Court File No. CV-17-589016-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

BOOK OF AUTHORITIES OF THE RESPONDENT, VR GLOBAL PARTNERS, L.P.

March 23, 2018

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In the Matter of Section 291 of the Business Corporations Act S.B.C. 2002, c. 57, as Amended

In the Matter of a Proposed Arrangement involving TELUS Corporation and its Non-Voting Shareholders

Mason Capital Management LLC, Petitioner and TELUS Corporation, Respondent

Fitzpatrick J.

Heard: November 7-9, 2012
Judgment: December 18, 2012
Docket: Vancouver S125864, S126123

Proceedings: affirming *Mason Capital Management LLC v. TELUS Corp.* (2012), 2012 BCSC 1619, 2012 CarswellBC 3489 (B.C. S.C.); affirming *TELUS Corp. v. CDS Clearing and Depository Services Inc.* (2012), 2012 BCSC 1540, 2012 CarswellBC 3201 (B.C. S.C.); affirming *TELUS Corp. v. CDS Clearing and Depository Services Inc.* (2012), 2012 BCSC 1539, 2012 CarswellBC 3203 (B.C. S.C.)

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Subject: Corporate and Commercial

Headnote

Business associations --- Changes to corporate status — Arrangements and compromises — With shareholders — Reorganization

Respondent T Inc. announced plan to convert non-voting shares to common shares — Petitioner was significant shareholder and opposed conversion — T Inc. proposed new arrangement which provided for exchange of all non-voting shares into common shares on one-for-one basis and gave dissent rights to non-voting shareholders — T Inc. brought ex parte application for interim order — Master granted interim order directing T Inc. to hold and conduct separate class meeting of non-voting shareholders and general meeting of common shareholders to consider and vote upon terms of arrangement — Shareholder brought applications to vary interim order — Master dismissed applications — Shareholder appealed and T Inc. brought application for court approval of arrangement — Appeal dismissed, application granted and arrangement approved — All evidence on application pointed to conclusion that arrangement which was proposed to non-voting shareholders was fair and reasonable — Positive vote by all shareholders was considered and was strong indication that shareholders considered that benefits outweighed negative aspects.

Business associations --- Specific matters of corporate organization — Shareholders — Meetings — Conduct of meeting — Voting — Miscellaneous

Respondent T Inc. announced plan to convert non-voting shares to common shares — Petitioner was significant shareholder and opposed conversion — T Inc. proposed new arrangement which provided for exchange of all non-voting shares into common shares on one-for-one basis and gave dissent rights to non-voting shareholders — T Inc. brought ex parte application for interim order — Master granted interim order directing T Inc. to hold and conduct separate class meeting of non-voting shareholders and general meeting of common shareholders to consider and vote upon terms of arrangement — Shareholder brought applications to vary interim order — Master dismissed applications — Shareholder appealed and T Inc. brought application for court approval of arrangement — Appeal dismissed, application granted and arrangement approved — There was no reason to delay meetings — Master considered substantial evidence that any postponement of meeting would have prejudiced telecommunications company and would have confused and inconvenienced shareholders.

Business associations --- Specific matters of corporate organization — Shareholders — Meetings — Notice — Miscellaneous

Respondent T Inc. announced plan to convert non-voting shares to common shares — Petitioner was significant shareholder and opposed conversion — T Inc. proposed new arrangement which provided for exchange of all non-voting shares into common shares on one-for-one basis and gave dissent rights to non-voting shareholders — T Inc. brought ex parte application for interim order — Master granted interim order directing T Inc. to hold and conduct separate class meeting of non-voting shareholders and general meeting of common shareholders to consider and vote upon terms of arrangement — Shareholder brought applications to vary interim order — Master dismissed applications — Shareholder appealed and T Inc. brought application for court approval of arrangement — Appeal dismissed, application granted and arrangement approved — Shareholder was able to and did continue to make its position very clear that shareholders should oppose any exchange of non-voting shares for common shares — Evidence before Master was that many shareholders had already received enough, if not too much, information on warring positions from both sides.

Business associations --- Specific matters of corporate organization — Shareholders — Meetings — Conduct of meeting — Proxies

Respondent T Inc. announced plan to convert non-voting shares to common shares — Petitioner was significant shareholder and opposed conversion — T Inc. proposed new arrangement which provided for exchange of all non-voting shares into common shares on one-for-one basis and gave dissent rights to non-voting shareholders — T Inc. brought ex parte application for interim order — Master granted interim order directing T Inc. to hold and conduct separate class meeting of non-voting shareholders and general meeting of common shareholders to consider and vote upon terms of arrangement — Shareholder brought applications to vary interim order — Master dismissed applications — Shareholder appealed and T Inc. brought application for court approval of arrangement — Appeal dismissed, application granted and arrangement approved — Proxies could be used — Instrument provided flexibility by its express terms which allowed certain "other matters" to be voted on by proxies — Master did not err in considering that proxies obtained by both parties allowed discretion on part of proxy holders to vote proxies on shareholder's resolutions as other matter that came before meeting.

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s. 6 — considered

APPLICATION by respondent for approval of proposed arrangement and APPEAL by petitioner from judgment reported at *Mason Capital Management LLC v. TELUS Corp.* (2012), 2012 BCSC 1619, 2012 CarswellBC 3489, 9 B.L.R. (5th) 20 (B.C. S.C.).

***Fitzpatrick J.*:**

I. Introduction

1 The telecommunications industry in Canada, and in other parts of the world, is extremely competitive. As a significant industry player, the petitioner TELUS Corporation seeks to maintain and enhance its own competitiveness in the Canadian marketplace. Failure to do so may have adverse consequences for the future of the company.

2 One factor negatively affecting TELUS' business model has been its dual share structure, which was put in place over a decade ago to comply with foreign ownership restrictions. In particular, the dual share structure poses corporate governance issues for TELUS and reduces share liquidity, which indirectly affects company performance and hence, its competitiveness. TELUS shareholders hold either common shares or non-voting

shares. Although both types of shares have the same economic attributes, historically, the common shares have traded at a premium to the price of the non-voting shares.

3 In order to rid itself of this encumbrance, TELUS has proposed an arrangement with the non-voting class of shareholders which would result in the non-voting shares being exchanged for common shares on a one-for-one basis. Aside from one significant shareholder, Mason Capital Management LLC, the overwhelming majority of both common and non-voting shareholders support this proposal. Mason opposes the proposal despite it being well acknowledged by both TELUS and Mason that there are significant benefits to TELUS and its shareholders in achieving this result.

4 The marketplace has already reacted favourably to the proposal in that the share price for both common and non-voting shares has increased.

5 Despite its significant share position, Mason has a limited financial stake in TELUS arising from an arbitrage strategy which it employed after TELUS announced its intention to collapse its dual class share structure. Mason is indifferent to the increase in the share prices as a result, and its primary intention is not to enhance the value of its shares in TELUS. Rather, it aims to profit from the historical trading spread as between the two classes of shares. Accordingly, Mason will reap significant financial benefits either from blocking the TELUS proposal (in which case the historical premium for the common shares is expected to re-emerge) or alternatively, by exerting sufficient leverage to prevent any conversion unless a premium is paid for the common shares (or alternatively, a discount is accepted for the non-voting shares).

6 The arrangement has been proposed by TELUS pursuant to the *Business Corporations Act*, S.B.C. 2002 c. 57 (the "*Act*"), and TELUS now seeks court approval of it. In the leading case of *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), the Court established a three-part test in considering approval of an arrangement: whether the arrangement is made in good faith, whether the statutory requirements have been met and finally, whether the arrangement is fair and reasonable.

7 Mason concedes that TELUS is acting in good faith and that, as part of the fair and reasonable test, there are valid business reasons for the arrangement. Mason contends, however, that there are conflict of interest issues on the part of both TELUS' Board and the Special Committee established to consider the arrangement. Mason also raises numerous issues relating to whether the statutory requirements under the *Act* have been met. Finally, Mason contends that the arrangement is not fair and reasonable to the common shareholders, and in particular to Mason.

8 This hearing also involved appeals from orders of Master Muir of this Court dealing with various interim matters leading to the meeting of the shareholders on October 17, 2012.

The issues arising in those appeals overlap to some extent with issues arising in the fairness hearing.

II. Background Facts

A. Circumstances of Telus

9 TELUS is a leading Canadian telecommunications company incorporated under the *Act* and headquartered in Vancouver, British Columbia. TELUS is a reporting issuer in all Canadian provinces.

10 TELUS has a multiple class share structure. It is authorized to issue up to 1,000,000,000 common shares (the "Common Shares"), 1,000,000,000 non-voting shares (the "Non-Voting Shares") and certain preferred shares. Currently, there are no issued and outstanding preferred shares. The Common Shares are traded on the Toronto Stock Exchange ("TSX") and the Non-Voting Shares are traded on both the TSX and the New York Stock Exchange ("NYSE").

11 As detailed below, the Non-Voting Shares were created to allow foreigners to participate economically in TELUS without running afoul of foreign ownership restrictions. The Non-Voting Shares are virtually identical in all material respects to the Common Shares. Specifically, they are equal with each other with respect to the payment of dividends and the distribution of assets of TELUS on a liquidation, dissolution or winding up of TELUS. Further, the Articles of TELUS (the "Articles") provide that the holders of Non-Voting Shares and Common Shares are equally entitled to receive notice of, attend and be heard at all general meetings of TELUS and to receive all notices of meetings, information circulars and other written information from TELUS.

12 The sole distinguishing characteristic between the two classes of shares — the difference which Mason says requires TELUS to offer a premium to Common Shareholders on any conversion or exchange — is the Common Shares carry voting rights in all circumstances and Non-Voting Shares do not. Despite being entitled to the same dividend and equity participation, being widely held and having similar liquidity, Non-Voting Shares have generally traded at a discount to the trading price of Common Shares. Measured over the last three years, the difference between the two classes was approximately 4.5%.

13 TELUS' dual class share structure was born out of several corporate mergers in the late 1990s. At that time, the industry was governed by provisions which restricted foreign control such that no more than one-third of TELUS' issued and outstanding voting shares could be owned by non-Canadians. Responding to concerns that the transactions would result in levels of foreign ownership beyond what was allowed, certain amendments were made to

the Articles to create the Non-Voting Share class and in 2000, TELUS issued a significant number of Non-Voting Shares.

14 In 2004, foreign ownership of TELUS shares dropped significantly. Since that time, further reductions have occurred so that total foreign ownership is now below the regulatory limit. In addition, TELUS says that while it remains unclear whether and when the government may make comprehensive changes to legislation to remove foreign ownership restrictions on entities such as TELUS, the federal government has indicated in the past that it is interested in liberalizing these foreign ownership rules. Certain market analysts agree that additional liberalization is likely.

15 Accordingly, TELUS has found itself in a position where the dual class structure, and in particular the need for the Non-Voting Shares, is no longer required to maintain compliance with current foreign ownership requirements; and based on indications from the federal government, it appears that these requirements could soon be loosened or altogether eliminated.

16 This new reality was recognized by several of TELUS' largest shareholders, who began to express concern about the impact of the dual structure on the liquidity and trading volumes of TELUS shares. These concerns were brought to the attention of the executive and management of TELUS, which provided the impetus for TELUS to consider collapsing its dual class share structure into a single voting class and in that event, on which terms such a conversion should occur.

17 As of September 4, 2012, TELUS' outstanding and issued share capital was comprised of 174,910,546 Common Shares and 150,902,132 Non-Voting Shares.

B. The Initial Proposal

18 By December 2011, TELUS had determined that extending full voting rights to all of TELUS' shareholders through a collapse of the dual class share structure warranted careful consideration. Management began to analyze the matter and prepare a proposal to the Board. In its preliminary analysis, which was prepared with the assistance of TELUS' lawyers, management reviewed and considered precedent transactions and potential structures under which such a collapse could be implemented.

