically the same company, or related companies, they wanted us to do a wrapper, a wrap-around OM, so that the RIC OM had to be included in the RCC OM. That was done. Then, the second thing was we had to offer rights of rescission to all investors that invested in the previous OM, so that they had the proper information to decide if they were going to rescind or remain in the company. And then once those two things were done, we were restored back into good standing with the regulators.

62 In addition, Mr. So was asked whether he had certain friends and family who are RIC Investors. He answered in the affirmative. He also understood that if the RIC Investors were successful on this substantive consolidation initiative, it would be reflected in the ultimate distribution to the investors.

63 Mr. So was asked questions with respect to the GSA provided by RIC to RCC, executed January 23, 2012.

> Question 518: Can you tell me, in your own words, what you think this document purports to do?
>
> Answer: I remember that this was when we created Redstone Capital. It was what . . . I believe the lawyers, for Craig Skauge . . . I can't remember who at that time had told us that it was to be put in place in order to make RCC RSP eligible or something of that sort, that there had to be a securities agreement in place into RIC. But one of the things that I wanted to add, was that I had always spoken to him about, that this was, is in *pari passu* with all RIC Investors . . .
>
> Question 528: So it's your evidence today that starting from your years at Harris Brown and subsequently your years at Redstone, where your primary function was to lend money to entities to take security for those loans, that you did not understand what this general security agreement did?
>
> Answer: I understood that RCC was taking a GSA at RIC. Yes, I understood that.
>
> Question 529: So we'll start again. When you executed this document in January 2012.
>
> Answer: Yes.
>
> Question 530: [D]id you understand that the effect of this document would be to grant a security interest in and to RCC, with respect to RIC's assets?
>
> Answer: I understood that it would be granting a security interest. Yes I did . . .
>
> Question 531: Okay.

Answer: My understanding . . . and which is why all marketing material, and the way that Redstone has always been presented to all investors and EMDss, was that everything was *pari passu*. The only difference between RCC and RIC was RCC was registered funds and RIC were non-registered.

Question 532: I understand that, but I guess. I just want to make sure I understood what you're saying to me. We have established that you understand what a general security agreement is.

Answer: Yes.

Question 533: And what a general security agreement does? And the effect of a general security agreement.

Answer: Yes.

Question 534: And you agree that this document has the effect of a typical general security agreement?

Answer: Yes.

Question 535: And you agree that you have executed this document.

Answer: Yes.

Question 536: But you're telling me that you always had the impression that RIC and RCC would be treated on a *pari passu* basis. I have a hard time how that holds together.

Answer: Well because that's what I had spoken to the lawyers about when we were creating the RCC OM and everything. That it was . . . everyone was always to be *pari passu*. And we were never told differently and that is. Mr. Hansen was even involved in that, when we were creating RCC. I never once told that RCC has a priority over RIC. . . .

64 The foregoing interchange establishes, in my view, that Mr. So's evidence is completely unreliable. It is inconceivable that an individual with a background education in commerce and finance, followed by a lengthy career in the financial industry, could make the statements that Mr. So did. He understands the effect of a GSA, which is that one party is granted security over its assets in favour of another party (the secured party). This is a fundamental and elementary financing concept. I fail to understand how Mr. So can appreciate the effect of a GSA in situations where a Redstone entity is lending money to a borrower, yet fail to understand the effects of the same type of agreement when granted by RIC in favour of RCC. It is impossible to reconcile these positions.

65 I find that Mr. So's attempt to explain this anomaly arose *ex post facto*. Mr. So arrived at his *pari passu* understanding not at the time of granting the security, but subsequent to the collapse of Redstone and the initiation of these proceedings in an attempt to justify that the three entities in question should be consolidated for distribution purposes. The fact that substantive consolidation, if granted, favours his family and friends, cannot be overlooked.

66 I am satisfied that Mr. So knew that RCC was created in order that it could attract eligible funds for registered investors; that RIC was a separate entity from RCC; that RIC granted a security agreement in favour of RCC; and that the effect of granting such a security agreement resulted in RCC being a secured party holding a security interest in the assets of RIC and, therefore, having priority over RCC.

67 The evidence of Mr. So is replete with contradictions. I find his evidence to be unreliable in all respects, such that I have disregarded it in its entirety. Obviously, this finding is extremely detrimental to the position put forth by counsel on behalf of both RIC Investors and RMS Investors. RMS Investors, to the extent they rely on the evidence of Mr. So.

Investor State of Mind

68 Counsel for the RMS Investors also pointed to evidence of a number of RMS and RIC Investors who claimed they were led to believe that there was no distinction between RIC and RMS or RIC and RCC, and further that there was no evidence that RCC Investors relied on their priority position in making their purchases. In support of this argument, the RMS Investors highlighted the evidence of Cynthia Lewis, Chad MacDonald, Nick DeCesare, Robert Dodd, Dario Mirabella and Ronald Smithers. In my view, the evidence of these individuals carries little weight.

69 Their evidence has to be discounted because it is subjective evidence provided today about their state of mind and knowledge at the time they made the investment a number of years ago. Their evidence is also at odds with the language contained in the loan agreement and OMs. The evidence is suspect as these parties are aware that it is in their best financial interest to take the position that they were led to believe there was no distinction between RIC, RMS and RCC. Indeed, it would be surprising if they did not take such a position. Investors in RIC and RMS stand to receive nominal distribution unless there is substantive consolidation. This is in contrast to a projected distribution of 28% if there is substantive consolidation.

70 A review of the authorities also convinces me that their evidence is of very limited utility and is largely irrelevant. The "elements of consolidation" adopted from U.S. case law were referenced in *Northland*, supra. Absent from this list, and for good reason, is the knowledge or state of mind of the investor or creditor at the time that investments were made or credit was advanced.

71 In my view, a creditor's motivation for investing is not relevant to any of the considerations set out in the test for substantial consolidation. I considered this issue in a preliminary motion, indexed as *Redstone Investment Corp., Re*, 2016 ONSC 513 (Ont. S.C.J.), at paras. 11 — 15:

> [11] RCC Representative Counsel submits that the evidence in the Bach Affidavit is relevant as it shows Mr. Bach's motivation for investing in RCC and the actual prejudice he will suffer in the event of substantive consolidation.
>
> [12] The test for substantive consolidation was recently summarized in *Bacic v. Millennium Educational and Research Charitable Foundation*, 2014 ONSC 5875, 19 C.B.R. (6th) 286 at para 113.
>
> It requires the balancing of interest of the affected parties and an assessment whether creditors will suffer greater prejudice in the absence of consolidation and the debtors or any objecting creditors will suffer from its imposition. Regard must be had to the:
>
> a) Difficulty in segregating assets;
>
> b) Presence of consolidated Financial Statements;
>
> c) Profitability of consolidation at a single location;
>
> d) Commingling of assets and business functions;
>
> e) Unity of interests in ownerships;
>
> f) Existence of intercorporate loan guarantees; and,
>
> g) Transfer of assets without observance of corporate formalities.
>
> in order to assess the overall effect of the consolidation. (*Atlantic Yarns Inc., Re*, 2008 NBQB 144 (N.B. Q.B.); *Northland Properties Ltd., Re*, [1988] B.C.J. No. 1210 (B.C. S.C.), affirmed in *Northland Properties Ltd., Re* (1988), [1989] B.C.J. No. 63 (B.C. S.C.) and *PSINET Ltd., Re* (2002), 33 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]).

[13] In *PSINET*, *supra*, Farley J. held, at para. 11 that consolidation by its very nature will benefit some creditors and prejudice others and, as a result, it is appropriate to look at the overall general effect. This approach was affirmed in *Atlantic Yarns*, *supra*. In *J.P. Capital Corp.*, Re (1995), 31 CBR (3d) 102 (Ont. S.C.) Chadwick J. expressed concern about the consolidation of actions without knowing the effect it will have on all creditors. Chadwick J. wrote, "Although expediency is an appropriate consideration, it should not be done at the possible prejudice or at the expense of any particular creditor." In considering the relevance of *JP Capital* to this matter, I note that the *J.P. Capital* involved an "extremely complex bankruptcy" touching on a number of companies and assets, the parties were in the midst of cross-examination, and there were issues raised with respect to the actual corporate structure of the various companies and the tracing of the assets in relationship to the parties (para.17)."

[14] In my view, Mr. Bach's motivation for investing in RCC is not relevant to any of the considerations set out in the test for substantive consolidation. As a result, in determining the overall general prejudice to both sets of creditors, it seems to me that if the evidence is not relevant, refusing leave cannot be prejudicial to Mr. Bach, as an individual creditor. The second part of the Rule 39.02(2) is not applicable as no cross-examination took place and since I have determined that the content of the affidavit is not relevant to the determination of the Substantive Consolidation Hearing, the fourth part of the test need not be considered.

[15] Accordingly, since I have concluded that the Bach Affidavit does not meet the relevance criteria of the Rule 39.02(2) test, the motion seeking leave to deliver the Bach Affidavit as evidence in the Substantive Consolidation Hearing is dismissed.

72 There is a great danger to placing any weight on the state of mind of the investor or creditor in the substantive consolidation analysis. Human nature is such that individuals would be far more likely to recite or recall a fact situation, which, if acceptable, puts them in a better financial position. All that is required would be for the individual to take the position that a number of the RIC Investors and RMS Investors are taking in these proceedings, namely, that they did not know that RCC had priority. This presupposes that the investors did not read the governing documents. It presupposes that the EMDs either did not read the governing documents or did not advise the Investors of the contents of the governing documents.

73 To recognize state of mind would result in an unacceptable level of commercial uncertainty where written contracts could be overridden by parties who voluntarily choose not to read the governing documents.

74 Counsel acknowledges that the consolidation of bankrupt estates was recently authorized in *Bacic*, supra and *D'Addario v. Ernst & Young Inc.*, 2014 ABQB 474 (Alta. Q.B.). In both cases, the assets of the corporations, business functions and financial statements were all co-mingled. However, in deciding to consolidate the estates, the court in each decision explicitly noted that consolidation would not be to the prejudice or expense of a particular creditor. In particular, the court in *D'Addario* found that "no creditor would benefit from consolidation at the expense of any other". That is clearly not so in this case. The projected distribution for RCC Investors would be reduced from 86% to 28%.

Legal Argument

75 Counsel to RMS Investors referenced the text of Dr. Janis Sarra, *Rescue: The Companies' Creditors Arrangement Act*, 2d ed (Toronto: Carswell, 2013), where the author explains the process to be followed in assessing whether to consolidate estates:

> Generally, the courts will determine whether to consolidate proceedings by assessing whether the benefits will outweigh the prejudice to particular creditors if the proceedings are to be consolidated. In particular, the court will examine whether the assets and liabilities are so intertwined that it is difficult to separate them for purposes of dealing with different entities. The court will also consider whether consolidation is fair and reasonable in the circumstances of the case.

76 Based on the jurisprudence canvassed above, there are two related streams of case law in Canada on the issue of substantive consolidation in either a restructuring or a bankruptcy situation: First, the *Northland* line of cases involving analysis of: (i) the elements of consolidation; and (ii) whether consolidation would prevent a harm or prejudice or would effect a benefit generally. Second, there is a more ad hoc approach involving fact-based analysis guided by the equities.

77 In this case, the essential effect of consolidation would be to avoid the priority arrangement purportedly created by the loan documents, resulting in moderate recoveries to the investors in each of the Redstone entities. Absent consolidation, RCC Investors will receive a projected 86% recovery. RCC Investors and RMS Investors would receive a nominal recovery at best.

78 The following general principles respecting the doctrine of substantive consolidation represent a summary of Canadian case law:

(i) Are the elements of consolidation present, such as the intertwining of corporate functions and other commonalities across the group?