19 On January 25, 2012, TELUS' Board established a Special Committee of independent directors to determine the implications of collapsing the dual class share structure, whether TELUS should proceed with such a proposal, and, if so, the most appropriate way to do so. The Special Committee was mandated to review, direct and supervise TELUS' assessment of the proposal to collapse the share structure, and to take such steps as it determined in its business judgment were necessary and appropriate in making its recommendation to the

Board. The members of the Special Committee were Brian Canfield (Chair), Charlie Baillie, John Butler, Rusty Goepel, John Lacey and Bill MacKinnon. The Committee was assisted by considerable input from both Canadian and U.S. legal counsel.

20 The Special Committee held its initial meeting on February 1. At that time, TELUS' management presented an overview of options to consider in deciding how best to collapse the dual class structure. The Special Committee discussed and reviewed with TELUS management: (i) information relating to the creation, attributes, and historical trading price and volumes of the Common Shares and the Non-Voting Shares; (ii) issues relating to the share conversion ratio and the impact of that ratio on share price, dividend yield, the number of outstanding Non-Voting Shares and Common Shares, forecasted earnings per share ("EPS"), and dividend payout; and (iii) the implications for both Non-Voting Shareholders and Common Shareholders.

21 Further, the Special Committee retained an independent financial advisor, Scotia Capital Inc. ("Scotia"). As an independent financial advisor, Scotia gave presentations to the Special Committee on February 8, 25 and 21 providing its views and its conclusions on the proposed conversion of Non-Voting Shares to Common Shares.

22 Scotia's presentations to the Special Committee focused on determining an appropriate conversion ratio and the potential approaches to determine the appropriate share conversion ratio. Scotia also provided its initial observations on share value and liquidity as compared with other industry players with single class share structures and dual class share structures. With respect to the fairness of the conversion ratio, Scotia evaluated and assessed the following factors: (i) the legal rights attached to the Common Shares and the Non-Voting Shares; (ii) market precedents for share consolidation transactions of this type; (iii) value implications; and (iv) the benefits flowing from a share consolidation to the Common Shares and the Non-Voting Shares.

23 After considering a range of different possible conversion ratios and providing its perspective on what effect these different ratios may have on share price, EPS, dividend yield and share dilution, Scotia was of the opinion that, in the circumstances, a one-for-one conversion ratio was most appropriate as being fair, from a financial point of view, to both the holders of Non-Voting Shares and the holders of Common Shares (the "First Fairness Opinion").

24 After receiving and considering the First Fairness Opinion, and after discussing a range of issues relating to the collapse of the dual class share structure, the Special Committee unanimously concluded that a one-for-one conversion of the Non-Voting Shares for Common Shares was in the best interests of TELUS, was reasonable and fair in the circumstances, and should be recommended to the Board and shareholders. By late February,

the Special Committee prepared a report to the Board which unanimously recommended that TELUS adopt and implement an arrangement involving a one-for-one conversion of Non-Voting Shares for Common Shares (the "Initial Proposal"). The Initial Proposal involved an amendment to TELUS' Articles.

25 Based on the Special Committee's recommendations and other considerations, and after Scotia's presentation of its First Fairness Opinion, the Board determined that the Initial Proposal was in the best interests of TELUS and was reasonable and fair in the circumstances.

26 On February 21, TELUS issued a news release outlining the key terms of the Initial Proposal. The shareholder vote on the Initial Proposal was set to be held at the annual and special meeting of shareholders scheduled for May 9. Given that the Initial Proposal required amendments to certain Articles, approval required a special majority (i.e. 2/3) of the votes cast by the holders of the Non-Voting Shares and the holders of the Common Shares, each voting separately as a class.

27 The Board met again on March 14 and confirmed that the Initial Proposal was in the best interests of TELUS and was reasonable and fair in the circumstances. The Board approved proceeding with the Initial Proposal and recommended that shareholders vote in favour of the Initial Proposal at the May 9 meeting.

28 On March 20, TELUS filed a petition in this Court and immediately obtained from Master Tokarek an *ex parte* interim order which established the parameters for the holding of the May 9 meeting to consider approval of the Initial Proposal (the "First Interim Order"). The First Interim Order, as amended, provided that the Initial Proposal would be adopted if it received the affirmative vote of not less than 2/3 of the votes cast by the holders of both the Common Shares and the Non-Voting Shares, each voting separately as a class. This voting threshold was consistent with requirements in the Articles when changes to the Articles were being proposed. The record date for the purposes of voting at the meeting was set for April 3.

29 By all accounts, the market reacted favourably to the February 21 announcement of the Initial Proposal. The spread between the trading price of the Non-Voting Shares and the Common Shares narrowed from a discount of approximately 3.8% on February 21 to a discount of approximately 0.9% the next day. Until August 30, the spread maintained an average of approximately 2%.

30 Additionally, shares of both classes rallied after the announcement. The trading price of Non-Voting Shares and Common Shares closed up 2.4 and 5.5%, respectively, representing an increase of approximately $675 million in TELUS' equity value. This outstripped both the broader market and close competitors. While Mason disputes whether the increase was

due to the announcement or other factors, I accept that the increase was in large measure due to the announcement.

C. Mason's Arbitrage Strategy

31 Mason Capital Management LLC is a hedge fund manager based out of New York. It provides investment advice to various hedge funds who now own shares in TELUS. For the purposes of these reasons, I will simply refer to this corporate group or related companies collectively as "Mason".

32 The narrowed spread remained at approximately 1% until Mason initiated a short-term arbitrage strategy — arbitrage being the practice of taking advantage of a price difference between two or more markets or striking a combination of matching deals that capitalize upon the imbalance, the profit resulting from the difference between the market prices. This strategy was accomplished in the face of the delay from the initial announcement by TELUS on February 21 (at which time Mason owned no TELUS shares) and the April 3 record date set by the notice of meeting to consider the Initial Proposal. During this time frame, Mason acquired a large number of Common Shares while simultaneously hedging its position by short selling an equivalent number of Non-Voting Shares and Common Shares.

33 Needless to say, evidence of significant trading in the shares after the announcement was an alarming development for TELUS. On March 21, a research analyst acting on behalf of Mason approached TELUS with confirmation that Mason had acquired a significant position and that it would not support the Initial Proposal unless a premium was paid for the Common Shares. The Board declined to enter into negotiations with Mason.

34 TELUS issued a press release on March 22 advising of this development and in particular an unusual accumulation of TELUS shares in the hands of non-Canadian shareholders. The press release stated in part:

> The catalyst for this announcement is recent significant buying interest by non-Canadian investment firms presumed to have short-term, event-driven trading tactics related to TELUS' February 21, 2012 proposal to convert Non-Voting Shares into Common Shares. TELUS believes one of the principal tactics being deployed by these event-driven foreign firms is acquiring the Common Shares and shorting the Non-Voting Shares. The result is little to no real net economic interest in TELUS. The sole purpose appears to be to exert influence over the proposed share conversion and to increase the share trading spread for near term profit. Since 2004, the level of non-Canadian ownership of Common Shares has been generally below 20 per cent and the current level is an exceptional development.
>
> [Emphasis added.]

35 On April 10, Mason disclosed publicly for the first time that it had acquired a significant number of TELUS shares. Mason reported that, as at March 31, it owned 32,722,329 Common Shares and 602,300 Non-Voting Shares, representing approximately 18.7% and 0.4% of the issued shares of each class, respectively. Mason further reported that it also had obligations under securities lending agreements to return to lenders a total of 10,963,529 Common Shares and 21,672,700 Non-Voting Shares.

36 As a result, Mason controlled a significant amount of the Common Shares (some $2 billion worth), yet its financial stake in TELUS was relatively small. In aggregate, Mason was simultaneously long 33,324,629 TELUS shares and short 32,636,229 TELUS shares, such that its net investment represented only 0.21% of TELUS' capital.

37 By early April, Mason's intentions with respect to this arbitrage strategy were clear; namely, it had executed its arbitrage plan for the purpose of voting against the Initial Proposal, which would allow it to profit from the re-emergence of the historical premium attached to the Common Shares once the Initial Proposal was defeated or withdrawn. Put bluntly, Mason's investment in TELUS was structured in such a way that its economic interest in TELUS primarily related to the *spread* of the share prices as between the two classes, not to the price of the shares themselves.

D. Efforts to Approve (and Defeat) the Initial Proposal

38 From the time of Mason's first public disclosure on April 10, the battle was joined as between TELUS and Mason. What followed was a very public and, to some extent, acrimonious dispute between them while both parties engaged in a long, extensive and aggressive campaign to garner shareholder support.

39 On April 13, TELUS forwarded its information circular to all 225,000 shareholders highlighting the benefits of the Initial Proposal and urging shareholders to vote in favour of the arrangement, supported by Scotia's First Fairness Opinion.

40 On April 16, Michael Martino, Principal and Co-Founder of Mason, had a conference call with Brian Canfield, the Chairman of TELUS' Board, to discuss Mason's position and the reasons for Mason's concerns. The results of that call were communicated to the Special Committee.

41 With TELUS uninterested in entering into negotiations, Mason circulated a lengthy and detailed dissident proxy circular on April 20 urging TELUS shareholders to vote against the Initial Proposal (the "First Mason Dissident Circular"). Mason engaged Kingsdale Shareholder Services Inc. ("Kingsdale") as its proxy solicitation agent. Mason's fundamental position was, as it asserts on this application, that since buyers of Common Shares had

consistently paid a premium over a long period of time for their right to vote, the one-for-one conversion would be unfair as it would take away this value without proper compensation. Mason asserted:

> Buyers of Voting Shares have consistently paid a premium over a long period of time. The premium has averaged 4% to 5% over any relevant time period in the five years before the Proposal was announced, and has been as high as 10%.
>
> Voting Shares have more value because they have more rights — the right to vote, to control the board, to control the Company and to convert into Non-voting Shares.
>
> The superior value of voting or multiple voting shares in dual class structures has been recognized in numerous other transactions where holders of such shares received a premium on the elimination of the dual-class structure.
>
> As the voting class controls the potential sale of TELUS, the Voting Shares should also be entitled to a control premium...
>
> A one-for-one conversion ratio takes this value away from holders of Voting Shares and confers a windfall benefit on holders of Non-voting Shares.
>
> This transfer of value was recognized by the market when the transaction was announced as the long-standing spread between the price of Voting Shares and Non-voting Shares immediately collapsed.
>
> The historical trading spread should be the starting point in setting a fair premium for the Voting Shares as compensation for permanently diluting their voting rights.
>
> [Emphasis added.]

42 Mason further argued that the Initial Proposal would dramatically reduce the permitted level of foreign ownership, thereby hurting the stock's liquidity.

43 Moreover, Mason said that the process adopted by TELUS' board was flawed because it failed to ensure the interests of the holders of Common Shares were fully and independently considered. It asserted that: (i) the Special Committee's mandate did not require it to determine whether the transaction was fair to Common Shareholders; (ii) the Special Committee failed to consider the historical trading premium between the two classes of shares; (iii) the Initial Proposal disproportionately benefited TELUS' management and directors, who predominantly owned Non-Voting Shares; and (iv) Scotia's Fairness Opinion was not independent, and TELUS did not otherwise obtain an independent fairness opinion.

44 Finally, Mason disputed many of TELUS' claims, including: (i) that the Non-Voting Shares and Common Shares are similar; (ii) that the Initial Proposal benefits both classes, as evidenced by the increase in market prices of both after the February 21 announcement; (iii) that a premium is unjustified, given the dual class structure was created to deal with foreign ownership rules; (iv) that TELUS has, for the most part, treated the two classes of shares similarly by extending voting rights to holders of Non-Voting Shares on various issues; and (v) that the Initial Proposal would enhance the liquidity and marketability of TELUS shares.

45 Mason concluded by urging TELUS shareholders to vote against the Initial Proposal. After release of the First Mason Dissident Circular, Mason continued its campaign to defeat the Initial Proposal through further public communications to the shareholders, including a press release on April 23 outlining similar arguments.

46 On April 24, TELUS announced that two independent proxy advisory firms, Institutional Shareholder Services Inc. ("ISS") and Glass, Lewis & Co., LLC ("Glass Lewis"), had issued reports on the Initial Proposal. Both companies recommended that TELUS shareholders vote for the Initial Proposal. In particular, ISS concluded that a vote in favour of the Initial Proposal was warranted, "[a]s the [Initial Proposal] would align voting rights with economic interest, offers shareholders meaningful economic opportunity through increased trading liquidity and a dual-listing [of the Common Shares] on the NYSE, and has been ratified by a strong market response — and as the provisions in the company's Articles effectively preclude any exchange ratio other than the proposed one-for-one exchange." Glass Lewis also recommended that shareholders vote in favour of the Initial Proposal, noting, "the potential long term financial benefits of a simplified share class structure, which will replace a share structure that was established to address foreign ownership restrictions that are no longer a major concern for the Company, outweigh any short term dilutive effects or costs resulting from the Conversion."

47 Mason issued a press release on April 24 asserting that the reports issued by ISS and Glass Lewis were flawed because they failed to consider Mason's rationale for voting against the Initial Proposal.

48 On April 26, TELUS sent a letter to shareholders via a press release extolling the benefits of the Initial Proposal and highlighting the positive support that the Initial Proposal had received from ISS and Glass Lewis. TELUS also went on the offensive, stating its position that Mason was an "empty voter" by taking a position inimical to the interests of "legitimate" TELUS shareholders:

> The proposal is opposed by [Mason], an opportunistic, event-driven hedge fund that recently amassed a large voting position in TELUS following the announcement of the proposal with a view to profiting from a short-term trading strategy. Mason has

employed an "empty voting" strategy that involves taking long and short positions in TELUS' shares in order to vote shares in which it does not have a net economic interest, and Mason is expected to exit its position opportunistically in the near future.

. . .

As referenced by ISS, "if announcement of the transaction itself increased the company's market value higher, voting down the transaction should logically result in the loss of some or all of that incremental market value." Despite this, Mason is seeking to defeat the proposal because it believes that the trading price of the Non-Voting Shares will decrease more than the trading price of the Common Shares and therefore Mason will profit. Why? Because the gain on its Non-Voting Share short position would exceed any loss on its offsetting Common Share position. This is in stark contrast to other holders of Common Shares and Non-Voting Shares whose interest is in seeing the shares appreciate in value.

49 Further press releases followed. TELUS issued two press releases on April 27 and 30 informing shareholders that ISS and Glass Lewis had updated their reports after considering the First Mason Dissident Circular and that they continued to reject Mason's position while reconfirming their recommendation that TELUS shareholders vote in favour of the Initial Proposal. Mason followed with a press release on April 30, reiterating its position that the Initial Proposal failed to recognize the valuable premium that Common Shareholders were entitled to. It summarized its position:

At the heart of our decision to vote against the proposal are three simple but very important facts:

1. Votes Are Valuable. There is no dispute that holders of the Voting shares have more rights — the right to vote, to control the board, to control the Company and to convert into Non-Voting shares of TELUS from time to time at the OPTION of the Voting shareholder. *We refuse to let TELUS trivialize the distinctive value of the Voting shares* — voting rights are the foundation of the Company's corporate governance and are a privilege exclusively owned by the holders of the Voting shares.

2. Holders of the Voting Shares Paid a Premium for Their Rights. Buyers of Voting shares have consistently paid a premium over a long period of time for their right to elect directors and to make other important decisions affecting the Company. This premium has averaged 4% to 5% over any relevant time period in the five years before TELUS announced its Proposal, and has been as high as 10%. If anything, that premium has only increased during that period and become more consistent.

> **3. TELUS' Proposal Takes Away these Valuable Rights for No Consideration.** Given the significant value carried by the ability to vote and the premium paid historically by holders of the Voting shares, TELUS' one-for-one proposal is a gift to the Non-Voting shareholders. Investors in each class of TELUS shares for many years have made an informed decision to either pay more for Voting stock or less for Non-voting stock. It is unfair for TELUS to take away the rights that the holders of the Voting shares have paid for without any compensation whatsoever and confer a windfall benefit on the holders of the Non-Voting shares.

50 In addition to all the above communication strategies, TELUS engaged the services of Laurel Hill Advisory Group to provide assistance with respect to a "call-out program", which involved contacting shareholders via telephone or e-mail to provide information regarding the Initial Proposal. Evidence from TELUS representatives indicate that arising from these communications: (i) shareholders were "generally very aware of the positions of both TELUS and Mason"; (ii) many shareholders were "quick to identify the exchange ratio as a main difference between the TELUS and Mason positions"; and (iii) many shareholders indicated that they supported the Initial Proposal, specifically the one-for-one conversion ratio.

51 Mason issued two further press releases in advance of the meeting, on May 2 and 3, confirming its intention to vote against the Initial Proposal because of TELUS' failure to recognize any premium for the Common Shares.

52 Despite its considerable efforts, TELUS realized that the Initial Proposal would not be approved in the face of Mason's opposition and its inevitable vote against it. Accordingly, on May 8, TELUS announced that it had withdrawn the Initial Proposal. TELUS indicated publicly, however, that it remained committed to a one-for-one exchange of Non-Voting Shares for Common Shares and that it was considering alternate means to effect this result in due course.

53 Although there was no formal vote on the Initial Proposal, many shareholders had already sent in their proxies. These votes were tallied. Ignoring Mason, the shareholders overwhelmingly supported the Initial Proposal. Factoring out Mason's votes, 92.4% of all voted shares were in support of the Initial Proposal, with 84.2% of the Common Shares and 98.6% of the Non-Voting Shares voting in favour.

E. The New Proposal

54 Although Mason had successfully defeated the Initial Proposal, TELUS remained publicly committed to achieving a similar result, *albeit* by other means. It appears that in light of this clear intention, the market maintained some expectation that the share reorganization would still happen. Accordingly, the historical spread between the trading values of the Non-

Voting Shares and Common Shares did not reappear. This prevented Mason from closing out its position.

55 In order to push TELUS to abandon its share reorganization plans and the one-for-one exchange ratio, commencing immediately after the May 9 meeting, Mason engaged in an unrelenting campaign to disrupt any efforts by TELUS to develop an alternate plan.

56 Immediately after the meeting, Mason sought to inspect the proxies deposited by the voting shareholders, claiming that TELUS had misrepresented or misled the public as to the results of the vote. TELUS initially refused, but later provided redacted copies of the proxies to Mason's counsel. On May 15, Mason wrote to the TSX complaining in part about disclosure issues related to the withdrawn vote, including TELUS' failure to disclose the alternate means by which it would effect the one-for-one exchange ratio. On May 16, Mason sought an order from the British Columbia Registrar of Companies for the inspection of TELUS' records, which was rejected.

57 In June, Mason publicly accused TELUS of not being in compliance with non-Canadian ownership restrictions and requested that TELUS disclose its foreign ownership levels and the steps it had taken to ensure compliance. TELUS responded in July, advising that there was "no merit whatsoever to Mason's allegations concerning TELUS' foreign ownership levels". Mason responded the next day, issuing a Petition in this Court seeking an order giving Mason access to unredacted copies of the proxies submitted in respect of the Initial Proposal. The Petition was not pursued any further.

58 On August 2, CDS Clearing and Depository Services Inc. ("CDS"), at Mason's request, delivered a requisition to TELUS in respect of a general meeting of shareholders (the "Requisition"). Mason's intention underlying the Requisition was to call a meeting of Common Shareholders so as to consider the "ground rules" for a future conversion of Non-Voting Shares to Common Shares. The Requisition set out certain resolutions on which the Common Shareholders would vote (collectively, the "Mason Resolutions"), which can be summarized as follows:

a) The first two resolutions contemplated amendments to TELUS' Articles which would enshrine an exchange ratio of either 1.08 or 1.0475 applicable to any future exchange of Non-Voting Shares for Common Shares, except where approved by an "Exceptional Resolution" (defined as an 80% majority of the votes cast by Common Shareholders) or otherwise in accordance with the existing Articles (i.e. in the case of a regulatory change or a takeover offer); and

b) If neither of the above resolutions were passed, Common Shareholders would then vote on ordinary resolutions that would, if passed, result in an advisory opinion that

TELUS not proceed with any future exchange of Non-Voting Shares for Common Shares unless done at one of the two above exchange ratios.

59 Mason also publicly announced the Mason Resolutions in an August 2 press release, with a detailed description of what was intended to be achieved by a positive vote on the Mason Resolutions.

60 By the summer of 2012, TELUS had already made significant efforts to develop an alternate plan in the face of Mason's opposition. These efforts had continued despite the substantial steps taken by Mason over the spring and summer of 2012 to derail any new proposal. As early as March, when it learned that Mason was seeking to interfere with the Initial Proposal, TELUS, in consultation with its legal advisors, began inquiring into alternative ways by which the two classes could be collapsed into the Common Shares. TELUS devised the current proposal to only the Non-Voting Shareholders, which involves a court-approved plan of arrangement that provides for a one-time *exchange* (as opposed to a conversion) of all the outstanding Non-Voting Shares for Common Shares on a one-for-one basis (the "New Proposal" or "Arrangement"). Under the New Proposal, the Non-Voting Shareholders will be compelled to exchange their shares for Common Shares.

61 TELUS argues that although the New Proposal achieves the same outcome as the Initial Proposal, unlike the Initial Proposal it does not require any amendments to the Articles to remove the Non-Voting Shares from TELUS' authorized share structure. Rather, the Articles would continue to authorize TELUS to issue Non-Voting Shares and Common Shares on exactly the same terms; there simply would be no issued and outstanding Non-Voting Shares if the New Proposal is implemented. TELUS further says that there is nothing in its Articles preventing it from exchanging Non-Voting Shares for Common Shares and maintaining an empty Non-Voting Share class. It points to the fact that its Articles include certain preferred share classes, both of which currently do not have any issued and outstanding shares.

62 As for the requisite shareholder approval, the New Proposal calls for approval by 2/3 of the votes cast by the Non-Voting Shareholders voting separately as a class at a class meeting, and a simple majority of the votes cast by Common Shareholders at a general meeting.

63 The Board and Special Committee began considering the New Proposal in April. In accordance with its mandate, the Special Committee continued to review, direct and supervise the process for the New Proposal, focusing on the new structure and the appropriateness of the new voting thresholds being proposed for Common Shareholders. The Special Committee held further meetings on April 17, August 17 and August 21 to discuss the New Proposal, again with the assistance of both legal counsel and Scotia as its financial advisor.

64 At a final meeting on August 21, the Special Committee received a presentation from Scotia, in which Scotia reviewed the factors that it had considered in assessing the fairness of a one-for-one exchange ratio, from a financial point of view, to the holders of Non-Voting Shares and the holders of Common Shares. Scotia presented its fairness opinion with respect to the New Proposal (the "Second Fairness Opinion"). As with the Initial Proposal, Scotia concluded that the proposed one-for-one exchange ratio was fair, from a financial point of view, to the holders of both classes of shares.

65 The Special Committee determined, based on its overall consideration of procedural and substantive factors relating to the New Proposal, that it was in the best interests of TELUS and each class of shareholders and was fair in the circumstances. The Special Committee unanimously recommended that the Board approve the New Proposal and recommend shareholders vote in favour of it.

66 Similar to the benefits arising from the Initial Proposal, the Special Committee identified the benefits to be achieved by the New Proposal, concluding that it would: enhance the liquidity and marketability of TELUS' Shares, including through the listing of the Common Shares on the NYSE for the first time; address concerns expressed by shareholders about the impact of TELUS' dual class share structure on liquidity and trading volumes; enhance TELUS' leadership in respect of good corporate governance practices by granting the right to vote to the Non-Voting Shareholders, who have the same economic interests as the Common Shareholders; align the capital structure of the Company with what is generally viewed as best practice; continue TELUS' ongoing ability to comply with the foreign ownership restrictions; and not affect the EPS and dividend paid per Common Share and Non-Voting Share.