(ii) Do the benefits of consolidation outweigh the prejudice to particular creditors?

(iii) Is consolidation fair and reasonable in the circumstances?

79 Based on the foregoing — and knowing that the evidence of Mr. So carries no weight and that the evidence of the investors is of very limited import — the analysis of the *Northland* factors supports maintaining the status quo.

(i) Difficulty in Segregating Assets

80 The assets of each of RIC, RCC and RMS are easily identifiable, are not difficult to segregate, and have been segregated as is demonstrated by the Receiver's Statement of Receipts and Disbursements.

(ii) Presence of Consolidated Financial Statements

81 RIC, RCC and RMS did not prepare consolidated financial statements. All financial statements, audited and unaudited, were prepared on an entity-by-entity basis. The financial statements of RIC and RCC were audited. This factor supports maintaining the status quo.

(iii) Co-mingling of Assets and Business Functions

82 The only material asset of RCC is the secured inter-company receivable from RIC, which is not co-mingled with any assets of RIC or RMS. To the extent that any business functions were co-mingled, this can be explained by the MSA between RMS and RIC and the terms of the OMs that confirm that RIC was liable for all costs incurred by RCC relating to RCC's Offering. As such, this factor supports maintaining the status quo.

(iv) Unity of Interests in Ownership

83 There is no unity of interest in ownership. RIC, RCC and RMS have different ownership structures. RIC is owned 60% by Mr. So and 40% by Mr. Hansen. RCC is owned 60% by TCI and 40% by Mr. So. RMS is wholly-owned by Mr. So.

(v) Existence of Inter-Corporate Loan Guarantees

84 There are no inter-corporate loan guarantees of any third party financing. This factor supports maintaining the status quo.

(vi) Transfer of Assets Without Observance of Corporate Formalities

85 While there is evidence of transfers of assets without observance of corporate formalities, the preponderance of evidence relates to transfers from RIC/RCC to RMS. Prior to the CCAA filing, it was determined that RMS received significant unauthorized cash transfers from RIC estimated to be approximately $8.5 million. The Receiver completed an investigation and prepared an analysis relating to the source and uses of funds relating to RMS. As a result of the analysis, the Receiver determined that there is a total of approximately $8.3 million due from RMS to RIC and RCC. As such, in my view, this factor supports maintaining the status quo.

Prejudice to Creditors

86 In addition to a review of the factors set out above, the court will consider the relative prejudice to creditors that will result from substantive consolidation. In this case, substantive consolidation eliminates the secured inter-company receivable, while it is the only material asset of RCC. The result is, therefore, from an objective standpoint, extremely prejudicial to the RCC Investors as their recoveries (based on available information in the Receiver's Fourth Report) would go from 86% in a status quo scenario to 28% in a substantively consolidated estates scenario. Conversely, the RIC Investors and RMS Investors benefit from the consolidation from effectively no recovery in a status quo scenario to a 28% recovery in a substantively consolidated scenario.

87 Investors in RCC and RIC took calculated risks based upon OMs that disclosed the RCC GSA and RIC loan. The RIC Investors acknowledge that these were risky investments and that they may not recover their investments. Now, facing the very risk they previously acknowledged, the RIC Investors seek to ameliorate the prospect of a negligible recovery against RIC to the prejudice of RCC Investors.

88 As Trainer J. explained in *Northland*, "it would be improper for the court to interfere with or appear to interfere with the rights of the creditors," and that such an appearance would be created if the estates are ordered merged for all purposes. This caution rings true in this case. To order substantive consolidation would require me to ignore written contracts and rely on subjective *ex post facto* evidence.

Conclusion

89 Substantive consolidation is an equitable remedy. The primary aim of this extraordinary remedy is to ensure the equitable treatment of all creditors. It is recognized that as consolidation effectively redistributes wealth among creditors of the related entities, individuals will invariably realize asymmetric losses or gains (see: M. MacNaughton and M. Arzoumanidis, "*Substantive Consolidation in the Insolvency of Corporate Groups: A Comparative Analysis*" (2007), ANNREVINSOLV 16, at p. 3).

90 In this case, I have concluded that it is not appropriate to invoke this extraordinary remedy. The assets are held separately and audited financial statements exist for RIC and RCC. The governing loan documents clearly set out that the corporations are separate and that the obligations of RIC to RCC are subject to a GSA. Referencing *Northland*, the "elements of consolidation" are not present. Furthermore, there would also be significant financial prejudice to creditors of RCC if substantive consolidation were ordered.

91 In the result, an order shall issue that the three corporate entities are not be to substantially consolidated.

Costs

92 The parties have previously provided costs outlines to the court, which should be incorporated into a draft order for my review.

Motion dismissed.

Footnotes

* A corrigendum issued by the court on October 17, 2016 has been incorporated herein.

1 The RIC OMs state that the subscription documents have to be delivered to RIC at its Duncan Mill Road address for all except subscriptions under RIC's first two OMs: the July 8, 2010 OM directs that forms be sent to Harris Brown & Partners Ltd. as RIC's agent, and the January 20, 2011 OM directs that forms be sent to Sterling Grace as RIC's agent. On February 20, 2014, the registration of Sterling Grace was suspended by the Ontario Securities Commission for several failures, including with respect to acting as an exempt market dealer facilitating subscriptions to Redstone Investment Corporation.

2 The RCC OMs state that the subscription documents be sent to RCC at its Duncan Mill Road address.

3 The cease trade orders were issued on June 7, 2012 in BC and June 15, 2012 in Alberta. The orders were fully revoked on October 4, 2012 in BC and October 10, 2012 in Alberta.

4 The RCC OMs are dated April 3, 2012 and March 1, 2013.

5 As a result of the *Mareva* order, the Monitor undertook a forensic review of two of RMS's bank accounts at the TD Bank. RMS also maintains an account with National Bank. The Receiver also completed an investigation and prepared completed an analysis relating to the sources and use of funds relating to RMS. As a result of this analysis, the Receiver determined that there was a total of $8,344,714 due from RMS to RIC and RCC.

6 313 U.S. 215 (U.S. Sup. Ct. 1941).

7 810 F.2d 270, Bankr. L. Rep. P 71, 618 (U.S. Ct. App. 1987). This test has been adopted by the D.C. Circuit and the Eleventh Circuit: see *Eastgroup Properties v. Southern Motel Assoc., Ltd.*, 935 F.2d 245, Bankr. L. Rep. P 74, 055 (U.S. C.A. 11th Cir. 1991). The necessity of consolidation requirement follows from *Snider Brothers Inc., Re*, 18 B.R. 230 (U.S. Mass. 1982) and the balancing of interests element flows from *Baker & Getty Financial Services Inc., Re*, 78 B.R. 139 (U.S. Bankr. N.D. Ohio 1987).

8 This is a typical *alter ego* inquiry made in corporate veil cases and generally involves consideration of the seven factors set out in In re Vecco Construction Industries, Inc., 4 B.R. 407 (Bankr. E.D. Va. 1980): 1. Difficulty in segregating assets; 2. Presence of consolidated financial statements; 3. Profitability of consolidation of a single location; 4. Comingling of assets and business functions; 5. Unity of interests in ownership; 6. Existence of inter-corporate loan guarantees; and 7. Transfers of assets without observance of corporate formalities.

9 860 F.2d 515, Bankr. L. Rep. P 72, 482 (U.S. C.A. 2nd Cir. 1988). This test has been adopted by the Second and Ninth Circuits and followed by the Fourth Circuit.

10 For example, in *Soviero v. Franklin National Bank of Long Island*, 328 F.2d 446 (U.S. C.A. 2nd Cir. 1964), the Second Circuit Court of Appeals focused the inquiry on corporate veil-based principles and specifically looked to whether there was an abuse of the corporate form or structure, including whether the companies at issue operated a single business, had the same directors, shareholders, and staff, or shared accounting records. In *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845 (U.S. C.A. 2nd Cir. 1966), the court found that substantive consolidation can be authorized where the finances of the entities are hopelessly entangled despite a creditor's reliance on the separate credit of the debtor companies.

11 419 F.3d 195, Bankr. L. Rep. P 80, 343 (U.S. C.A. 3rd Cir. 2005).

End of Document

TAB 10

2014 ONSC 5274
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2014 CarswellOnt 11369, 2014 ONSC 5274, 244 A.C.W.S. (3d) 10

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

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Newbould J.

Heard: July 25, 2014
Judgment: September 11, 2014
Docket: 09-CL-7950

Counsel: Benjamin Zarnett, Graham Smith, for Monitor and Canadian Debtors
Ken Rosenberg, for Canadian Creditors' Committee
Michael Barrack, D.J. Miller, Michael Shakra, for UK Pension Claimants
Tracy Wynne, for EMEA Debtors
Kenneth Kraft, for Wilmington Trust, National Association
Richard Swan, Gavin Finlayson, Kevin Zych, for Ad Hoc Group of Bondholders
Shayne Kukulowicz, for US Unsecured Creditors' Committee
John D. Marshall, for Law Debenture Trust Company of New York
Brett Harrison, for Bank of New York Mellon
Andrew Gray, Scott Bomhof, for US Debtors

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.c Application of Act
XIX.1.c.i Relationship between Act and Bankruptcy and Insolvency Act

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Relationship between Act and Bankruptcy and Insolvency Act

Canadian debtor and its US affiliates (collectively N Co.) issued unsecured pari passu notes under three separate bond indentures — All notes were payable by entities of N Co. in both Canada and US, either as maker or guarantor — Canadian debtor filed for and was granted protection under Companies' Creditors Arrangement Act (CCAA) — Proceedings were "liquidating CCAA" proceedings in that debtor was for all intents and purposes liquidated — Bondholders brought claim against debtor for principal and pre-filing interest under terms of bonds — Bondholders also brought claim for post-filing interest — Aside from bondholders, main claimants against debtor were pensioners who, unlike bondholders, had no contractual right to interest — Claim for post-filing interest dismissed — There was no provision in CCAA that would not permit application of common law "interest stops rule" in CCAA proceedings, and there were policy reasons in favour of applying it — To permit some creditors' claims to grow disproportionately to others during stay would not maintain status quo — Moreover, this would encourage creditors whose interests were being disadvantaged to immediately initiate bankruptcy proceedings, thereby threatening objectives of CCAA — Bankruptcy and Insolvency Act (BIA) and CCAA are parts of integrated insolvency scheme, and courts will avoid interpretations of such acts that give creditors incentives to prefer BIA processes.

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

Canadian debtor and its US affiliates (collectively N Co.) issued unsecured pari passu notes under three separate bond indentures — All notes were payable by entities of N Co. in both Canada and US, either as maker or guarantor — Canadian debtor filed for and was granted protection under Companies' Creditors Arrangement Act (CCAA) — Proceedings were "liquidating CCAA" proceedings in that debtor was for all intents and purposes liquidated — Bondholders brought claim against debtor for principal and pre-filing interest under terms of bonds — Bondholders also brought claim for post-filing interest — Aside from bondholders, main claimants against debtor were pensioners who, unlike bondholders, had no contractual right to interest — Claim for post-filing interest dismissed — There was no provision in CCAA that would not permit application of common law "interest stops rule" in CCAA proceedings, and there were policy reasons in favour of applying it — To permit some creditors' claims to grow disproportionately to others during stay would not maintain status quo — Moreover, this would encourage creditors whose interests were being disadvantaged to immediately initiate bankruptcy proceedings, thereby threatening objectives of CCAA — Bankruptcy and Insolvency Act (BIA) and CCAA are parts of integrated insolvency scheme, and courts will avoid interpretations of such acts that give creditors incentives to prefer BIA processes.