67 On August 21, the Board met and considered Scotia's Second Fairness Opinion and the Special Committee's recommendation. The Board determined that the New Proposal was in the best interests of TELUS and was fair in the circumstances. The Board authorized, subject to receiving a satisfactory interim order from this Court, the calling of a class meeting of holders of Non-Voting Shares and a general meeting on October 17 to consider the New Proposal.

68 On August 21, the Board also considered the earlier Requisition sent by CDS and Mason regarding the Mason Resolutions. It refused to call a meeting to consider those Resolutions.

69 On the same day, August 21, counsel for TELUS appeared *ex parte* before Master Scarth seeking an interim order for the New Proposal. Master Scarth granted an interim order (the "Second Interim Order") directing TELUS to hold and conduct a separate class meeting of the Non-Voting Shareholders and a general meeting of the Common Shareholders on October 17 at 2:00 p.m. (collectively, the "TELUS Meetings") to consider and vote upon

the terms of the Arrangement. The record date of the TELUS Meeting was set as September 4.

F. Efforts to Approve (and Defeat) the New Proposal

70 On August 21, after obtaining the Second Interim Order, TELUS issued a news release outlining the key terms of the New Proposal and calling the TELUS Meetings.

71 Mason was quick to signal to TELUS and the broader market that it did not consider itself defeated. In an August 22 news article published in the Globe and Mail, Mr. Martino remained defiant and signalled that Mason would not, as the saying goes, 'go gently into that good night'. Mr. Martino made it clear that Mason would continue its opposition, and he was quoted as saying that the Board should be concerned about Mason's response.

72 On August 30, CDS called a meeting to vote on the Mason Resolutions (the "Mason Meeting"). The notice sent to shareholders contained details regarding the Mason Resolutions and a complete reproduction of the actual Mason Resolutions. Mason also issued a press release to that effect on August 31, highlighting the provisions of the Mason Resolutions and also Mason's vigorous opposition to the New Proposal:

> Today's action furthers Mason's efforts to protect the rights of all TELUS voting shareholders. Given the oppressive actions taken by TELUS to disenfranchise an entire class of shareholders, <u>it is critical that voting shareholders have the opportunity to vote on a binding change to TELUS' articles to establish an appropriate minimum premium to be paid in any dual-class collapse transaction.</u> Moreover, TELUS' recycled proposal demonstrates the lengths the company is willing to go to circumvent the protections afforded to the voting shareholders under the law. <u>Mason will continue to vigorously oppose TELUS' latest attempts to take value from voting shareholders and transfer it to non-voting shareholders</u>...
>
> [Emphasis added.]

73 The Mason Meeting was scheduled to be held on the same day as the TELUS Meetings, but earlier in the day and at a different location. The record date for the Mason Meeting was set for August 31.

74 Notably, by August 31, Mason had taken steps to reduce its position. On that date, Mason beneficially owned or controlled 32,765,829 Common Shares (approximately 18.73%), but had disposed of all Non-Voting Shares. Further, Mason had short sold 14,658,129 Common Shares and 18,036,800 Non-Voting Shares. Accordingly, as of August 31, Mason was simultaneously long 32,765,829 TELUS shares and short 32,694,929 TELUS shares, representing a net holding of 70,900 Common Shares and a reduction in its position

in the overall capital of TELUS from the previous level of 0.21% to 0.021% of TELUS' issued and outstanding shares.

75 On September 6, TELUS sent the notices of the TELUS Meetings, an extensive management information circular (attaching the Second Fairness Opinion), and forms of proxy relating to the TELUS Meetings. TELUS also sent a letter to all shareholders on August 30 encouraging them to vote for the Arrangement.

76 Consequently, three shareholder meetings were scheduled to be held on October 17: (i) the Mason Meeting at 10:00 a.m. to consider and vote on the Mason Resolutions; and (ii) the TELUS Meetings (Common Shares and Non-Voting Shares) at 2:00 p.m. to consider and vote on the New Proposal.

77 With the meetings set, the two sides once again recommenced or, perhaps more accurately, continued their aggressive campaigns to solicit support from shareholders in favour of their respective positions, by distributing information circulars, issuing press releases and initiating call-out campaigns. Again, both campaigns can be described as extensive and aggressive; and the tenor of the debate would continue to the time of the meeting, with each side vigorously describing the other in quite negative terms.

78 On September 11, Mason suffered a setback. Justice Savage of this Court refused to give effect to the Requisition, a matter that will be discussed in more detail below. Nevertheless, Mason continued with its campaign.

79 On September 24, Mason filed its second dissident circular outlining the reasons why shareholders should vote against the New Proposal and seeking proxies in support of its position (the "Second Mason Dissident Circular"). The Second Mason Dissident Circular attached an analysis from Professor Bernard Black and a detailed report from Blackstone Advisory Partners L.P. which provided a precedent analysis implying that a conversion ratio greater than one-to-one was appropriate (the "Blackstone Report"). Mason also issued a news release advocating for its premium exchange ratio.

80 Although Mason argued forcefully on this application that the issue in this case is more nuanced than whether shareholders should have voted 'for or against' a one-for-one exchange ratio, the Second Mason Dissident Circular heavily emphasized the importance of the historical premium, which Mason contends is "a reflection of the inherent superior economic value of the voting shares". In fact, the Second Mason Dissident Circular discussed at length Mason's commitment to "defend the rights" of the holders of Common Shares. Further, it stressed that Mason's objective was not to influence management decisions or seek other changes relating to the underlying enterprise of TELUS; rather, its primary objective was to "ensure that the dual-class collapse is implemented fairly and in a manner that does not result in a transfer of wealth from the voting class to the non-voting class".

81 That no exchange should occur absent a Common Share premium is a consistent theme throughout the Second Mason Dissident Circular:

> Instead of simply proposing a neutral exchange ratio that avoided a transfer of wealth between the classes and which all shareholders could accept, TELUS management appears prepared to take any action to push through a one-to-one conversion ratio. Mason will take all appropriate steps to oppose such actions, which not only disregard the interests of an entire class of shareholders but are plainly coercive.
>
> Mason will continue its efforts to redress the failure of corporate governance that has occurred at TELUS and seek a fair exchange ratio for the benefit of all voting shareholders. We intend to vote our shares against TELUS' current one-to-one proposal. We ask you to do the same. <u>Your vote will send a clear message to TELUS management that the rights of the voting shareholders must be respected and that the dual-class collapse must be done on the basis of an exchange ratio that is fair to the holders of the voting shares.</u>
>
> [Emphasis added.]

82 It is significant that the Second Mason Dissident Circular included a complete description of the Mason Resolutions and why Mason had proposed them. Mason also advised it was seeking to appeal Savage J.'s decision prior to the meetings.

83 On September 27, Mason held an investor call during which it reiterated its position with respect to a minimum exchange ratio. Again, Mason argued that the Non-Voting Shares must be exchanged for Common Shares either at a discount of 8%, a value identified by Blackstone, or at a discount of 5%, which Mason says would properly recognize the "average historical trading premium" of 4.83%.

84 On October 1, TELUS issued a letter to shareholders via a news release, again reviewing the benefits of the New Proposal. It also addressed Mason's claims in the Second Mason Dissident Circular. In particular, TELUS underscored the efforts it had undertaken to develop the New Proposal and reiterated its view that a one-for-one exchange ratio was fair, from a financial point of view, to both classes of shares. It also summarized a new report issued by ISS (the "Second ISS Report"), in which ISS recommended that shareholders vote for the New Proposal. As highlighted by ISS in the Second ISS Report, the market gains had proven durable. As at market closing on September 27, Non-Voting Shares and Common Shares had risen by 14.8% and 11.2%, respectively, since the announcement. This again beat both the market and TELUS' peers by a consistent margin. Finally, TELUS attacked Mason's "empty voting" tactics.

85 On October 2, Mason wrote to shareholders encouraging them to reject the New Proposal because Common Shareholders would have to give up the premium they paid for those shares.

86 On October 5, TELUS issued a press release announcing that Glass Lewis recommended that shareholders vote in favour of the New Proposal (the "Second Glass Lewis Report"). TELUS reiterated its views on Mason's "empty voting" strategy and asked shareholders to vote for the New Proposal.

87 Also on October 5, Mason sent yet another letter to shareholders with what it said was further support for its position. The theme was consistent with its earlier press releases and letters, stating in part:

> If approved, TELUS' flawed proposal would result in you giving up the premium that you paid for your voting shares and a 46% reduction in your voting power — with no compensation whatsoever. In fact, TELUS' proposal would rank among the worst Canadian share collapse transactions.
>
> Professor Ronald Gilson of Stanford Law School and the Columbia School of Law has stated that "voting rights attached to shares are valuable" and that "the premium associated with TELUS voting common shares is well recognized by the market." Professor Gilson notes that TELUS' proposal would have the effect of "transferring value from the existing holders of common shares with voting rights to the existing holders of non-voting shares."
>
> With such clear negative implications for an entire class of shareholders, we cannot help but question the motives behind TELUS' proposal.

88 Mason issued a news release on October 11, again urging shareholders to reject the New Proposal.

89 On October 11, TELUS issued an investor bulletin via e-mail to approximately 1,000 institutional investors and analysts, and posted it to its website for shareholders to view. TELUS also filed slides on SEDAR from a presentation setting out the benefits of voting in favour of the New Proposal. The presentation primarily addressed the issue of what constitutes a fair exchange ratio. TELUS noted that all of Scotia, ISS and Glass Lewis supported a one-for-one exchange ratio and once more denounced Mason's "empty voting" strategy as being misaligned with shareholders interests.

90 As with the campaign in respect of the Initial Proposal, TELUS engaged the services of Laurel Hill to communicate with TELUS shareholders, which Laurel Hill did in two

rounds: the first to bring awareness to shareholders about the TELUS Meetings, and the second in response to the Second Mason Dissident Circular. On this application, TELUS provided evidence from the Laurel Hill communications that many shareholders were already "generally very aware" of both parties' positions with respect to the Initial Proposal, the New Proposal, the Requisition and the Mason Resolutions. In fact, it appears that several shareholders were becoming frustrated or "saturated" by the volume of information they had received from both TELUS and Mason. In addition, there is evidence that shareholders understood that the dispute between TELUS and Mason primarily related to the appropriate exchange ratio.

91 Similarly, Mason again led its own vigorous solicitation campaign against the New Proposal in the weeks leading up to October 17 with the assistance of its proxy solicitation agent, Kingsdale.

92 As will be discussed at length below, TELUS contends that through its aggressive solicitation campaign, Mason made its position — that there should be no exchange without payment of a premium to Common Shareholders — crystal clear to all shareholders such that there is no reasonable possibility that any shareholder could still be confused as to what he or she was being asked to vote on at the October 17 meetings.

G. TELUS' Action to Quash the Mason Meeting

93 There were a number of court proceedings involving TELUS and Mason in the months leading up to this fairness hearing. Some of the background of this dispute has already been set out in detail in previous decisions of this Court and the Court of Appeal. For the purpose of considering some issues arising on these applications, however, it is useful to again set out the relevant procedural history.

94 On August 31, TELUS commenced a proceeding for a declaration that the Requisition sent by CDS and Mason in relation to the Mason Meeting was non-compliant with s. 167 of the *Act* and that the Mason Meeting should not be held. That issue was argued before Savage J. on September 6 and 7, and reasons were issued on September 11: *TELUS Corp. v. CDS Clearing and Depository Services Inc.*, 2012 BCSC 1350 (B.C. S.C.) (the "*Savage Reasons*"). Justice Savage ordered that the Mason Meeting not proceed given defects he found relating to the Requisition.

95 On October 12, the British Columbia Court of Appeal overturned Savage J.'s Order as it related to the validity of the Requisition. In addition, the Court also found that Mason's status as an "empty voter" did not disentitle Mason from asserting its position under s. 167 of the *Act* with respect to shareholder requisitions for general meetings: *TELUS Corp. v. CDS Clearing and Depository Services Inc.*, 2012 BCCA 403 (B.C. C.A.) (the "*BCCA Reasons*"). Although the Court of Appeal recognized that its decision could lead to a "confusing and

unwieldy" process, it refused to cancel the Mason Meeting and left it to the parties to work out the logistics for both the Mason Meeting and the TELUS Meetings, with the assistance of this Court, as necessary.