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Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

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Stelco Inc., Re (2007), 2007 ONCA 483, 2007 CarswellOnt 4108, 35 C.B.R. (5th) 174, 32 B.L.R. (4th) 77, 226 O.A.C. 72 (Ont. C.A.) — distinguished

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

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s. 11(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

Winding-up Act, R.S.C. 1970, c. W-10
Generally — referred to

CLAIM by bondholders for post-filing interest against an insolvent estate under *Companies' Creditors Arrangement Act*.

***Newbould J.*:**

1 Nortel Networks Corporation ("NNC") and other Canadian debtors filed for and were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, ("CCAA") on January 14, 2009. On the same date, Nortel Network Inc. ("NNI") and other US debtors filed petitions in Delaware under the United States Bankruptcy Code, 11 U.S.C., Chapter 11.

2 Beginning in 1996, unsecured *pari passu* notes were issued under three separate bond indentures, first by a US Nortel corporation guaranteed by Nortel Networks Limited ("NNL"), a Canadian corporation, and then by NNL in several tranches jointly and severally guaranteed by NNC and NNI (the "crossover bonds"). Thus all of the notes are payable by Nortel entities in both Canada and the US, either as the maker or guarantor. Under claims procedures in both the Canadian and US proceedings, claims by bondholders for principal and pre-filing interest in the amount of US $4.092 billion have been made against each of the Canadian and US estates. The bondholders also claim to be entitled to post-filing interest and related claims under the terms of the bonds which, as of December 31, 2013, amounted to approximately US$1.6 billion.

3 The total assets realized on the sale of Nortel assets worldwide which are the subject of the allocation proceedings amongst the Canadian, US, and European, Middle East and African estates ("EMEA") are approximately US$7.3 billion, and thus the post-filing bond interest claims of now more than US$1.6 billion represent a substantial portion of the total assets available to all three estates. While the post-filing bond interest grows at various compounded rates under the terms of the bonds, the US$7.3 billion is apparently not growing at any appreciable rate because of the very conservative nature of the investments made with it pending the outcome of the insolvency proceedings. Apart from the bondholders, the main claimants against the Canadian debtors are Nortel disabled employees, former employees and retirees.

4 The bond claims in the Canadian proceedings have been filed pursuant to a claims procedure order in the CCAA proceedings dated July 30, 2009. The order contemplated that the claims filed under it would be finally determined in accordance with further procedures to be authorized, including by a further claims resolution order. By order dated September 16, 2010, a further order was made in the CCAA proceedings that authorized procedures to determine claims for all purposes.

5 By direction of June 24, 2014, it was ordered that the following issues be argued:

(a) whether the holders of the crossover bond claims are legally entitled in each jurisdiction to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and

(b) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The hearing in the US Bankruptcy Court was scheduled to proceed at the same time as the hearing in this Court but was adjourned due to an apparent settlement between the US Debtors and certain bondholders.

7 The Monitor and Canadian debtors, supported by the Canadian Creditors' Committee, the UK Pension Claimants, the EMEA debtors, and the Wilmington Trust take the position that in a liquidating CCAA proceeding such as this, post-filing interest is not legally payable on the crossover bonds as a result of the "interest stops" rule. The Ad Hoc Group of Bondholders, supported by the US Unsecured Creditors' Committee, Law Debenture Trust Company of New York and Bank of New York Mellon take the position that there is no "interest stops" rule in CCAA proceedings and that the right to interest on the crossover bonds is not lost on the filing of CCAA proceedings and can be the subject of negotiations regarding a CCAA plan of reorganization. They take the position that no distribution of Nortel's sale proceeds that fails to recognize the full amount of the crossover bondholders' claims, including post-filing interest, can be ordered under the CCAA except under a negotiated CCAA plan duly approved by the requisite majorities of creditors and sanctioned by the court.

8 For the reasons that follow, I accept the position and hold that post-filing interest is not legally payable on the crossover bonds in this case.

The interest stops rule

9 In this case, the bondholders have a contractual right to interest. The other major claimants, being pensioners, do not. The Canadian debtors contend that the reason for the interest stops rule is one of fundamental fairness and that the rule should apply in this case.

10 The Canadian debtors contend that the interest-stops rule is a common law rule corollary to the *pari passu* rule governing rateable payments of an insolvent's debts and that while the CCAA is silent as to the right to post-filing interest, it does not rule out the interest-stops rule.

11 The bondholders contend that to deny them the right to post-filing interest would amount to a confiscation of a property right to interest and that absent express statutory authority the court has no ability to interfere with their contractual entitlement to interest. I do not see their claim to interest as being a property right, as the bonds are unsecured. See *Thibodeau v. Thibodeau* (2011), 104 O.R. (3d) 161 (Ont. C.A.), at para. 43. However, the question remains as to whether their contractual rights should prevail.

12 It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (Ont. C.A.) at para. 25, per Blair J.A. and *Indalex Ltd., Re* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J. [Commercial List]), at para. 16 per Morawetz J. This common law principle has led to the development of the interest stops rule. In *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610 (Ont. S.C.J. [Commercial List]), Blair J. (as he then was) stated the following:

> **20** One of the governing principles of insolvency law - including proceedings in a winding-up - is that the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of the insolvency. This principle has led to the development of the "interest stops rule", i.e., that no interest is payable on a debt from the date of the winding-up or bankruptcy. As Lord Justice James put it, colourfully, in *Re Savin* (1872), L.R. 7 Ch. 760 (C.A.), at p. 764:

> I believe, however, that if the question now arose for the first time I should agree with the rule [i.e. the "interest stops rule"], seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

13 This rule is "judge-made" law. See *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), at 647, per Sir G. M. Giffard, L.J.

14 In *Shoppers Trust*, Blair J.A. referred to *pari passu* principles in the context of the interest stops rule and the common law understanding of those rules in liquidation proceedings. He stated:

> 25. The rationale underlying this approach rests on a fundamental principle of insolvency law, namely, that "in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up": *Humber Ironworks*, *supra*, at p. 646 Ch. App. Unless this is the case, the principle of *pari passu* distribution cannot be honoured. See also *Re McDougall*, [1883] O.J. No. 63, 8 O.A.R. 309, at paras. 13-15; *Principal Savings & Trust Co. v. Principal Group Ltd. (Trustee of)* (1993), 109 D.L.R. (4th) 390, 14 Alta. L.R. (3d) 442 (C.A.), at paras. 12-16; and *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519, [2003] O.J. No. 2754 (S.C.J.), at p. 525 [O.R.] While these cases were decided in the context of what is known as the "interest stops" rule, they are all premised on the common law understanding that claims for principal and interest are provable in liquidation proceedings to the date of the winding-up.

15 The interest stops rule has been applied in winding-up cases in spite of the fact that the legislation did not provide for it. In *Shoppers Trust*, Blair J.A. stated:

> 26. Thus, it was of little moment that the provisions of the *Winding-up Act* in force at the time of the March 10, 1993 order did not contain any such term. The 1996 amendment to s. 71(1) of the *Winding-up and Restructuring Act*, establishing that claims against the insolvent estate are to be calculated as at the date of the winding-up, merely clarified and codified the position as it already existed in insolvency law.

16 In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.* (1992), 11 C.B.R. (3d) 193 (Alta. C.A.), Kerans J.A. applied the interest stops rule in a bankruptcy proceeding under the BIA even although, in his view, the BIA assumed that interest was not payable after bankruptcy but did not expressly forbid it. He did so on the basis of the common law rule enunciated in *Savin, Re* [(1872), 7 Ch. App. 760 (Eng. Ch. Div.)], quoted by Blair J. in *Confederation Life*. Kerans J.A. stated:

> 19. ... I accept that *Savin* expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy.

17 In *Confederation Life*, Blair J. was of the view that the Winding-Up Act and the BIA could be interpreted to permit post-filing interest. Yet he held that the common law insolvency interest stops rule applied. He stated:

> **22** This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the Winding-Up Act and section 121 of the BIA, which might be read to the contrary, in my view....
>
> **23** Yet the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

18 Thus I see no reason to not apply the interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application. The issue is whether the rule should apply to this CCAA proceeding.

Nature of the CCAA proceeding

19 When the Nortel entities filed for CCAA protection on January 14, 2009, and filed on the same date in the US and the UK, the stated purpose was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. However that hope quickly evaporated and on June 19, 2009 Nortel issued a news release announcing it had sold its CMDA business and LTE Access assets and that it was pursuing the sale of its other business interests. Liquidation followed, first by a sale of Nortel's eight business lines in 2009-2011 for US$2.8 billion and second by the sale of its residual patent portfolio under a stalking-horse bid process in June 2011 for US$4.5 billion. The sale of the CMDA and LTE assets was approved on June 29, 2009.

20 The Canadian debtors contend that this CCAA proceeding is a liquidating proceeding, and thus in substance the same as a bankruptcy under the BIA. The bondholders contend that there is no definition of a "liquidating" CCAA proceeding and no distinct legal category of a liquidating CCAA, essentially arguing that like beauty, it is in the eyes of the beholder.

21 In this case, I think there is little doubt that this is a liquidating CCAA process and has been since June, 2009, notwithstanding that there was some consideration given to monetizing the residual intellectual property in a new company to be formed (referred to as IPCO) before it was decided to sell the residual intellectual property that resulted in the sale to the Rockstar consortium for US$4.5 billion. In *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the CCAA can be applied in "a liquidating insolvency". See also Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at p. 167, in which she states "increasingly, there are 'liquidating CCAA' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

22 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), Farley J. recognized in para. 7 that a CCAA proceeding might involve liquidation. He stated:

> It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company ... provided the same is proposed in the best interests of the creditors generally.

23 It is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a distribution of the proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.

Can the interest stops rule apply in a CCAA proceeding?

24 There is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest. Accordingly, it is necessary to deal with first principles and with various cases raised by the parties.

25 The Canadian debtors contend that the rationale for the interest stops rule is equally applicable to a liquidating CCAA proceeding as it is in a BIA or Winding-Up proceeding. They assert that the reason for the interest stops rule is one of fundamental fairness. An insolvency filing under the CCAA stays creditor enforcement. Accordingly, it is unfair to permit the bondholders with a contractual right to receive a payment on account of interest, and thus compensation for the delay in receipt of payment, while other creditors such as the pension claimants, who have been equally delayed in payment by virtue of the insolvency, receive no compensation. They cite Sir G. M. Giffard, L.J. in *Humber Ironworks*:

> I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

26 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], Deschamps J. reaffirmed that the purpose of a CCAA stay of proceedings is to preserve the *status quo*. She stated at para. 77:

> The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.

27 If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights and obtaining post-judgment interest, the Canadian Creditors' Committee contend that the *status quo* has not been preserved.

28 It has long been recognized that the federal insolvency regime includes the CCAA and the BIA and that the two statutes create a complimentary and interrelated scheme for dealing dealing with the property of insolvent companies. See *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62 and 64, per Laskin J.A.

29 Recently the Supreme Court of Canada analysed the CCAA and indicated that the BIA and CCAA are to be considered parts of an integrated insolvency scheme, the court will favour interpretations that give creditors analogous entitlements under the CCAA and BIA, and the court will avoid interpretations that give creditors incentives to prefer BIA processes.

30 In *Century Services*, Deschamps J. enunciated guiding principles for interpreting the CCAA. Deschamps J. also stated that the case was the first time that the Supreme Court was called upon to directly interpret the provisions of the CCAA. The case involved competing interpretations of the federal *Excise Tax Act* ("ETA") and the CCAA in considering a deemed trust for GST collections. The ETA expressly excluded the provisions in the BIA rendering deemed trusts ineffective, but did not exclude similar provisions in the CCAA. In holding in favour of a stay under the CCAA, Deschamps J. was guided in her interpretation of the relevant CCAA provision by the desire to have similar results under the BIA and CCAA.