H. Mason's Efforts to Vary the Second Interim Order and Delay the Meetings

96 On September 2, Mason gave TELUS notice of its intention to commence an application before Savage J. to vary the Second Interim Order. Mason took no further steps in respect of this application. Further, on September 4, Mason commenced a proceeding for directions concerning the conduct of the Mason Meeting (Action No. S126123).

97 On September 26, Mason launched a second application seeking to discharge and vary the Second Interim Order on the basis of non-disclosure by TELUS. That matter was argued before Master Muir on October 11 and she reserved her decision.

98 Following the release of the *BCCA Reasons*, two applications were filed: firstly, Mason sought to postpone both the TELUS Meetings and the Mason Meeting to an unspecified date; secondly, TELUS sought directions from the court that the meetings proceed as scheduled as a joint meeting and it also sought additional orders as to the conduct of those meetings.

99 On October 15, Master Muir released her decision dismissing Mason's application to vary the Second Interim Order based on non-disclosure: *TELUS Corp. v. CDS Clearing and Depository Services Inc.*, 2012 BCSC 1539 (B.C. S.C.) ("*Muir Reasons #1*"). Master Muir found no basis for Mason's allegations of non-disclosure. Also, at paras. 40-59, she found that the voting thresholds for the Common Shares provided for in the Second Interim Order were appropriate. Mason is not pursuing the non-disclosure allegations, but continues to take issue with the voting threshold set out in the Second Interim Order by way of an appeal from *Muir Reasons #1*.

100 Immediately after the release of *Muir Reasons #1*, the parties argued Mason's applications to postpone the meetings and TELUS' applications for directions. Mason argued that the meetings should be adjourned to allow it to send an information circular to shareholders and solicit proxies for the Mason Resolutions as it would have done in the normal course. As on this application, Mason argued that Savage J.'s Order enjoining the Mason Meeting negatively affected its ability to oppose the New Proposal and solicit support for the Mason Resolutions until the decision was overturned on October 12. That contention is addressed below in the context of the appeal from the Master's Order concerning the meetings and also in the context of the fairness hearing, particularly with respect to procedural fairness.

101 Master Muir delivered oral reasons dismissing Mason's applications and granting TELUS' applications: *TELUS Corp. v. CDS Clearing and Depository Services Inc.*, 2012 BCSC 1540 (B.C. S.C.) ("*Muir Reasons #2*"). She held that Mason would not be prejudiced by having the Mason Meeting proceed along with the TELUS Meetings. Accordingly, she ordered that the TELUS Meetings and the Mason Meeting proceed on October 17 as a joint meeting. She also made certain orders in relation to the procedures to be followed at the meetings.

102 On October 17, an hour before the meetings were to begin, the parties appeared before Master Muir to settle the terms of Master Muir's October 15 Order concerning the conduct of the meetings. Master Muir dismissed Mason's further arguments on that issue, and in particular with respect to the use of the proxies at the meeting: *Mason Capital Management LLC v. TELUS Corp.*, 2012 BCSC 1619 (B.C. S.C.) ("*Muir Reasons #3*").

103 Mason also appeals from the decisions arising from *Muir Reasons #2* and *#3*.

104 On October 23, the parties appeared before me and made submissions as to whether Mason's appeals from the decisions of Master Muir should proceed prior to the fairness hearing or be adjourned to the fairness hearing. Exercising my statutory discretion under s. 291(2) of the *Act*, I adjourned the appeals to be heard in conjunction with this fairness hearing: *Mason Capital Management LLC v. TELUS Corp.*, 2012 BCSC 1582 (B.C. S.C.) (the "*Fitzpatrick Reasons*").

I. The October 17 Meetings

105 The meetings proceeded on October 17, as ordered by Master Muir.

106 With respect to the vote on the New Proposal, the necessary quorum requirements were met in that approximately 73.7% of Common Shares (24,556 shareholders representing 128,865,344 Common Shares) and approximately 84.6% of Non-Voting Shares (9,757 shareholders representing 127,693,578 Non-Voting Shares) participated in person or by proxy.

107 On a combined basis, 78.7% of votes in relation to issued and outstanding shares were cast, with 81.1% of those votes in favour of the New Proposal and 18.9% against.

108 In accordance with Master Muir's previous direction, the forms of proxy solicited by TELUS and Mason in relation to the TELUS Meetings were used for all of the business considered at the meetings.

109 The results of the vote on the New Proposal were as follows:

Summary of Votes on the New Proposal

	Non-Voting Shareholders	*Common Shareholders*
"For"	127,013,409 (99.5%)	81,060,235 (62.93%)
"Against"	639,086 (0.5%)	47,751,327 (37.07%)
Total	127,652,495	128,811,562

110 As can be seen, the voting thresholds for both the Non-Voting Shares (2/3) and the Common Shares (simple majority) were met in accordance with the thresholds established in the New Proposal and in the Second Interim Order.

111 Excluding Mason's vote, 76.3% of votes in relation to all issued and outstanding shares were cast, with 93% in favour and 7% against. Again excluding Mason, 84.4% of the Common Shareholders voted in favour of the New Proposal. This analysis also applies if the calculations are based on Mason's net position in accordance with its arbitrage strategy.

112 At the start of the meetings, counsel for Mason spoke on the record. He stated that Mason was participating in the meetings "under protest" because, in Mason's view, the decision of the Court of Appeal vindicated its position. Mason's counsel said that many proxies were deposited before the *BCCA Reasons*, at a time when proceedings under the Mason Resolutions had been halted. Mason's counsel took the position that TELUS should have adjourned the joint meeting to allow voting shareholders more time to consider the nature and consequences of the Mason Resolutions and the New Proposal. Mason's counsel then asked whether shareholders attending the meeting had read the Mason Resolutions, to which many shareholders responded in the affirmative.

113 Mason placed the Mason Resolutions before the Common Shareholders at the Mason Meeting by moving and seconding the relevant motions. The results of the vote were as follows: 128,811,562 votes were counted, with 37.1% voting in favour and 62.9% voting against in respect of each Resolution. Resolutions 1 and 2 (to set a new voting threshold for an established conversion ratio) were not approved by the required 2/3 of votes cast. Resolutions 3 and 4 were not approved by the required simple majority of votes cast. Accordingly, all of the Mason Resolutions failed.

III. Procedural Appeals From the Master's Orders

A. Applicable Tests

114 As stated above, there are appeals from both of Master Muir's Orders granted in these proceedings on October 15.

115 The first appeal arises from the Second Interim Order of August 21 and Master Muir's refusal on October 15 to set it aside in relation to the voting threshold that was ordered for the vote by the Common Shareholders. The second and third appeals arise from Master Muir's Orders on October 15 in relation to the conduct of the October 17 meetings, in particular her refusal to adjourn the TELUS Meetings and her order that the Mason Meeting proceed. Her decision also allowed certain voting procedures at the meetings under the proxies then in the hands of the parties.

116 In the *Fitzpatrick Reasons*, at paras. 20-26, I outlined the applicable standard of review in relation to a decision of the Master. In summary, where a decision is on a point of law, the standard of review is "correctness"; where the decision involves an exercise of discretion, the standard of review is whether the Master was "clearly wrong".

B. Did the Second Interim Order Set an Incorrect Voting Threshold?

117 In the *Fitzpatrick Reasons*, I addressed the interplay between the issue arising under the first appeal and the issue arising on the fairness hearing as to whether the statutory requirements under the *Act* had been met with respect to the voting threshold for the Common Shares: see paras. 28-44. I concluded that the issues were the same in that a decision in the context of the fairness hearing would inevitably dictate whether the voting threshold proposed by TELUS and incorporated in the Second Interim Order was appropriate.

118 Accordingly, this issue is fully canvassed below in relation to the fairness hearing.

119 I do not understand what Mason gains by continuing to advance this argument as an appeal of the Master's decision. If Mason is correct in its contention, then the requisite majority vote by the Common Shareholders was not obtained and TELUS did not obtain the necessary votes to approve the New Proposal. If so, whether the Second Interim Order was correct or not is of little concern since the Arrangement was not approved by the shareholders, let alone by the court.

120 Nevertheless, what remains for consideration is whether these types of issues should be addressed at the preliminary stage or at a later stage, such as at the fairness hearing.

121 I have already cited in the *Fitzpatrick Reasons* the authorities that express the view that the obtaining of an interim order is intended to be a preliminary step in the proceedings to set the wheels in motion towards the ultimate step of seeking court approval of the arrangement at the fairness hearing. The voting threshold here was set by TELUS in the New Proposal, and Master Scarth was asked to exercise her discretion to set the procedures for the meeting to consider the Arrangement. I do not consider that, by doing so, she "set" or "established"

the appropriate voting threshold, since that matter was intended to be addressed in a fulsome manner at the fairness hearing.

122 Accepting Mason's arguments that this issue should be fully considered and decided at the interim order stage would completely negate the preliminary and summary procedures in relation to these arrangements that have been in place for some time, not only in British Columbia but in other parts of Canada. As was noted by Madam Justice Neilson (as she then was) in *Pacifica Papers Inc. v. Johnstone*, 2001 BCSC 701 (B.C. S.C. [In Chambers]) at para. 36, these interim applications usually proceed *ex parte* "due to the administrative burden of notifying all shareholders of the application".

123 If one accepts that an interim order has the effect of settling a substantive matter, then one must also accept that proper service on all parties affected would be required. This would impose a substantial burden on companies, particularly public companies, in terms of proposed arrangements, not only in terms of the timing in effecting service on parties but also the cost. The comments of Blair J. (as he then was) in *First Marathon Inc., Re*, [1999] O.J. No. 2805 (Ont. S.C.J. [Commercial List]) are apposite:

> [8] ... Because of the very nature of such transactions — particularly in relation to publicly traded companies — there is often a tight timing dynamic to them. The provisions of the Act should be construed and applied in a fashion which facilitates the fair and effective processing of the application in a manner that is consistent with their "real time" nature as business transactions. To require the corporation to serve notice on all shareholders before taking any steps seems to me to introduce unnecessary expense, duplication, and delay into the procedure.

124 The process relating to an interim application is such so as to avoid this delay and cost while also ensuring that proper safeguards are established to make certain that procedurally, the arrangement is put before the affected stakeholders in a fair and proper manner. This approach was adopted in *First Marathon Inc., Re* where the court found that the adequacy of an information circular was best left for consideration at the fairness hearing: para. 11.

125 I agree that in proper circumstances, the court may reconsider on a comeback hearing the procedures ordered in an interim order if they are so manifestly in error. Beyond that, however, any procedural issues should be considered at the fairness hearing. The hearing for an interim order is not an opportunity for a stakeholder to micromanage the process or cause undue delay and cost.

126 The matter of the voting threshold here is both a procedural and a substantive matter. TELUS set the voting threshold for the Common Shares in the New Proposal; and in accordance with the New Proposal, TELUS agreed that procedurally, it needed to obtain at

least that voting threshold in order to proceed to apply for court approval. This was adopted in the Second Interim Order.

127 Similar to the comments of the court in *First Marathon Inc., Re* concerning the adequacy of the circular, however, the Second Interim Order did not "approve" that voting threshold from a substantive point of view; it only acknowledged the voting threshold set by TELUS. I agree with Master Muir in *Muir Reasons #1*:

> [49] The *Business Corporations Act* in s. 291(2) is clear that the order being made is in respect of a proposed arrangement. It is quite different from the wording of s. 289 which deals with the adoption of an arrangement.
>
> [50] I do not consider that by making an order under s. 291(2) the Court is necessarily making an order regarding the method of adoption of an arrangement ...

128 The Second Interim Order should not be reconsidered on a comeback hearing with respect to issues that are properly addressed at the fairness hearing. Substantive issues, such as those that are raised by Mason here, are best left to the fairness hearing, by which time the vote will have been taken and proper service on all affected stakeholders will have been completed. If that is the case, no prejudice will have been suffered by any stakeholder. Its rights to argue that statutory requirements have not been met are still preserved until that time.

129 The approval of the preliminary procedures for the purpose of informing shareholders, calling the meeting and obtaining a vote on the arrangement is exactly what the Second Interim Order achieved. I would note that even if the voting threshold set by the Second Interim Order was wrong, it had no effect on the voting itself. In other words, the voting proceeded in a proper fashion and it remained to be determined whether TELUS' proposed threshold was the correct one. Mason suffers no prejudice as a result of this interpretation of the Second Interim Order.

130 In conclusion, I find that Master Scarth was not clearly wrong in setting the voting threshold for the Common Shares in the Second Interim Order, and it follows that I agree with Master Muir's conclusions at the comeback hearing as to the effect of the Second Interim Order.

131 The first appeal is accordingly dismissed.

C. Should the October 17 Meetings Have Taken Place?

132 Once the Court of Appeal's decision confirmed that Mason was entitled to proceed to a meeting to consider the Mason Resolutions, the issue after October 12 became how that

could be accomplished. Both TELUS and Mason agreed that a joint meeting to consider both the New Proposal and the Mason Resolutions was appropriate.

133 However, Mason contends that Master Muir was clearly wrong in exercising her discretion in dismissing Mason's applications to adjourn the TELUS Meetings and the Mason Meeting scheduled for October 17, and in setting certain procedures relating to the use of proxies at the joint meeting as requested by TELUS: see *Muir Reasons #2* and *#3*. As a result, Mason contends that all business conducted at the October 17 meetings with respect to both the New Proposal and the Mason Resolutions is invalid and of no force and effect.

1. Are the Appeals Moot?

134 As a preliminary matter, TELUS contends that since the meetings took place on October 17 — as a result of which the shareholders voted and the results were announced — these appeals are moot.

135 Mason made no application for a stay of the Second Interim Order regarding the TELUS Meetings pending the hearing of its appeal from Savage J.'s Order. It is, however, the case that during the appeal, Mason's counsel raised the prospect that if it was successful, and depending on when the decision was rendered, the parties would have to address the mechanics as to when and how the meetings would be held. Mason suggested that it may seek an adjournment of the meetings. TELUS indicated that it would oppose any adjournment.

136 Mr. Justice Groberman specifically referred to any potential issues concerning the meetings in the *BCCA Reasons*:

> [82] TELUS's final contention is that there are difficulties with the record date specified in CDS's notice of meeting, and that the holding of two meetings on the same day at different places and under different rules will be confusing and unwieldy.
>
> [83] I agree that the problems identified by TELUS are genuine. The issue of the appropriate record date for the meeting called by CDS must be resolved. As well, it would seem that a practical solution should be found to ensure that the October 17, 2012 meetings can proceed without undue confusion or inconvenience to shareholders.
>
> [84] These concerns, however, do not entitle the court to cancel the meeting called by CDS, nor do they justify prohibiting Mason from putting its resolutions before the shareholders.
>
> [85] Counsel for Mason has advised that the parties will appear before the Supreme Court for the purposes of obtaining a court order giving directions as to the conduct of the October 17, 2012 meeting or meetings. It seems to me that s. 186 of the *Business*

> *Corporations Act* (quoted above) gives the court ample powers to give directions and make orders to ensure that the meetings take place in an orderly manner and without causing undue confusion. In my view, it is appropriate to allow the parties to work out the logistics for the scheduled meetings, with the assistance of the Supreme Court, as necessary.
>
> [Emphasis added]

137 When the Court of Appeal released its reasons on October 12, the parties immediately asked this Court to address that matter. That gave rise to the hearing before Master Muir and the release of *Muir Reasons #2* on October 15, by which she ordered that the joint meeting should proceed. Again, Mason says that it did not seek a stay of her order that the joint Meetings proceed because it was impractical to attempt to obtain a stay with the impending Meetings only two days away.

138 TELUS says that it is too late for Mason to now challenge Master Muir's Orders regarding the conduct of the meetings on the basis that they have been fully performed. TELUS cites various authorities in support of its position that there is no right of appeal in circumstances where an order has already been performed.

139 In *Norcan Oils Ltd. v. Fogler* (1964), [1965] S.C.R. 36 (S.C.C.), an appeal had been taken from an order approving an amalgamation. However, no stay of proceedings was obtained and the transactions to accomplish the amalgamation were completed. In those circumstances, the Court held that the order had been fulfilled and rights and interests were acquired by persons. As such, no appeal could be taken: p. 44. Similarly, in *Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.* (1993), 81 B.C.L.R. (2d) 142 (B.C. C.A.), the court was addressing an order that had been fully performed by the distribution of partnership assets to the limited partners.

140 Appeals from orders regarding the taking of votes have also been found to be moot. In *Sparling v. Northwest Digital Ltd.*, [1991] B.C.J. No. 487 (B.C. C.A.), a director filed a petition seeking an order restraining the respondents from voting at a meeting of the company. The day before the meeting, the chambers judge dismissed the application. When the appeal was heard some months later, the British Columbia Court of Appeal quashed the appeal as moot, noting that there was no longer any "live" controversy. In *Scion Capital, LLC v. Gold Fields Ltd.*, [2006] O.J. No. 466 (Ont. S.C.J.), an issue arose concerning the validity of the voting of certain shares. Mr. Justice Morawetz held that deciding the issue had no practical effect given that the outcome of the meeting did not depend on whether the shares were voted: paras. 44-53.

141 I am not convinced that the concept of mootness is applicable in these circumstances. Unlike *Norcan Oils Ltd.* and *Galcor Hotel Managers Ltd.*, there were no actions taken under

the Orders of Master Scarth and Master Muir, nor were any rights obtained as a consequence of the meetings such that it is impossible to 'unring the bell'. Furthermore, voting at the meetings was not the only issue raised by Mason. Mason's fundamental position was that it was not appropriate to allow the meetings to proceed in circumstances where Mason could not fairly and properly solicit support for the Mason Resolutions and have a proper vote in respect of those Resolutions, hence the position taken by Mason's counsel at the meetings that it was putting the Mason Resolutions forward and voting on all matters "under protest".

142 Accordingly, I do not consider the issue to be moot even in light of the fact that the meetings were held and the votes were taken. If Mason prevails in its position, then it is possible to have the parties recommence the necessary procedures to call, hold and conduct meetings in place of the October 17 meetings.

2. The Proxy Issue

143 Part of the relief sought by TELUS on the October 15 application before Master Muir related to the use of the proxies at the joint meeting. As I have outlined above, by that time both parties had undertaken extensive campaigns to solicit proxies for their respective positions in respect of the TELUS Meetings.

144 By October 14, TELUS' proxies had been received representing 82,914,665 Common Shares, which accounted for 47.4% of Common Shares excluding the shares owned by Mason. If shares associated with Mason were included, proxies had been received representing 115,680,494 Common Shares or 66.14% of Common Shares. As of October 14, TELUS' proxies had been received representing 122,874,824 Non-Voting Shares or 81.43% of Non-Voting Shares. The final deadline for the submission of proxies was 2:00 p.m. on October 15.

145 On October 15, Master Muir rejected Mason's contention that it needed more time to solicit proxies for the Mason Resolutions. A key factor relevant to her determination was her finding that the proxies for the TELUS Meetings could be used, as it was "common ground that these proxies are sufficiently broad to allow voting on the Mason Resolutions": *Muir Reasons* #2 at para. 8.

146 There was a clear basis upon which the Master made that statement, given that Mason had specifically acknowledged that the use of the existing proxies was possible. Despite Mason's current contention that this was only a "prediction of what TELUS would do", Mason's counsel gave evidence on October 12 that, based on information from and the belief of Mason's securities lawyer, he believed that:

> The proxy form issued to shareholders by TELUS in respect of the meeting it called gives discretion to the proxyholder to vote the proxy in respect of any unspecified business

that comes before the meeting. If TELUS proposes to have the resolutions proposed by Mason considered by the shareholders at this meeting, it will be able to vote the management proxies against the resolutions proposed by Mason...

[Emphasis added]

147 Further, on September 25, Ivan Ross, a research analyst at Mason, gave evidence on the effect of para. 13 of the Second Interim Order, which provided that TELUS was authorized to amend, modify or supplement the "Meeting Materials" as it may determine. "Meeting Materials" was defined in para. 6 of the Second Interim Order to include materials relating to the TELUS Meetings. Mr. Ross said that, in his view, this provision:

... allows TELUS to change, at will, the meeting business or its commentary on important items of business and advertise those in any way it wishes. If changes are made, proxies solicited and completed before the changes will count as if the changes had been brought to the attention of the proxyholder on a timely basis. In my opinion it is an unusual and unreasonable power.

148 Accordingly, Master Muir's October 15 Orders allowed the existing proxies to be used by TELUS and Mason such that a management proxy in favour of the New Proposal (or neutral) could be used by management to vote on the Mason Resolutions in its discretion (i.e. against them), and a dissident proxy against the New Proposal (or neutral) could be used by Mason to vote on the Mason Resolutions in its discretion (i.e. in favour of them). If any proxy gathered by a party was against its position, then it was required to be voted in support of the opposing resolution(s).

149 The Order specified:

7. All proxy holders of dissident proxies (the "Dissident Proxies") received with respect to the TELUS Meeting from holders of Common Shares that indicate a voting intention against the Arrangement Resolution, or that do not indicate a voting intention, be entitled to vote at the discretion of the holders of the Dissident Proxies on the Mason Resolutions provided that if a Dissident Proxy indicates a vote in favour of the Arrangement Resolution the proxy holder will vote the proxy against the Mason Resolutions;

8. All proxy holders of management proxies (the "Management Proxies") received with respect to the TELUS Meeting from holders of Common Shares indicate a voting intention in favour of the Arrangement Resolution, or do not indicate a voting intention, be entitled to vote at the discretion of the holders of the Management Proxies on the Mason Resolutions provided that if a Management Proxy indicates a vote against the

Arrangement Resolution the proxy holder will vote the proxy in favour of the Mason Resolutions.

150 Despite Mason's stated position on TELUS' ability to vote the proxies in respect of the Mason Resolutions, it resiled from that position not two days later. On October 17, just hours before the meeting, Mason tried a different argument before Master Muir, despite the fact that that hearing was simply to settle the terms of her October 15 Order. Mason argued that it was an error in law to allow the proxies for the TELUS meeting to be used for voting on the Mason Resolutions.

151 Both the management and dissident proxy forms stated:

> This proxy confers discretion on the proxyholder with respect to amendments to matters identified in the [TELUS] Notice of General Meeting <u>and other matters that may properly come before the meeting or any adjournment</u> or postponement, in each instance to the extent permitted by law, whether or not the amendment or other matter that comes before the meeting is or is not routine and whether or not the amendment or other matter that comes before the meeting is contested.
>
> [Emphasis added.]

152 Mason contended at this later time that Master Muir's earlier ruling on October 15 was inconsistent with National Instrument 51-102 (the "Instrument"), a rule adopted by Canadian securities regulators relating to proxies and information circulars. In s. 9.1 of the Instrument, requirements are set out for the forwarding of proxies and information circulars in respect of a proposed meeting:

> 9.1(1) If management of a reporting issuer gives notice of a meeting to its registered holders of voting securities, management must, at the same time as or before giving that notice, send to each registered holder of voting securities who is entitled to notice of the meeting a form of proxy for use at the meeting.
>
> (2) Subject to section 9.2, a person or company that solicits proxies from registered holders of voting securities of a reporting issuer must,
>
> > (a) in the case of a solicitation by or on behalf of management of a reporting issuer, send an information circular with the notice of meeting to each registered securityholder whose proxy is solicited; or
> >
> > (b) in the case of any other solicitation, concurrently with or before the solicitation, send an information circular to each registered securityholder whose proxy is solicited.