31 In her analysis, Deschamps J. made a number of statements, including

> Because the CCAA is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful. (para. 23)
>
> With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation. (para. 24)
>
> Moreover, a strange asymmetry would arise if the interpretation giving the ETA priority over the CCAA urged by the Crown is adopted here: the Crown would retain priority over GST claims during CCAA proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the BIA, creditors' incentives would lie overwhelmingly with avoiding proceedings under the CCAA and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the CCAA can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert. (para. 47)
>
> Notably, acting consistently with its goal of treating both the BIA and the CCAA as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes... (para. 54)
>
> The CCAA and BIA are related and no gap exists between the two statutes which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy. (para. 78)

32 In *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.), a case involving a competition between a deemed trust under provincial pension legislation and the right of a lender to security granted under the DIP lending provisions of the CCAA, Deschamps J. had occasion to refer to the *Century Services* case and her statement in *Century Services* in para 23 referred to above. She then stated:

> In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements.

33 Thus it is a fair comment taken the direction of the Supreme Court in *Century Services* and *Indalex* regarding the aims of insolvency law in Canada to say that if the common law principle of the interest stops rule was applicable to proceedings under the BIA and *Winding-Up Act* before legislative amendments to those statutes were made, (or if the comments of Blair J. in *Confederation Life* are accepted that the BIA still might be read to prevent its application but does not trump the application of the rule), there is no reason not to apply the interest stops rule in liquidating CCAA proceedings. I accept this and note that there is no provision in the CCAA that would not permit the application of the rule.

34 There are also policy reasons for this result, and they flow from *Century Services* and *Indalex*. I accept the argument of the Canadian Creditors' Committee that to permit some creditors' claims to grow disproportionately to others during the stay period would not maintain the *status quo* and would encourage creditors whose interests are being disadvantaged to immediately initiate bankruptcy proceedings, threatening the objectives of the CCAA.

35 In my view, there is no need for there to be a "liquidating" CCCAA proceeding in order for the interest stops rule to apply to a CCAA proceeding. The reasoning for the application of the common law insolvency rule, being the desire to prevent a stay of proceedings from militating against one group of unsecured creditors over another in violation of the *pari passu* rule, is equally applicable to a CCAA proceeding that is not a liquidating proceeding. In such a proceeding, the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done.

36 The bondholders contend, however, that *Stelco Inc., Re*, 2007 ONCA 483, 32 B.L.R. (4th) 77 (Ont. C.A.) is binding authority that the interest stops rule does not apply in any CCAA proceeding. I do not agree. The facts of the case were quite different and did not involve a claim for post-filing interest against the debtor. Stelco was successfully restructured under the CCAA by a plan of compromise and arrangement approved by the creditors. The sanctioned plan did not provide for payment of post-petition interest. As among senior unsecured debenture holders, subordinated (junior) debenture holders and ordinary unsecured creditors, the plan treated all in the same class and *pro rata* distributions were calculated on the basis that no post-filing interest was allowed. That result was not challenged.

37 The relevant pre-filing indenture in *Stelco* provided that in the event of any insolvency, the holders of all senior debt would first be entitled to receive payment in full of the principal and interest due thereon, before the junior debenture holders would be entitled to receive any payment or distribution of any kind which might otherwise be payable in respect of their debentures. While the plan cancelled all Stelco debentures, subject to section 6.01(2) of the plan, that section provided that the rights between the debenture holders were preserved. The plan was agreed to by the junior debenture holders. After the plan had been sanctioned, the junior debenture holders challenged the senior debt holders' right to receive the subordinated payments towards their outstanding interest.

38 Wilton-Siegel J. rejected the argument, holding that the subordination agreement continued to operate independently of the sanctioned plan and was not affected by it. While it is not clear why, the junior Noteholders contended that interest stopped accruing in respect of the claims of the senior debenture holders against Stelco after the CCAA filing. There was no issue about a claim against Stelco for post-filing interest, as no such claim had ever been made. The issue was a contest between the two levels of debenture holders. However, Wilton-Siegel J. stated that in situations in which there was value to the equity, a CCAA plan could include post-filing interest. I take this statement to be *obiter*, but in any event, it is not the situation in Nortel as there is no equity at all. At the Court of Appeal, O'Connor

A.C.J.O, Goudge and Blair JJ.A. agreed that the interest stops rule did not preclude the continuation of interest to the senior note holders from the subordinated payments to be made by the junior note holders under the binding inter-creditor arrangements.

39 In the course of its reasons, the Court of Appeal stated that there was no persuasive authority that supports an interest stops rule in a CCAA proceeding, and referred to statements of Binnie J. in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.), [*NAV Canada*]. A number of comments can be made.

40 First, *Stelco* did not involve proceeding or claims against the debtor for post-filing interest. Second, the decision in *Stelco* was derived from the terms of negotiated inter-creditor agreements in the note indenture that were protected by plan. There was nothing about the common law interest stops rule that precluded one creditor from being held to its agreement to subordinate its realization to that of another creditor including foregoing its right to payment until the creditor with priority received principal and interest. That is what the Court of Appeal concluded by stating "We do not accept that there is a 'Interest Stops Rule' that precludes such a result". Third, the general statements made in *Stelco* and *NAV Canada* must now be considered in light of the later direction in *Century Services* and *Indalex*. I now turn to *NAV Canada*.

41 In *NAV Canada*, Canada 3000 Airlines filed for protection under the CCAA. Three days later the Monitor filed an assignment in bankruptcy on its behalf. Federal legislation gave the airport authorities a right to apply to the court authorizing the seizure of aircraft for outstanding payments owed by an airline for using an airport. The contest in the case was between the airport authorities and the owners/lessors of the aircraft as to the extent that the owners/lessors were liable for those payments and whether a seizure order could be made against the aircraft leased to the airline. It was ultimately held that the owners/lessors were not liable for the outstanding payments owed by the airline but that the aircraft could be seized.

42 Interest on the arrears was raised in the first instance before Ground J. He held that the airport authorities were entitled as against the bankrupt airline to detain the aircraft until all amounts with interest were paid in full or security for such payment was posted under the provisions of the legislation, i.e. interest continued to accrue and be payable after bankruptcy. The Court of Appeal did not deal with interest as in their view it was relevant only if the airport authorities had a claim against the owners/lessors of the aircraft, which the court held they did not.

43 In the Supreme Court, which also dealt with an appeal from Quebec which dealt with the same issues, nearly the entire reasons of Binnie J. dealt with the issues as to whether the owners/lessors of the aircraft were liable for the outstanding charges and whether the aircraft could be seized by the airport authorities. It was held that the owners/lessors were not directly liable for the charges owed by the airline but that the aircraft could be seized until the charges were paid.

44 At the end of his reasons, Binnie J. dealt with interest and held that it continued to run until the earlier of payment, the posting of security, or bankruptcy. The bondholders rely on the last two sentences of the following paragraph from the reasons of Binnie J. which refer to the running of interest under the CCAA:

> **96** Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

45 The Quebec airline in question had first filed to make a proposal under the BIA and when that proposal was rejected by its creditors, it was deemed to have made an assignment in bankruptcy as of the date its proposal was filed. Thus the comments of Binnie J. regarding the CCAA could not have related to the Quebec airline, but only to Canada 3000, which

had been under the CCAA for only three days before it was assigned into bankruptcy. It is by no means clear how much effort, if any, was spent in argument on the three days' interest issue. Binnie J. did not refer to any argument on the point.

46 There was no discussion of the common law interest stops rule and whether it could apply during the three day period in question or whether it should apply to a liquidating CCAA proceeding. Nor was there any discussion of the definition of claim in the CCAA, being a claim provable within the meaning of the BIA, and how that might impact a claim for post-filing interest under the CCAA. The statement regarding interest under the CCAA was simply conclusory. It may be fair to say that the statement of Binnie J. was *per incuriam*.

47 In my view, the statement of Binnie J. should not be taken as a blanket statement that interest always accrues in a CCAA proceeding, regardless of whether or not it is a liquidating proceeding. The circumstances in *NAV Canada* were far different from Nortel involving several years of compound interest in excess of US$1.6 billion out of a total world-wide asset base of US$7.3 billion. The statement of Binnie J. should now be construed in light of *Century Services* and *Indalex*.

Need for a CCAA plan

48 The bondholders contend that there is no authority under the CCAA to effect a distribution of a debtor's assets absent a plan of arrangement or compromise that must be negotiated by the debtor with its creditors, and that as a plan can include payment of post-filing interest, it is not possible for a court to conclude that the bondholders have no right to post-filing interest. They assert that there is no jurisdiction for a court to compromise a creditor's claim in a CCAA proceeding except in the context of approving a plan approved by the creditors. They also assert that plan negotiations cannot meaningfully take place "in earnest" until the allocation decision as to how much of the US$7.3 billion is to be allocated to each of the Canadian, US, or EMEA estates.

49 One may ask what is left over in this case to negotiate. The assets have long been sold and what is left is to determine the claims against the Canadian estate and, once the amount of the assets in the Canadian estate are known, distribute the assets on a *pari passu* basis. This is not a case in which equity is exchanged for debt in a reorganization of a business such as *Stelco*.

50 However, even if there were things to negotiate, they would involve creditors compromising some right, and bargaining against those rights. What those rights are need to be determined, and often are in CCAA proceedings.

51 In this case, compensation claims procedure orders were made by Morawetz J. The order covering claims by bondholders is dated July 30, 2009. It was made without any objection by the bondholders. That order provides for a claim to be proven for the purposes of voting and distribution under a plan. The claims resolution order of Morawetz J. dated September 16, 2010 provides for a proven claim to be for all purposes, including for the purposes of voting and distribution under any plan. The determination now regarding the bondholders claim for post-filing interest is consistent with the process of determining whether these claims by the bondholders are finally proven. Contrary to the contention of the bondholders, it is not a process in which the court is being asked to compromise the bondholders' claim for post-filing interest. It is rather a determination of whether they have a right to such interest.

52 It is perhaps not necessary to determine at this stage how the assets will be distributed and whether a plan, or what type of plan, will be necessary. However, in light of the argument advanced on behalf of the bondholders, I will deal with this issue.

53 I first note that the CCAA makes no provision as to how money is to be distributed to creditors. This is not surprising taken that plans of reorganization do not necessarily provide for payments to creditors and taken that the CCAA does not expressly provide for a liquidating CCAA process. There is no provision that requires distributions to be made under a plan of arrangement.

54 A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a court may make any order it considers appropriate in the circumstances. Although this section was provided

by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated:

> **65** I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).
>
> **67** The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.
>
> **68** In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence. (underlining added)

55 I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Ltd., Re*, 2014 ONSC 3393 (Ont. S.C.J.), Morawetz J. noted at para. 38 that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan. In that case, there was a shortfall to the secured creditors and no assets available to the unsecured creditors. The fact that the distributions went to the secured creditors rather than to an unsecured creditor makes no difference to the jurisdiction under the CCAA to do so.

56 In *AbitibiBowater Inc., Re*, 2009 QCCS 6461 (C.S. Que.), Gascon J.C.S. (as he then was) granted a large interim distribution from the proceeds of a sale transaction to senior secured noteholders ("SSNs"). The bondholders opposed the distribution on the same grounds as advanced by the bondholders in this case:

> 56 The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.
>
> 57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.
>
> 58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

57 Justice Gascon did not accept this argument. He stated:

> 71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada. (underlining added)

58 Justice Gascon was persuaded that the distribution should be made as it was part and parcel of a DIP loan arrangement that he approved. Whatever the particular circumstances were that led to the exercise of his discretion, he did not question that he had jurisdiction to make an order distributing proceeds without a plan of arrangement. I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.