153 Section 9.4 of the Instrument addresses the matter of the form of the proxy:

> 9.4(4) A form of proxy sent to securityholders of a reporting issuer must provide an option for the securityholder to specify that the securities registered in the securityholder's name will be voted for or against each matter or group of related matters identified in the form of proxy, in the notice of meeting or in an information circular, other than the appointment of an auditor and the election of directors.
>
> (5) A form of proxy sent to securityholders of a reporting issuer may confer discretionary authority with respect to each matter referred to in subsection (4) as to which a choice is not specified if the form of proxy or the information circular states in bold-face type how the securities represented by the proxy will be voted in respect of each matter or group of related matters.
>
> . . .
>
> (8) A form of proxy sent to securityholders of a reporting issuer may confer discretionary authority with respect to
>
> > (a) amendments or variations to matters identified in the notice of meeting; and
> >
> > (b) other matters which may properly come before the meeting, if,
> >
> > (c) the person or company by whom or on whose behalf the solicitation is made is not aware within a reasonable time before the time the solicitation is made that any of those amendments, variations or other matters are to be presented for action at the meeting; and
> >
> > (d) a specific statement is made in the information circular or in the form of proxy that the proxy is conferring such discretionary authority.
>
> [Emphasis added.]

154 It is apparent that proxies were only obtained either by TELUS or Mason with respect to the Arrangement. No proxies were sent to the shareholders, either by TELUS or Mason, in relation to the Mason Resolutions because of the effect of Savage J.'s Order and the later delivery of the *BCCA Reasons* just prior to the meeting date that had been set since August. By the time the Court of Appeal released its reasons on October 12, it was too late to send out further information circulars and proxy forms specifically in relation to the Mason Resolutions if the meetings were to proceed.

155 Mason contends that s. 9.4 of the Instrument should be interpreted such that the discretionary power in s. 9.4(8) is read as subject to ss. 9.4(4) or (5), which tie a proxy to a specific "matter" identified in the proxy form, the notice of meeting or the information circular. Accordingly, Mason says that the discretionary power in s. 9.4(8)(a) has no application to the Mason Resolutions because they were not amendments or variations to the "matters" identified in the TELUS Notice of Meeting, which only referred to the proposed arrangement for a one-for-one exchange of shares. Further, Mason says that with respect to s. 9.4(8)(b), "other matters which may properly come before the meeting" refers only to minor matters such as matters of procedure or matters ancillary to the "matter" in the New Proposal, which would not include the Mason Resolutions.

156 Mason cites no authority in support of this interpretation of the Instrument other than an excerpt from H.R. Nathan & M.E. Voore, *Corporate Meetings: Law and Practice* (Toronto: Carswell, 2010) ("*Nathan and Voore*") at pp. 19-8 to 19-9:

> The inclusion of substantial new items [to the agenda of a meeting] should be declined where shareholders have had no prior notice, with the result that they were not in a position to determine whether or not to attend, deposited proxies are silent on the issues and shareholders present in person may not be prepared sufficiently to deal with the issues on short notice. ...

157 Mason's interpretation of the provisions of the Instrument was rejected by Master Muir in *Muir Reasons #3*:

> [7] I am satisfied that my discretion is broad enough under s. 186 of the *Business Corporations Act*, S.B.C. 2002, c. 57 to make the order that I have made, which is that the application go in terms of paragraphs 1(a) through (g) of the TELUS notices of application and I am not persuaded that there is any binding authority that prevents me from doing that.

158 I accept the proposition that generally speaking, proxies solicited for certain matters should not be used for voting on other matters if prior notice has not been given to the shareholders so that they may consider any such "new" matter. It is reasonable to surmise that a proxy is given by a shareholder in the expectation that it will be used to vote on a particular matter. This is consistent with both the underlying intent behind the Instrument and the comments in *Nathan and Voore*.

159 Nevertheless, I do not accept Mason's argument that s. 9.4(8) of the Instrument is to be so strictly construed such that any "other matter" must be procedurally and directly related to or "ancillary" to the "matter" in the original notice of meeting. Depending on the issues involved and the specific circumstances, there may be any number of "other matters"

that may be brought before the meeting. The Instrument provides that very flexibility by its express terms in s. 9.4(8), which allows certain "other matters" to be voted on by the proxies if those other matters "properly" come before the meeting.

160 Whether a matter *properly* comes before the meeting will, in my view, depend on the particular circumstances of each case. Factors will include how substantive the other matter is, whether the Board has considered the matter, and what prior notice of such matter has been received by the shareholders. It may be appropriate to bring a matter before the meeting on the basis that it is so inextricably connected — but not necessarily procedurally connected or ancillary — to the matters which were raised in the notice of meeting that a consideration by the shareholders of that "other matter", whether in person or under the proxies already provided, does not give rise to any element of unfairness or prejudice to the shareholders.

161 The clear terms of s. 9.4(8)(b) of the Instrument, the wording of which was copied into the proxies gathered by both TELUS and Mason, provide that same flexibility in this case.

162 Accordingly, I do not consider that Master Muir erred in considering that, as a matter of law, the proxies obtained by both TELUS and Mason allowed discretion on the part of the proxy holders to vote the proxies on the Mason Resolutions as an "other matter" that came before the meeting.

163 As Mason points out, the Order relating to the use of the proxies was a fundamental aspect of the Master's reasoning in relation to the issue of prejudice to the shareholders, including Mason, as considered on the adjournment application. Accepting my decision above that, in appropriate circumstances, the proxies could be used in this fashion, the issue becomes whether the Master should have made that order. This issue involves a review of the factors considered by Master Muir which led her to order that the meetings proceed and that the proxies be used.

3. Was it Unfair and Prejudicial to Mason that the Meetings Proceeded on October 17?

164 The notice for the Mason Meeting to consider the Mason Resolutions was forwarded to shareholders on September 1. The ability of Mason to proceed with the Mason Resolutions was suspended, however, as a result of Savage J.'s Order on September 11. After the *BCCA Reasons* were issued on October 12, Mason filed an application that day for an order adjourning both the TELUS and Mason meetings. Mason contended that it was only upon the successful outcome of the appeal proceedings that it was entitled to proceed properly in relation to the Mason Resolutions.

165 The Master refused Mason's application to adjourn both the TELUS and Mason Meetings. It appears that Mason did not offer any alternative proposal as to when and how the meetings could proceed, except for that they should be delayed.

166 Master Muir's October 15 decision was an exercise of her statutory discretion under s. 186 of the *Act*, which reads as follows:

> 186(1) The court may, on its own motion or on the application of the company, the application of a director or the application of a shareholder entitled to vote at the meeting,
>
> (a) order that a meeting of shareholders be called, held and conducted in the manner the court considers appropriate, and
>
> (b) give directions it considers necessary as to the call, holding and conduct of the meeting.
>
> (2) The court may make an order under subsection (1)
>
> . . .
>
> (c) for any other reason the court considers appropriate.
>
> [Emphasis added]

167 The Master's decision also followed upon the directions from the Court of Appeal (quoted above) to address "the logistics of the scheduled meetings" and to find a "practical solution" so that the meetings could proceed in such a way as to avoid confusion on the part of shareholders.

168 Accordingly, the appropriate standard of review is that I am to interfere with the Master's decision only if she was "clearly wrong".

169 The parties agree that the correct test to have been applied on the adjournment application was whether an adjournment of the meetings was in the best interests of shareholders.

170 Mason contends that it was unfairly prejudiced by the Master's decision that the meetings proceed because it was unable to send out an information circular regarding the Mason Resolutions or solicit proxies in support of the Mason Resolutions. Mason argues that Savage J.'s Order setting aside the Requisition precluded it from sending out a circular explaining the Mason Resolutions and their interrelationship to the New Proposal. Mason points out that many shareholder proxies for the TELUS Meetings had been deposited by Friday, October 12, a short time before the deadline for the deposit of proxies on Monday, October 15. Mason says that given this timing, Savage J.'s Order effectively "killed its campaign" against the New Proposal because it could not solicit any proxies in support

of the Mason Resolutions until October 12; and even then, it was unable to act in any meaningful way until Monday, October 15. As such, Mason contends that an adjournment of the meetings was appropriate.

171 Mason also says that the Master's decision concerning the use of the proxies was fundamental to her determination that both the New Proposal and the Mason Resolutions could be brought forward to the shareholders at the October 17 joint meeting and that there could be a meaningful vote on the Mason Resolutions. Mason says that the only basis on which the court could have held that there was no prejudice to Mason in having the Mason Resolutions proceed at the meetings was that the proxies solicited by Mason against the New Proposal were equivalent to the proxies Mason would have been able to solicit in support of the Mason Resolutions if given additional time to do so.

172 The circumstances leading up to the adjournment application are critically important in considering the reasoning of the Master. The Master agreed that other circumstances may have dictated that an adjournment was appropriate, but in the specific circumstances at that time she was satisfied that no prejudice to Mason arose: *Muir Reasons #2* at paras. 4-5.

173 From the time that Mason publicly surfaced in April 2012, both TELUS and Mason engaged in extensive and aggressive campaigns to win the hearts and minds of the Common Shareholders in support of their respective positions. Mason especially undertook a massive solicitation campaign to garner support for its position that there should be no exchange of shares without a premium being paid.

174 Furthermore, it is abundantly clear that Mason's campaign, both before and after September 11, addressed the issue that is at the heart of the Mason Resolutions — namely, that there should be no exchange of Non-Voting Shares for Common Shares without a premium for the Common Shares. Justice Savage's Order did not prevent or deter Mason from continuing its campaign to win over holders of Common Shares to defeat the New Proposal.

175 As already outlined in these reasons, after September 11 and continuing to the date of the meetings, Mason continued its solicitation campaign in the same extensive and aggressive manner as it had before. In particular:

a) on September 24, Mason issued the extensive Second Mason Dissident Circular that included the Blackstone Report and a lengthy third party opinion on TELUS' allegations of empty voting. In that Circular, Mason again advocated for a premium on the exchange;

b) further press releases were issued on September 24 and October 11;

c) further letters were sent to shareholders on October 2 and 5;

d) Mason hosted various investor and shareholder calls, including a call on September 27; and

e) in addition to the "call-out" program by Kingsdale, Mason representatives called TELUS' Common Shareholders to discuss Mason's position.

176 TELUS argues, and I agree, that far from being silenced during this interim period, Mason was able to and did continue to make its position very clear that shareholders should oppose any exchange of Non-Voting Shares for Common Shares that did not provide for the necessary premium.

177 Further, the evidence before Master Muir was that many shareholders had already received enough, if not too much, information on the warring positions from both sides. Evidence from certain large institutional investors indicated that they had read and understood the respective positions from the various communications; and with that disclosure in hand, they clearly favoured TELUS' position over Mason's competing position.

178 I agree with TELUS that, in substance, the Mason Resolutions raise the very same issue that is raised by the New Proposal. Although technically there was no exchange of information circulars by TELUS and Mason specifically directed to the Mason Resolutions, I am hard pressed to see how they would have materially differed from the materials circulated to shareholders leading up to the October 17 meetings.

179 At the end of the day, whether in the New Proposal or in the Mason Resolutions, the issue before shareholders is the same: should the Non-Voting Shares be exchanged with Common Shares on a one-for-one basis, or should there only be an exchange if a premium is paid for the Common Shares? The Court of Appeal commented on the fundamental issue in the *BCCA Reasons* as follows:

> [2] Underlying the dispute is the issue of whether, and at what rate, non-voting shares of TELUS will be converted to, or exchanged for, common shares. The Board of Directors of TELUS has proposed plans that would see the non-voting shares converted into or exchanged for common shares at the rate of 1:1. The clients of Mason Capital Management LLC ("Mason") oppose those plans, and have an interest in keeping the value of the common shares higher than that of the non-voting shares.

180 In my view, Mason's argument that it was prejudiced by being forced to proceed to the meetings lacks any substance. Starting from the time Mason declared its opposition to the Initial Proposal on April 10, the battle lines were clearly drawn very publicly as

between the respective positions of TELUS and Mason. As is apparent from the factual background outlined above, the respective positions of Mason and TELUS were set out in substantial public documentation, including information circulars, letters and press releases. Any shareholder wishing to understand the issues had a plethora of information to consider.