59 There is a comment by Laskin J.A. in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.) that questions the right of a judge to order payment out of funds realized on the sale of assets under a CCAA process, in that case to pension plan administrators for funding deficiencies. He stated:

> [I]n my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds.

60 This was an *obiter* statement. But in any event Justice Laskin was discussing a situation in which all parties agreed that the CCAA proceedings "were spent". That is, there was effectively no CCAA proceeding any more. This is not the situation with Nortel and I do not see the *obiter* statement as being applicable. As stated by Justice Gascon, distribution orders without a plan are common in Canada.

61 While it need not be decided, I am not persuaded that it would not be possible for a court to make an order distributing the proceeds of the Nortel sale without a plan of arrangement or compromise.

Conclusion

62 I hold and declare that holders of the crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion).

63 Those seeking costs may make cost submissions in writing within 10 days and responding submissions may be made in writing within a further 10 days. Submissions are to be brief and include a proper cost outline for costs sought.

Claim dismissed.

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TAB 11

2015 ONCA 681
Ontario Court of Appeal

Nortel Networks Corp., Re

2015 CarswellOnt 15461, 2015 ONCA 681, 127 O.R. (3d) 641, 259 A.C.W.S. (3d) 15, 32 C.B.R. (6th) 21, 340 O.A.C. 234, 391 D.L.R. (4th) 283

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

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Janet Simmons, E.E. Gillese, Paul Rouleau JJ.A.

Heard: April 29, 2015
Judgment: October 13, 2015
Docket: CA C59703

Proceedings: affirming *Nortel Networks Corp., Re* (2014), 121 O.R. (3d) 228, 2014 ONSC 4777, 2014 CarswellOnt 17193 (Ont. S.C.J. [Commercial List])

Counsel: Richard B. Swan, S. Richard Orzy, Gavin H. Finlayson, for Appellant, Ad Hoc Group of Bondholders
Andrew Kent, Brett Harrison, for Respondent, Bank of New York Mellon
Edmond Lamek, for Respondent, Law Debenture Trust Company of New York
Benjamin Zarnett, Graham D. Smith, for Monitor and Respondent, Canadian Debtors
Kenneth D. Kraft, John J. Salmas, for Respondent, Wilmington Trust, National Association
Kenneth T. Rosenberg, Ari N. Kaplan, for Respondent, Canadian Creditors' Committee
Tracy Wynne, for Joint Administrators (EMEA)
Scott A. Bomhof, Adam M. Slavens, for Nortel Networks Inc./U.S. Debtors

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.4 Appeals

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Appellants were ad hoc group of bondholders holding crossover bonds that were issued or guaranteed by Canadian

entities of companies and they provided for continuing accrual of interest until payment — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US$4.092 billion and they also claimed they were entitled to post-filing interest under terms of crossover bonds — In context of joint allocation trial, CCAA judge found that the common law "interest stops rule" applied in context of CCAA and holders of crossover bond claims were not legally entitled to claim or receive any amounts under relevant indentures above and beyond outstanding principal debt and pre-petition interest — Bondholders' appealed — Appeal dismissed — Main purposes of interest stops rule were fairness to creditors and achieving orderly administration of insolvent debtor's estate — Interest stops rule had been consistently applied in bankruptcy and winding-up proceedings — While there were differences between CCAA and other insolvency schemes, same principles supporting conclusion that interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, fair treatment of creditors and orderly administration of insolvent debtor's estate, applied with equal force to CCAA proceedings — As interest stops rule applied upon bankruptcy under Bankruptcy and Insolvency Act, it should also apply in CCAA proceedings unless rule was ousted by CCAA, which it was not — If interest stops rule did not apply in CCAA proceedings then creditors who did not have contractual right to post-filing interest would have skewed incentives against reorganization under CCAA — CCAA created conditions for preserving status quo and if post filing interest was available to only one set of creditors then status quo was not preserved — If interest stops rule did not apply to CCAA proceedings then key objective of CCAA, to facilitate restructuring of corporations through flexibility and creativity, might be undermined due to uneven entitlement to interest that might be created — Principle of fairness supported application of interest stops rule — Interest stops rule was not contrary to established CCAA practice and it did not prevent CCAA plan from providing for post-filing interest — There were rational reasons for adopting interest stops rule in CCAA context.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Appellants were ad hoc group of bondholders holding crossover bonds that were issued or guaranteed by Canadian entities of companies and they provided for continuing accrual of interest until payment — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US$4.092 billion and they also claimed they were entitled to post-filing interest under terms of crossover bonds — In context of joint allocation trial, CCAA judge found that the common law "interest stops rule" applied in context of CCAA and holders of crossover bond claims were not legally entitled to claim or receive any amounts under relevant indentures above and beyond outstanding principal debt and pre-petition interest — Bondholders' appealed — Appeal dismissed — Main purposes of interest stops rule were fairness to creditors and achieving orderly administration of insolvent debtor's estate — Interest stops rule had been consistently applied in bankruptcy and winding-up proceedings — While there were differences between CCAA and other insolvency schemes, same principles supporting conclusion that interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, fair treatment of creditors and orderly administration of insolvent debtor's estate, applied with equal force to CCAA proceedings — As interest stops rule applied upon bankruptcy under Bankruptcy and Insolvency Act, it should also apply in CCAA proceedings unless rule was ousted by CCAA, which it was not — If interest stops rule did not apply in CCAA proceedings then creditors who did not have contractual right to post-filing interest would have skewed incentives against reorganization under CCAA — CCAA created conditions for preserving status quo and if post filing interest was available to only one set of creditors then status quo was not preserved — If interest stops rule did not apply to CCAA proceedings then key objective of CCAA, to facilitate restructuring of corporations through flexibility and creativity, might be undermined due to uneven entitlement to interest that might be created — Principle of fairness supported application of interest stops rule — Interest stops rule was not contrary to established CCAA practice and it did not prevent CCAA plan from providing for post-filing interest — There were rational reasons for adopting interest stops rule in CCAA context.

The group of companies were subject to proceedings under the Companies' Creditors Arrangement Act (CCAA). The appellants were an ad hoc group of bondholders holding crossover bonds, which were unsecured bonds that were issued or guaranteed by the Canadian entities of the companies. The indentures provided for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment

obligations. Other claimants, including pensioners and former employees, did not have a provision for interest on amounts owing. The holders of the crossover bonds filed claims for principal and pre-filing interest in the amount of US$4.092 billion. They also claimed they were entitled to post-filing interest and related claims under the terms of the crossover bonds of approximately US$1.6 billion.

In the context of a joint allocation trial, the CCAA judge found that the common law "interest stops rule" applied in the context of the CCAA. The CCAA judge found that the holders of the crossover bond claims were not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest, namely, above and beyond US$4.092 billion. The crossover bondholders appealed.

Held: The appeal was dismissed.

Per Rouleau J.A. (Simmons and Gillese JJ.A. concurring): The pari passu principle provided that the assets of an insolvent debtor were to be distributed amongst classes of creditors rateably and equally as those assets were found at the date of insolvency. The pari passu principle was the foremost principle in insolvency law. The pari passu principle was grounded in the need to treat all creditors fairly and to ensure an orderly distribution of assets. A necessary corollary of the pari passu principle was the interest stops rule. The interest stops rule was a fundamental tenant of insolvency law. Absent the interest stops rule, the fair and orderly distribution sought by the pari passu principle could not be achieved. The main purposes behind the interest stops rule were fairness to creditors and to achieve the orderly administration of an insolvent debtor's estate. The interest stops rule had been consistently applied in bankruptcy and winding-up proceedings.

There were differences between the CCAA and other insolvency schemes. However, the same principles supporting the conclusion that the interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate, applied with equal force to CCAA proceedings. The CCAA was an integrated insolvency regime, which included the Bankruptcy and Insolvency Act (Act). In keeping with the idea of harmonization, as the interest stops rule applied upon bankruptcy under the Act, it should also apply in CCAA proceedings unless the rule was ousted by the CCAA, which it was not. If the interest stops rule did not apply in CCAA proceedings then the creditors who did not have a contractual right to post-filing interest would have skewed incentives against reorganization under the CCAA. Such creditors would have an incentive to proceed under the Act or the Winding-up and Restructuring Act where the interest stops rule applied to prevent creditors who had a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors. The CCAA created conditions for preserving the status quo and if post filing interest was available to only one set of creditors then the status quo was not preserved.

If the interest stops rule did not to apply CCAA proceedings then the key objective of the CCAA, to facilitate the restructuring of corporations through flexibility and creativity, might be undermined due to the uneven entitlement to interest that might be created. Creditors who had an entitlement to post-filing interest might be less motivated to compromise. The ability to find a compromise acceptable to all creditors would be more challenging if the amount of a creditor's legal entitlement was constantly shifting as post-interest accrued. The principle of fairness supported the application of the interest stops rule. The interest stops rule was not contrary to established CCAA practice and it did not prevent a CCAA plan from providing for post-filing interest. There were rational reasons for adopting the interest stops rule in the CCAA context.

The interest stops rule did not preclude the payment of post-filing interest under a plan of compromise or arrangement. Nothing in the CCAA judge's reasons prevented the bondholders from seeking and obtaining post-filing interest through a negotiated plan.

Table of Authorities

Cases considered by *Paul Rouleau J.A.*:

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Canada 3000 Inc., Re (2002), 2002 CarswellOnt 1598, 33 C.B.R. (4th) 184, 5 P.P.S.A.C. (3d) 272, [2002] O.T.C. 310 (Ont. S.C.J.) — followed

Canada 3000 Inc., Re (2004), 2004 CarswellOnt 149, 235 D.L.R. (4th) 618, 183 O.A.C. 201, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.*) 69 O.R. (3d) 1, 3 C.B.R. (5th) 207 (Ont. C.A.) — referred to

Humber Ironworks & Shipbuilding Co., Re (1869), 4 Ch. App. 643 (Eng. Ch. Div.) — considered

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — followed

NAV Canada c. Wilmington Trust Co. (2006), 2006 SCC 24, 2006 CarswellQue 4890, 2006 CarswellQue 4891, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc., (Bankrupt), Re*) 349 N.R. 1, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.*) 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc. (Bankrupt), Re*) 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re*) 269 D.L.R. (4th) 79, (sub nom. *Canada 3000 Inc., Re*) [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66 (S.C.C.) — followed

Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — referred to

R. v. Henry (2005), 2005 SCC 76, 2005 CarswellBC 2972, 2005 CarswellBC 2973, 33 C.R. (6th) 215, 202 C.C.C. (3d) 449, 260 D.L.R. (4th) 411, 49 B.C.L.R. (4th) 1, 219 B.C.A.C. 1, 361 W.A.C. 1, 376 A.R. 1, 360 W.A.C. 1, 136 C.R.R. (2d) 121, [2006] 4 W.W.R. 605, (sub nom. *R. c. Henry*) [2005] 3 S.C.R. 609, 342 N.R. 259 (S.C.C.) — considered

Stelco Inc., Re (2006), 2006 CarswellOnt 4857, 24 C.B.R. (5th) 59, 20 B.L.R. (4th) 286 (Ont. S.C.J. [Commercial List]) — followed

Stelco Inc., Re (2007), 2007 ONCA 483, 2007 CarswellOnt 4108, 32 B.L.R. (4th) 77, 35 C.B.R. (5th) 174, 226 O.A.C. 72 (Ont. C.A.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada*

(A.G.)) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — followed

Statutes considered:

Aeronautics Act, R.S.C. 1985, c. A-2
Generally — referred to

Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5
Generally — referred to

s. 9 — considered

s. 9(1) — considered

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

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

s. 121 — considered

s. 122 — considered

Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20
Generally — referred to

s. 55 — considered

s. 56 — considered

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

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

APPEAL by bondholders from judgment reported at *Nortel Networks Corp., Re* (2014), 2014 ONSC 4777, 2014 CarswellOnt 17193, 121 O.R. (3d) 228 (Ont. S.C.J. [Commercial List]), finding interest stops rule applied in *Companies' Creditors Arrangement Act* proceedings and that bondholders were not legally entitled to claim or receive any amounts beyond outstanding principal debt and pre-petition interest.

***Paul Rouleau J.A.*:**

A. Overview

1 This appeal represents another chapter in the Nortel proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), which has been on-going since January 2009. A parallel proceeding under Chapter 11 of the United States *Bankruptcy Code* has also been on-going in Delaware since that time.

2 The *Ad Hoc* Group of Bondholders (the "appellant") brings this appeal with leave. The group represents substantial holders of "crossover bonds", which are unsecured bonds either issued or guaranteed by certain of the Canadian Nortel entities. The relevant indentures provide for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations, such a make-whole provisions and trustee fees.

3 In contrast, the claims of other claimants, such as Nortel pensioners and former employees, do not have a provision for interest on amounts owing to them.

4 Holders of the crossover bonds have filed claims for principal and pre-filing interest in the amount of US$4.092 billion against each of the Canadian and U.S. Nortel estates. They also claim they are entitled to post-filing interest and related claims under the terms of the crossover bonds. As of December 31, 2013, the amount of this claim was approximately US$1.6 billion. The total of these two amounts represents a significant portion of the proceeds generated from the worldwide sale of Nortel's business lines and other Nortel assets, totalling approximately $7.3 billion. This latter amount is apparently not growing at any appreciable rate because of the conservative nature of the investments made with it pending the outcome of the insolvency proceedings.

5 In the context of a joint allocation trial, the *CCAA* judge directed that two issues be argued:

> 1. whether the holders of the crossover bond claims are legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and
>
> 2. if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The *CCAA* judge answered the first question in the negative and so he did not need to answer the second question. In reaching that conclusion, he accepted that the common law "interest stops rule", which has been held to be a fundamental tenet of insolvency law, applies in the *CCAA* context. He disagreed with the appellant's submission that the Supreme Court of Canada's decision in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.) [hereinafter *Canada 3000*], and this court's subsequent decision in *Stelco Inc., Re*, 2007 ONCA 483, 35 C.B.R. (5th) 174 (Ont. C.A.), are binding authority that the interest stops rule does not apply in the *CCAA* context.

7 On appeal, the appellant raises two related issues — whether the *CCAA* judge erred in concluding that an interest stops rule applies in *CCAA* proceedings and, if not, whether he erred in concluding that the holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest.

8 I would dismiss the appeal. As I will explain, there are sound legal and policy reasons for applying the interest stops rule in the *CCAA* context, and as I read *Stelco Inc., Re* and *Canada 3000*, they do not preclude such a result. Nor do I see a basis for varying the order that he made.

B. Background

9 In the *CCAA* court's initial order of January 14, 2009, the Canadian Debtors [1] were directed, subject to certain exceptions, to make no payments of principal or interest on account of amounts owing by the Canadian Debtors to any of their creditors as of the filing date, unless approved by the Monitor. Further, all proceedings and enforcement processes, and all rights and remedies of any person against the Canadian Debtors were stayed absent consent of the Canadian Debtors and the Monitor, or leave of the court.

10 In accordance with a claims procedure order dated July 30, 2009, claims against the Canadian Debtors were required to be filed by a claims bar date. Under a subsequent claims resolution order dated September 16, 2010, a disputed claim could be brought before the *CCAA* court for final determination.

11 As previously noted, holders of the crossover bonds filed proofs of claim that included not only the principal amount of the debt and interest accrued to the date of insolvency but also contractual claims for interest and other amounts post-filing.

12 In May 2014, a joint allocation trial, conducted by way of video-link by the *CCAA* judge in Ontario and Judge Gross in Delaware, commenced on the issue of the allocation of the sale proceeds among the debtor estates, including the Canadian and U.S. estates. In his 2015 decision, the *CCAA* judge, citing the "fundamental tenet of insolvency law that all debts shall be paid *pari passu*" and that "all unsecured creditors receive equal treatment" held that the $7.3 billion in funds generated from the Nortel liquidation should be allocated on a *pro rata* basis as among the estates: 2015 ONSC 2987, 23 C.B.R. (6th) 249 (Ont. S.C.J. [Commercial List]), at para. 209. He ordered, at para. 258, that the funds be allocated among the debtor estates in accordance with a number of principles, including the principle that each debtor estate "is to be allocated that percentage of the [liquidation proceeds] that the total allowed claims against that Estate bear to the total allowed claims against all Debtor Estates." A number of parties have sought leave to appeal that decision.

13 It was on June 24, 2014, while the joint allocation trial was proceeding, that the *CCAA* judge directed that the two issues set out above be decided.

C. Decision Below

14 The *CCAA* judge began his analysis with a review of cases applying the interest stops rule in the bankruptcy and winding-up context. He noted the relationship between the interest stops rule and the *pari passu* principle, which he described as "a fundamental tenet of insolvency law" that requires equal treatment of unsecured creditors. He found there was "no reason to not apply the [common law] interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application." The issue was "whether the rule should apply to this CCAA proceeding."

15 He went on to conclude that "[t]here is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest." In reaching this conclusion, he distinguished *Stelco* and *Canada 3000* and found that the application of the interest stops rule was supported by the more recent decisions in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], and *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.).

16 The *CCAA* judge thus ordered that "holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion)."

D. Issues on Appeal

17 The appellant raises two related issues:

1. Did the *CCAA* judge err in concluding that an interest stops rule applies in *CCAA* proceedings?

2. If the *CCAA* judge did not err in concluding that an interest stops rule applies in *CCAA* proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

E. Analysis

(1) Did the CCAA judge err in concluding that an interest stops rule applies in CCAA proceedings?

18 The appellant, supported by the Bank of New York Mellon and the Law Debenture Trust Company of New York as indenture trustees, submits that the *CCAA* judge erred in concluding that the interest stops rule applies.

19 First, the appellant submits he applied inapplicable case law and misinterpreted case law in concluding that the rule did and should apply. Among other things, the appellant criticizes the *CCAA* judge's application of the Supreme Court of Canada's decisions in *Century Services* and *Indalex*, which deal with the inter-play between the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

20 The appellant also submits that the application of the interest stops rule in the *CCAA* context is inconsistent with the *CCAA* and would have negative practical consequences.

21 Finally, the appellant submits that *Canada 3000* and *Stelco* are binding authority that preclude the application of the interest stops rule in the *CCAA* context and that the *CCAA* judge violated the principle of *stare decisis* in refusing to follow them.

22 I will deal with these submissions in turn, beginning with a discussion of the interest stops rule and the related *pari passu* principle.

(a) Should the interest stops rule apply in CCAA proceedings?

(i) Origin and scope of the interest stops rule

23 It is well settled that the *pari passu* principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 (Ont. S.C.J. [Commercial List]), at para. 20, *per* Blair J. [2] In fact, the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal "Priority as Pathology: The *Pari Passu* Myth" (2001) 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed ... in geography and time": Mokal, at pp. 581-582.

24 The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.

25 As explained in *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), nearly 150 years ago, a necessary corollary of the *pari passu* principle is the interest stops rule. Absent the interest stops rule, the fairness and orderly distribution sought by the *pari passu* principle could not be achieved. Selwyn L.J. explained the rationale for the interest stops rule, at pp. 645-646:

> In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are some creditors who have a right to receive interest, and others having debts not bearing interest.
>
> . . . . .
>
> It is very difficult to conceive a case in which the assets of a company could be ... immediately realized and divided; but suppose they had a simple account at a bank, which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that, in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up. I, therefore, think that nothing should be allowed for interest after that date.

26 Giffard L.J. similarly stated, at p. 647-648:

> That rule ... works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that, where an estate is insolvent, convenience is in favour of stopping all the computations at the date of the winding-up.
>
> . . . . .
>
> I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

27 Thus, the primary purpose behind the common law interest stops rule is fairness to creditors. Another purpose is to achieve the orderly administration of an insolvent debtor's estate.

28 The common law interest stops rule has been consistently applied in proceedings under bankruptcy and winding-up legislation. In fact, as explained by Blair J. in *Confederation Life Insurance Co.* at paras. 22-23, the rule has been applied even when the legislation might be read to the contrary:

> This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the *Winding-Up Act* and section 121 of the *BIA*, which might be read to the contrary, in my view.
>
> . . . . .
>
> Yet, the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

29 I will now turn to the question of whether the interest stops rule should be applied in the *CCAA* context.

(ii) Should the interest stops rule apply in CCAA proceedings?

30 The respondents[3] maintain that one would expect the interest stops rule to apply in *CCAA* proceedings given that *CCAA* proceedings are insolvency proceedings to which the common law *pari passu* principle applies. Consistent with the *pari passu* principle and the related interest stops rule, creditors in *CCAA* proceedings must surely expect to be treated fairly and not see creditors with interest entitlements have their claims grow, post-insolvency, disproportionately to those with no, or lesser, interest entitlements. In the respondents' submission, the same reasoning used by courts to conclude that the interest stops rule applies in winding-up and bankruptcy proceedings leads to the conclusion that the interest stops rule applies in *CCAA* proceedings.

31 The appellant, on the other hand, submits that *CCAA* proceedings are different from other insolvency proceedings in that they do not immediately or permanently alter the rights of creditors. The filing is intended to give the debtor breathing space so that a plan of compromise or arrangement can be negotiated with creditors and the business can continue. The objective of a *CCAA* proceeding is a consensual, statutory compromise in the form of a *CCAA* plan. Such a *CCAA* plan can provide for any kind of distribution, provided it is approved by the requisite majority of creditors and the court.

32 In the appellant's submission, until a plan is negotiated or the proceeding is converted to bankruptcy or winding-up, the rights of creditors are not altered; rather, their rights to execute on them are simply stayed. In the appellant's view, therefore, unless and until this sought-after compromise of rights is negotiated, only the exercise of the rights is stayed. The *CCAA* filing does not affect the right to accrue interest; it only stays the collection of that interest.

33 The appellant further argues that the *CCAA* judge's decision is contrary to the established *CCAA* practice and the reasonable expectations of the parties in this proceeding. In particular, the appellant notes that a *CCAA* plan may, and

often does, provide for the recovery of post-filing interest. The appellant also submits that the application of the interest stops rule would allow debtors to obtain a permanent interest holiday simply by filing for *CCAA* protection, even if the filing were later withdrawn, causing a permanent prejudice to the creditors not contemplated by the *CCAA*. And, the appellant submits that an interest stops rule would create a disincentive for creditors to participate in *CCAA* proceedings since they would not be compensated for delays under the *CCAA* even if there were ultimately assets available to do so

34 I do not accept the appellant's submissions on this point. Admittedly, there are differences between the *CCAA* and other insolvency schemes, including that the *CCAA* does not provide for a fixed scheme of distribution. Further, assuming a plan of compromise or arrangement under the *CCAA* is negotiated it may or may not result in a distribution to creditors. Nevertheless, in my view, the same principles that underpin the conclusion that the interest stops rule is necessary in bankruptcy and winding-up proceedings — namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate - apply with equal force to *CCAA* proceedings. I say so for several reasons.

35 First, the *CCAA* is part of an integrated insolvency regime, which also includes the *BIA*. The Supreme Court of Canada in *Century Services* considered the *CCAA* regime and opined, at para. 24, that "[w]ith parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency 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". The court went on to explain, at para. 78, that the *CCAA* and *BIA* are related and "no 'gap' exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy".

36 Consistent with the notion of harmonization, because the common law interest stops rule applies upon bankruptcy under the *BIA*, it should follow that the common law rule also applies in a *CCAA* proceeding unless, of course, the rule is ousted by the *CCAA*. The *CCAA* does not address entitlement to claim post-filing interest let alone oust the common law rule with clear wording.

37 Second, if the interest stops rule were not to apply in *CCAA* proceedings, the creditors who do not have a contractual right to post-filing interest would, as the Supreme Court explained in *Century Services* at para. 47, have "skewed incentives against reorganizing under the *CCAA*" and this would "only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert." This concern over skewed incentives was confirmed in *Indalex* where the Supreme Court held, at para. 51, that "[i]n order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those they would receive under the *BIA*.

38 Without an interest stops rule under the *CCAA*, the creditors with no claim to post-filing interest would have an incentive to proceed under the *BIA* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors, such as the appellant, who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors.

39 Third, as recognized by the Supreme Court in *Century Services* at para. 77, the "*CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all". This is achieved through grouping all claims within a single proceeding and staying all actions against the debtor, thus putting creditors on an equal footing: *Century Services*, para. 22.

40 As submitted by the Canadian Creditors' Committee, if post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining a judgment that bears interest, the *status quo* has not been preserved.

41 Fourth, if the interest stops rule were not to apply in *CCAA* proceedings, the key objective of that statute — to facilitate the restructuring of corporations through flexibility and creativity — may be undermined. This is because of the asymmetrical entitlement to interest that would be created. Creditors with an entitlement to post-filing interest may

be less motivated to compromise than those creditors without such an entitlement. Using the case under appeal as an example, if post-filing interest is allowed to accrue, the delay and failure to reach a compromise will see the appellant's proportionate claim against the assets of the debtors rise very significantly at the expense of other creditors. One could well understand that if the urgency for reaching a compromise and the incentive to compromise are significantly lower for one group of unsecured creditors than for the balance of the unsecured creditors, restructuring will be more difficult to achieve and the ability to reach creative solutions will be lessened.

42 Furthermore, if the amount of an unsecured creditor's legal entitlement is constantly shifting as post-filing interest accrues, the ability to find a compromise that is acceptable to all creditors at any one point in time will pose a greater challenge than if the entitlements are fixed as of the date of filing.

43 Fifth, the principle of fairness supports the application of the interest stops rule. Insolvency proceedings are intended to be fair processes for liquidating or restructuring insolvent corporations. How, one may ask, is it fair if the appellant, an unsecured creditor, sees its claim against the assets of the debtor balloon from $4.092 billion to $5.692 billion (as of December 31, 2013) because of contractual provisions when the claims of unsecured creditors, who have no such contractual provisions and who have been prevented for almost seven years by the *CCAA* stay from converting their claims into court judgments that would bear interest, have seen no increase at all? Delays in liquidating the Nortel assets have helped the Monitor achieve the very significant recoveries made ($7.3 billion) and, in fairness, this achievement should be for the benefit of all creditors.

44 Finally, I wish to respond to the appellant's concerns.

45 As to past practice and the reasonable expectations of the parties, I do not view the existence of an interest stops rule as being contrary to established *CCAA* practice or as preventing a *CCAA* plan from providing for post-filing interest. Parties may negotiate for a plan that provides for payments of more or less than a creditor's legal entitlement in lieu of the foregone interest. Thus, I do not accept the appellant's submission that there would be a disincentive to participate in *CCAA* proceedings, which is based on the premise that post-filing interest may not be recovered under a *CCAA* plan.

46 The appellant also raised the concern that a debtor company could obtain a permanent interest holiday, resulting in unfairness. The appellant says that if there are proceeds over and above the amounts needed to satisfy the pre-filing claims of creditors, those proceeds would be for the benefit of the shareholders of the debtor. This follows from the fact that the *CCAA* contains no provision for the payment of a "surplus" to creditors and the interest stops rule would prevent the unsecured creditors from recovering any post-filing interest. The debtor could therefore resort to the *CCAA* to stop interest from accruing and operate his business interest free.

47 This hypothetical raises the same concern about the loss of post-filing interest but in a somewhat different way. The concern is that a debtor may seek *CCAA* protection to avoid the obligation to pay interest.

48 There may well be exceptional situations where, at some point in a *CCAA* proceeding, the common law interest stops rule risks working an unfairness of some sort. I leave for another day what orders, if any, might be made by a *CCAA* judge in cases such as the hypothetical presented by the appellant where a debtor might be considered to benefit unfairly as a result of the common law interest stops rule. I note, however, that in order to achieve the remedial purpose of the *CCAA*, *CCAA* courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of *CCAA* proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise: see, for example, paras. 61 and 70.

49 In conclusion, there are sound reasons for adopting an interest stops rule in the *CCAA* context. I now turn to the argument that *Canada 3000* and *Stelco* preclude the application of the rule.

(b) Are Canada 3000 and Stelco binding authorities to the effect that the interest stops rule does not apply in CCAA proceedings?

50 The appellant vigorously maintains that the *CCAA* judge was bound by *Canada 3000* and *Stelco*, which both confirm that the interest stops rule does not apply in *CCAA* proceedings.

51 I would not give effect to this submission. As I will explain, both of these decisions should be read narrowly and do not constitute a precedent with respect to the issue raised in this appeal — whether the common law interest stops rule applies in *CCAA* proceedings.

(i) Canada 3000

Background and lower court decisions

52 The decision in *Canada 3000* arose out of the collapse of three airlines — Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"), and Inter-Canadian (1991) Inc. ("Inter-Canadian"). Canada 3000 filed for protection under the *CCAA* and, three days later, filed for bankruptcy. Inter- Canadian filed a *BIA* proposal but the proposal ultimately failed and so it too was placed into bankruptcy effective as of the date it filed its notice of intention to make a proposal.

53 At the time the airlines collapsed, they owed significant amounts in unpaid airport and navigation charges. As a result, various airport authorities and NAV Canada sought remedies under the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 ("*Airports Act*") and the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("*CANSCA*"). In particular, they sought orders seizing and detaining aircraft leased by the bankrupt airlines. While the lessors of the planes retained legal title to the aircraft, the bankrupt airlines were the registered owner for the purposes of the *Aeronautics Act*, R.S.C. 1985, c. A- 2.

54 The airport authorities and NAV Canada brought proceedings in Ontario and Quebec.

55 In Ontario, Ground J. dismissed motions for orders permitting the airport authorities and NAV Canada to seize and detain the aircraft leased by Canada 3000: *Canada 3000 Inc., Re* (2002), 33 C.B.R. (4th) 184 (Ont. S.C.J.). On the question of interest, he concluded, at para. 73, that the airport authorities and NAV Canada were entitled to charge interest on the unpaid charges up to the date of payment or the posting of security for payment.

56 On appeal from Ground J.'s decision, this court held that the interest question need not be determined since the airport authorities and NAV Canada did not have the right to detain the aircraft: *Canada 3000 Inc., Re* (2004), 69 O.R. (3d) 1 (Ont. C.A.), at para. 197.

Supreme Court's decision

57 On appeal to the Supreme Court of Canada, the court determined that the airport authorities and NAV Canada had the right to detain the aircraft leased and operated by the bankrupt airlines. The issue of post-filing interest was, therefore, an issue the court had to decide.

58 In deciding that issue, Binnie J. made the following comment at para. 96:

> While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].
>
> [Emphasis added.]

59 The appellant submits that the underlined words are binding *ratio* and must be followed in this case.

60 While I agree that Binnie J.'s comment about the *CCAA* is not *obiter*, I am not convinced that it should be read as broadly as the appellant contends. In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.), Binnie J. warned, at

para. 57, against reading "each phrase in a judgment ... as if enacted in a statute". Rather, the question to be asked is "what did the case decide?".

61 To answer what *Canada 3000* decided about post-filing interest under the *CCAA*, it is important to consider the context in which Binnie J. made his comment, including the facts of the case, the issues before the court, the structure of his reasons, the wording he used, and what he said as well as what he did not say.

62 At para. 40., Binnie J. defined the "two major questions raised by the appeals" as follows: (1) "are the *legal titleholders* liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers?" and (2) "even if they are not so liable, are *the aircraft* to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by Canada 3000 and Inter-Canadian?" (emphasis in original). The answer to those two questions turned on the interpretation of the *Airports Act* and *CANSCA*. As Binnie J. noted at para. 36, the case was "from first to last an exercise in statutory interpretation".

63 After engaging in a lengthy exercise of statutory interpretation, he concluded that: (1) under s. 55 of *CANSCA*, the legal titleholders were not jointly and severally liable for the charges due to NAV Canada; and (2) under s. 56 of *CANSCA* and s. 9 of the *Airports Act*, the airport authorities and NAV Canada were entitled to apply for an order detaining the aircraft operated by the failed airlines.

64 Binnie J. then addressed eight additional arguments made by the parties and just before his last paragraph on disposition, he included a section simply entitled "Interest", starting at para. 93.

65 He began his analysis of the interest issue by outlining the statutory authority for charging interest: s. 9(1) of the *Airports Act* expressly provided for the payment of interest, and while *CANSCA* did not explicitly provide for interest, a regulation under *CANSCA* imposed interest: para. 93.

66 "The question then", said Binnie J. at para. 95, was "how long the interest can run". He addressed that question as follows, at paras. 95-96:

> The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.
>
> Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].
>
> [Emphasis added.]

67 Significantly, Binnie J. made no mention in his reasons of the common law interest stops rule or the related *pari passu* principle. Nor did he cite any case law dealing with those issues. In fact, even though it is well established that the interest stops rules applies under the *BIA*, he did not rely on the common law rule in support of his finding that interest stopped on bankruptcy. Instead, he relied on ss. 121 and 122 of the *BIA* in concluding that the interest payable under the *Airports Act* and the regulation under *CANSCA* did not accrue post-bankruptcy.

68 Binnie J.'s analysis of the issue is rooted in the factual and statutory context of the case. In discussing the accrual of interest under the *CCAA*, he specified that the interest was on "unpaid charges", namely charges under *CANSCA* and

the *Airports Act*. Binnie J. was not answering an abstract legal question but rather deciding how long interest ran in the particular factual and statutory context.

69 In effect, I read Binnie J. as saying that a *CCAA* filing does not stop the accrual of interest under *CANSCA* or the *Airports Act* but the statutory provisions of the *BIA* ss. 121 and 122 do. He was not deciding whether, in the absence of the right to interest under *CANSCA* and the *Airports Act*, interest would have accrued or been stopped by the common law interest stops rule.

70 Let me add that I agree with the *CCAA* judge's comment that Binnie J.'s statement in *Canada 3000* should "now be construed in light of *Century Services* and *Indalex*". In fact, one can well imagine that the court's interpretation of *CANSCA* and the *Airports Act* as allowing the accrual of interest in a *CCAA* proceeding but not in a *BIA* proceeding might have been different had it reached the Supreme Court after these two more recent cases. That question, however, is for another day. For now, I turn to this court's decision in *Stelco*.

(ii) Stelco

Background and motion judge's decision

71 The post-filing interest issue in *Stelco* arose in "the final chapter of the financial restructuring of Stelco" under the *CCAA*: *Stelco Inc., Re* (2006), 24 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]), at para. 1. The final chapter involved competing claims to a portion of the amount payable to the holders of subordinated notes (the "Junior Noteholders") pursuant to Stelco's plan of arrangement (the "Plan"). The claim to these funds ("Turnover Proceeds") was made by the "Senior Debentureholders".

72 The dispute over the Turnover Proceeds arose after Stelco's Plan had been sanctioned and Stelco had emerged from restructuring with its debt reorganized. The Senior Debentureholders claimed the Turnover Proceeds on the basis of subordination provisions contained in the Note Indenture under which Stelco had issued convertible unsecured subordinated debentures to the Junior Noteholders.

73 Under the terms of the Note Indenture, the Junior Noteholders expressly agreed that, in the event that the debtor became insolvent, they would subordinate their right of repayment until after repayment in full of "Senior Debt".

[74] The plan of arrangement that had been approved was a "no interest" plan, meaning that distribution from Stelco to the creditors did not include or account for post-filing interest. The Plan, however, provided that the rights as between the Senior Debentureholders and the Junior Noteholders were preserved. The Senior Debentureholders, who had not received payment of post-filing interest from Stelco under the Plan, demanded payment of it from the Junior Noteholders pursuant to the terms of the Note Indenture. The Junior Noteholders argued, among other things, that the subordination provisions did not survive the Plan's implementation and that the Senior Debentureholders were not entitled to claim post-filing interest from them.

75 The motion judge, and on appeal, this court ruled in favour of the Senior Debentureholders. The courts found that the Plan was expressly drafted to preserve the subordination provisions and that the *CCAA* does not purport to affect rights as between creditors to the extent that they do not directly involve the debtor.

How to read Stelco?

76 The appellant and the respondents offer different readings of *Stelco*.

77 The appellant argues that this court's decision is binding authority for the proposition that the interest stops rule does not apply in the *CCAA* context. The passages relied on by the appellant include para. 67:

> [T]here is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in [*Canada 3000*] at para. 96, where he said:

> While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

78 The respondents, for their part, read the case more narrowly as a resolution of an inter-creditor dispute. They submit that the *ratio* of the case is that there was no rule that prohibited giving effect to the agreed upon inter- creditor postponement. To the extent that this court discussed the interest stops rule in the abstract, its comments are *obiter*.

79 I agree with the respondents. In my view, the court in *Stelco* did not need to decide whether the interest stops rule applies in *CCAA* proceedings for it to decide the inter-creditor dispute before the court and so its statements about the rule's application are not binding.

80 This court expressly noted, at para. 44, that it was dealing with an inter-creditor dispute. The Junior Noteholders had accepted the subordination terms in the Note Indenture. They had agreed not to be paid anything, in the event of insolvency, until those who held Senior Debt were paid principal and interest in full. The court affirmed, at para. 44, that the *CCAA* does not change the relationship among creditors where it does not directly involve the debtor.

81 As noted, this was a "no interest" plan, meaning that the Senior Debentureholders received no post-filing interest from Stelco. Rather, they sought and eventually received payment of post-filing interest from the Junior Noteholders' share of the proceeds. The court found that the Stelco Plan contemplated the continued accrual of interest to Senior Debentureholders for the purpose of their rights as against the Junior Noteholders after the *CCAA* filing date: paras. 59 and 70. It noted that *CCAA* plans can and sometimes do provide for payments in excess of claims filed in *CCAA* proceedings. There was no rule precluding the payment of post-filing interest to the Senior Debentureholders in accordance with the Stelco Plan: para. 70.

82 The court's conclusion that the Junior Noteholders could not rely on the interest stops rule is consistent with the traditional interest stops rule. The interest stops rule relates to claims by creditors against the debtor. It does not deal with arrangements as between creditors. In other words, whether or not the interest stops rule applies in *CCAA* proceedings did not need to be decided because the agreement between creditors fell outside the scope of that rule.

83 The appellant makes two further submissions based on its interpretation of s. 6.2(1) of the Note Indenture. That paragraph reads as follows:

> 6.2 Distribution on Insolvency or Winding-up.
>
> . . . . .
>
> (1) the holders of all Senior Debt will first be entitled to receive payment in full of the principal thereof, premium (or any other amount payable under such Senior Debt), if any, and interest due thereon, before the Debentureholders will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or securities, which may be payable or deliverable in any such event in respect of any of the Debentures;
>
> [Emphasis added.]

84 The first argument is that the Senior Debentureholders were only entitled to receive principal, premium and interest "which may be payable or deliverable in any such event", the event being insolvency or bankruptcy proceedings. Therefore, the court must have concluded, at least implicitly, that the Senior Debentureholders would have been entitled to maintain their claim for post-filing interest against Stelco.

85 The second argument is that, by the terms of s. 6.2(1), the Senior Debentureholders were only entitled to interest "due thereon" and so they could not claim post-filing interest from the Junior Noteholders unless they could claim post-filing interest from Stelco.

86 I would not give effect to either submission.

87 In *Stelco*, the court did not address either argument and we do not have a copy of the entire agreement nor do we have the other agreements that form part of the factual matrix. Without that context, this court is not in the position to interpret s. 6.2(1).

88 In my view, the key question for this court is not how to properly interpret s. 6.2(1) but, rather, how we should read the reasons in *Stelco*. What did the *Stelco* court decide, and specifically, should we read the panel as implicitly deciding that the Senior Debentureholders could not recover post-filing interest from the Junior Noteholders unless they could claim post-filing interest against Stelco?

89 In discussing post-filing interest, the court's only mention of the Senior Debentureholders' claim as against Stelco is found at paras. 57-59, where the panel expressly rejected the argument that "any claim the Senior [Debentureholders] have for interest must be based on a "claim" [as defined in the Plan] they have against Stelco for such interest" and that "[i]f the Senior Debt does not include post-filing interest, there can be no claim against the [Junior] Noteholders for such amounts": see paras. 58-59.

90 Admittedly, the panel made this comment in discussing the effect of the Stelco Plan as opposed to the effect of the interest stops rule. However, as I read the section on post-filing interest as a whole, the court is saying that the Junior Noteholders agreed to be bound by the deal they made. They had agreed to the subordination provisions that guaranteed full payment to the Senior Debentureholders in the event of insolvency, and the Plan affirmed that the Senior Noteholders could claim the full amount that would have been owing had there been no *CCAA* filing. In this court's words at para. 70, there is no interest stops rule "that precludes such a result." In my view, therefore, this court did not make an implicit finding that the Senior Debentureholders had to be able to claim post-filing interest from Stelco in order to claim post-filing interest from the Junior Noteholders.

91 In conclusion, I consider the comment that there is no persuasive authority that supports an interest stops rule in *CCAA* proceedings to be *obiter*. *Stelco* dealt with the effect of an agreement as between creditors as to how, between them, they would share distributions. Whether or not interest stops upon a *CCAA* filing was of no import in answering that question.

(2) If the CCAA judge did not err in concluding that an interest stops rule applies in CCAA proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

92 The appellant objects to the wording of the *CCAA* judge's order. It provides that "holders of Crossover Bond Claims are not legally entitled to claim *or receive* any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). While the appellant asked the *CCAA* judge to amend his order to delete "or receive", he refused. The appellant submits that, to the extent this precludes the bondholders from receiving post-filing interest under a *CCAA* plan, the *CCAA* judge erred. The appellant notes that all the parties in this proceeding agree that a *CCAA* plan may provide for post-filing interest.

93 As I explained above, the interest stops rule does not preclude the payment of post-filing interest under a plan of compromise or arrangement.

94 As I read the *CCAA* judge's reasons and order, he did not decide otherwise. His decision confirms that the common law interest stops rule applies in *CCAA* proceedings. If a plan of compromise or arrangement is concluded, it should not, for example, be read as limiting any right to recover post-filing interest creditors may have as amongst themselves, as existed in *Stelco*, or from non-parties. Nor does it dictate what any creditor may seek in bargaining for a fair plan of compromise or arrangement. In that regard, I do not interpret the *CCAA* judge's use of the words "or receive" as preventing the appellant from seeking and obtaining such a result in a negotiated plan. In particular, I note the *CCAA*

judge's comment at para. 35 of his reasons that "the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done."

95 The appellant also seeks clarification as to the effect of the words "*any amounts* under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). The appellant notes that, without clarification, the wording of the order could potentially preclude the recovery of other contractual entitlements under the relevant indentures, such as costs and make-whole provisions, even though no arguments were advanced before the *CCAA* judge with respect to any amounts other than post-filing interest.

96 The issue the *CCAA* judge was directed to answer was "whether the holders of the crossover bond claims ... [were] legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest". As indicated in the appellant's factum, the only arguments advanced before the *CCAA* judge related to post-filing interest and not any other amounts under the indentures. The appellant does not appear to have made submissions to the *CCAA* judge with respect to the costs and make-whole fees it now raises in its factum. This court is in no position to deal with the new argument raised by the appellant. Further, beyond making the broad submission noted above, the appellant did not expand on that submission and direct the court to the specific claims or indenture provisions it relies on in support of its argument or explain why the claims should not be caught by the order.

97 As I have already indicated, the *CCAA* judge's order confirms that the interest stops rule, and the limits imposed by the rule, apply in *CCAA* proceedings. To the extent that the appellant maintains that there are other contractual entitlements under the relevant indentures not covered by the interest stops rule, it is up to the *CCAA* court to decide if those can now be raised and ruled upon.

F. Final Comments

98 I acknowledge that the Nortel *CCAA* proceedings are exceptional, particularly with respect to the length of the delay. The amount the appellant claims for post-filing interest and related claims under the indentures, and the resulting impact on other unsecured creditors is so great because of the length of that process. The principle, however, is the same whether the *CCAA* process is short or long. After the imposition of a stay in *CCAA* proceedings, allowing one group of unsecured creditors to accumulate post-filing interest, even for a relatively short period of time, would constitute unfair treatment vis-à-vis other unsecured creditors whose right to convert their claim into an interest-bearing judgment is stayed.

99 This decision does not purport to change or limit the powers of *CCAA* judges. Although the decision clearly settles at the outset of a *CCAA* proceeding whether there is a legal entitlement to post-filing interest, it does not dictate how the proceeding will progress thereafter until a plan of compromise or arrangement is approved, or the *CCAA* proceeding is otherwise brought to an end.

100 The determination of legal entitlement is important as it clearly establishes the starting point in a *CCAA* proceeding. It tells creditors, debtors and the court what legal claim a particular creditor has. Its significance is not only for purposes of setting the voting rights of creditors on any proposed plan of compromise or arrangement, it also ensures that, in assessing any such proposed plan, the parties will know what they are or are not compromising and the court will be equipped to consider the fairness of such a plan.

G. Disposition

101 For these reasons, I would dismiss the appeal. Pursuant to the agreement of the parties, I would award the respondent Monitor, as successful party, costs as against the appellant fixed in the amount of $40,000, inclusive of disbursements and applicable taxes. I would make no other order as to costs.

Janet Simmons J.A.:

I agree

E.E. Gillese J.A.:

I agree

Appeal dismissed.

Footnotes

1 There are five Canadian Debtors: Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation.

2 As explained in Roderick J. Wood's text on bankruptcy and insolvency law, "insolvency law is the wider concept, encompassing bankruptcy law but also including non-bankruptcy insolvency systems.": Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law Inc., 2009), at p. 1.

3 The respondents are the Monitor, the Canadian Debtors, the Canadian Creditors' Committee and the Wilmington Trust, National Association. While technically The Bank of New York Mellon and the Law Debenture Trust Company of New York are also respondents, they support the appellant's position and so my use of the term "respondents" excludes them.

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