181 With respect to Mason, it clearly set out in its materials the contention that the conversion ratio should be higher than that proposed by TELUS. It was well known that Mason took the position that if there was to be any conversion, the Common Shareholders should be entitled to a premium.

182 Similarly, the form and substance of the Mason Resolutions had been clearly communicated to the shareholders through press releases on August 2 and 31 and in the notice materials relating to the Mason Meeting on September 1. There was also other substantial information available to the public, particularly to shareholders, that the Mason Resolutions had been proposed. Many shareholders at the meetings confirmed that they had read the Mason Resolutions. The Second Mason Dissident Circular dated September 24 expressly referred to the Mason Resolutions:

> Due to the failure of the TELUS directors to protect the voting class, Mason called a meeting of the shareholders of TELUS to give voting shareholders the opportunity to express their views on the appropriate minimum premium in a dual-class collapse transaction. At the requisitioned meeting, voting shareholders would be entitled to vote on a binding amendment to the Articles of TELUS to require TELUS to obtain shareholder approval by exceptional resolution (80%) to issue voting shares in a dual-class collapse transaction, unless the exchange ratio of non-voting shares for voting shares was above certain specified levels. This step was aimed at addressing the collective action problem, effectively providing the voting shareholders with the collective means to set ground rules for a fair exchange ratio in advance of a specific transaction being presented to the shareholders for approval.

183 Mason's contention is that the Mason Resolutions constituted a "third option" that was a matter that should logically have been considered by the Common Shareholders prior to the New Proposal. The substance of Mason's argument is that if it had had more time to educate the Common Shareholders about the Mason Resolutions, it would have garnered sufficient support to raise the voting threshold to 80%. If so, then obviously TELUS' later efforts to approve the New Proposal would not have received the necessary support.

184 The fallacy of Mason's argument is it completely ignores the approximately six month campaign that was waged between these two parties to persuade and convince the Common Shareholders to accept their respective positions.

185 At the end of the day, TELUS garnered support from almost 63% of the Common Shareholders. That being so, those Common Shareholders were in support of the one-for-one exchange proposed by TELUS. Assuming that level of support for an exchange of the shares on that basis, it defies logic that those same Common Shareholders would have voted for the Mason Resolutions, whether those Resolutions were considered before or at the same time as the New Proposal. The Mason Resolutions did not propose an arrangement, but simply proposed that the voting threshold with respect to any conversion within a range be raised to 80%. Logically though, a Common Shareholder in support of the New Proposal, whatever the voting threshold may be, would vote against the Mason Resolutions. In other words, for a Common Shareholder in support of the New Proposal, the voting threshold was of no consequence since they were prepared to vote in favour of the Arrangement so as to implement it *at this time*. It would be illogical to suggest that that same Common Shareholder would vote in favour of a resolution to raise the voting threshold in respect of some future arrangement that might be proposed.

186 In the above circumstances, the solution offered by TELUS in respect of the use of the proxies made perfect sense. In other words, Common Shareholders were really only choosing between two alternate positions. Mason had substantial opportunities to garner support for its position. Assuming, as Master Muir did, that the substantial campaigns had resulted in significant shareholder knowledge of those two positions, the order that the proxies be used either for or against those respective positions was indeed the "practical solution" that the Court of Appeal encouraged be found.

187 Mason does not offer any evidence that any Common Shareholder or group of Common Shareholders did not understand the choices that were offered as between TELUS and Mason or that they would have acted differently if they received further information.

188 As such, the proxies that had been deposited in relation to the New Proposal were directly related to the issue raised by the Mason Resolutions. In these circumstances, the use of the proxies at the meetings was fair and reasonable.

189 One might infer, as TELUS suggests I do, that Mason's strategy was simply to delay the meetings in the hopes that the uncertainty in the marketplace would result in the re-emergence of the historical spread in the share trading prices. In my view, there is considerable merit in this suggestion. I would note again that Mason did not offer any alternate plan to Master Muir as to how the meetings could take place within a reasonably short period of time. Its proposal was simply a delay.

190 Mason also submits that it was prejudiced by the fact that TELUS, until only a few days before the vote, could rely on what was found to be erroneous reasoning (i.e. the *Savage Reasons*) to support its position with respect to the New Proposal and to besmirch Mason's

position. It argues that TELUS used the *Savage Reasons* to unfairly persuade shareholders that: (i) Mason had engaged in an invalid manoeuvre in attempting to requisition and call the Mason Meeting; (ii) Mason's tactic was successfully challenged in court; (iii) the court decided overwhelmingly in favour of TELUS and found that Mason's actions were contrary to law; and (iv) the court confirmed that Mason was an "empty voter". Essentially, Mason complains that the *Savage Reasons* provided TELUS with ammunition to unfairly demonize Mason in "personal and unwarranted attacks" in its solicitation for support of the New Proposal and support against the Mason Resolutions.

191 Mason also submits that it was prejudiced by not being able to properly respond to TELUS' pejorative comments in the press describing its "empty voting" position. Mason points to letters forwarded by TELUS to the shareholders on September 29 and October 1, which describe Mason's position in fairly negative terms. At that time, TELUS was obviously in a position to rely upon the *Savage Reasons* and his comments on the empty voting issue. Mason says that the Court of Appeal's comment that Mason had a "cogent position" which could reasonably be advanced was not something Mason could reasonably communicate to the shareholders before the meeting.

192 I find Mason's argument on this last point unpersuasive. Whether Mason was described as an "empty voter" in the *Savage Reasons* is really beside the point. Justice Savage did not rely on Mason's status as an "empty voter" in determining that the Requisition was non-compliant. Furthermore, the Court of Appeal did not excuse or otherwise endorse Mason's strategy. The Court of Appeal did not say that Mason was not an "empty voter". To the contrary, the Court stated a number of times that Mason's limited financial stake in TELUS was a "cause for concern" in light of its opposition to the New Proposal and its ability to vote its Common Shares. The only positive comment from the Court of Appeal related to Mason having a "cogent position" in relation to the exchange ratio issue. Other than that, the reasons of both Savage J. and the Court of Appeal negatively refer to the substance of Mason's position in the sense of it having substantial voting power with a limited economic interest, a fact which is not disputed by Mason and which cannot be disputed, whether one agrees or not with labelling Mason as an "empty voter".

193 Mason further argues that there was insufficient publicity by TELUS about the *BCCA Reasons*. However, Mason issued a press release on October 12 announcing the results of the Court of Appeal's decision to the extent that it assisted in persuading Common Shareholders of its "cogent position". Notably, and somewhat hypocritically, there was no mention in Mason's press release of the Court's comments that there was "cause for concern" about its position.

194 It is also the case that TELUS was not the only person who publicly described Mason's arbitrage position in less than glowing terms. One well-known New York law firm

commented generally on the case and stated that, in its view, Mason's strategy was "deeply pernicious".

195 In these circumstances, I fail to see how giving Mason further time by delaying the meetings would have allowed Mason to rehabilitate its image in the eyes of the Common Shareholders and gain further support for its position.

196 While the *BCCA Reasons* might have provided some shareholders further food for thought, there is no evidence that any shareholders called back their proxies before the voting deadline on October 15 for any reason, let alone because they needed further time to reconsider their vote.

197 Master Muir found that Mason had had sufficient time to solicit support from the Common Shareholders in *Muir Reasons #2*:

> [6] Mason has already extensively solicited TELUS shareholders with respect to its position on the proposed one-to-one exchange of non-voting common shares and argued for its position that the right to vote the common shares is a valuable right that can be quantified by the difference in the cost of non-voting versus common shares and therefore that there should be a premium in the exchange.
>
> [7] On September 24, 2012, Mason issued a dissident proxy circular in response to the TELUS proposal. It set out Mason's position and urged shareholders to vote against the proposal. In addition Mason has held conferences, issued news releases, and contacted shareholders to advocate its position.
>
> [8] Shareholders have already had a lengthy period to consider the differing views and proxies have been returned in accordance with both the information circular and the dissident circular. ...

198 Further, Master Muir considered substantial evidence that any postponement of the TELUS Meetings would have prejudiced TELUS and would have confused and inconvenienced the shareholders. TELUS argued that:

> (i) shareholders had voted with the reasonable expectation that the issues would proceed and be decided upon on October 17;
>
> (ii) TELUS had undertaken significant preparations for the holding of the TELUS Meetings, including renting equipment, contracting out for various services, and making travel arrangements. It was also anticipated that many shareholders had made travel or other arrangements to attend the TELUS Meeting;

(iii) the market expected and understood that shareholders would resolve the question of whether there would be an exchange of the shares on a one-for-one basis (and thus a rejection of Mason's position) on October 17. In particular, the investor community had prepared for the TELUS Meetings, including the two proxy advisory firms, ISS and Glass Lewis, who had issued reports summarizing their recommendations to shareholders;

(iv) TELUS had spent an inordinate time in the very public battle with Mason, and many shareholders were concerned about the need to refocus on TELUS' business and customers without having to address the continued disruption caused by Mason; and

(v) delay would invariably lead to the shareholder confusion and inconvenience that the Court of Appeal sought to avoid.

199 In *Muir Reasons #2*, the Master accepted this evidence and found that prejudice to the shareholders would have been considerable:

[8] ... Plans for the meeting are complete. Considerable disruption would be caused to the shareholders of TELUS should the meeting be adjourned. I do not consider it necessary, either in the interest of justice or in the best interests of the shareholders of TELUS that an adjournment be ordered.

200 The Master's approach in considering the adjournment application is supported by the authorities. The court will not lightly interfere with the conduct of a shareholder meeting which is properly called and, in particular, will not lightly order that a properly called meeting not proceed. In *Trans-Mountain Pipeline Co. v. Inland Natural Gas Co.* (1983), 49 B.C.L.R. 126 (B.C. C.A.), at 129, Carrothers J.A. stated:

It has been clear company law for a century that there must be a very strong case indeed to authorize and justify a court in restraining a meeting of shareholders called to settle their own affairs. As Lindley L.J. in *Isle of Wight Ry. Co. v. Tahourdin* (1883), 25 Ch. D. 320, 53 L.J. Ch. 353 at 359-60 said:

> One must bear in mind the decisions in equity and other cases, and bear in mind also that this Court has constantly and consistently refused to interfere with shareholders' relief where they have done the best they can by calling meetings to manage their own affairs. Bear in mind that line of decision on the one side, and see what position the shareholders would be in if there was to be another line of decision prohibiting the meeting of shareholders to consider their own affairs. It appears to me that it must be a very strong case indeed to authorise and justify this Court in restraining a meeting of shareholders.

201 In exercising the broad discretion found in the *Act* to make orders in relation to company meetings, the court must exercise that discretion reasonably: *Brio Industries Inc. v. Clearly Canadian Beverage Corp.*, [1995] B.C.J. No. 1441 (B.C. S.C.) at paras. 12 and 16; *Proprietary Industries Inc. v. eDispatch.com Wireless Data Inc.*, 2001 BCSC 1850 (B.C. S.C.) at paras. 18-27. Prejudice will be a key consideration in the exercise of that discretion.

202 The consequences of acceding to Mason's position are significant. A good portion of the 225,000 TELUS shareholders have now voted. This voting took place after what can only be described as an extensive solicitation campaign on the part of both TELUS and Mason. The votes have been recorded and publicly reported and the market has, understandably, reacted to the outcome. Mason's proposal is that the entire process, beginning with the Second Interim Order, be set aside and that TELUS be forced to go back to square one in terms of scheduling meetings and restarting the solicitations. In my view, such an outcome would result in substantial prejudice to TELUS and the shareholders as a whole in the face of a complete lack of prejudice to Mason. There is simply no reasoned basis for such a result where fully informed shareholders, by way of a long and no doubt expensive process, have registered their position on the issues in the expectation that their votes will be considered.

203 I conclude that, in light of all the circumstances that were before the Master, she exercised her discretion in a reasonable manner and that accordingly, she was not "clearly wrong" in granting the orders that she did. There was no reason to delay the meetings on October 17, and clear prejudice to TELUS and all its shareholders would have resulted in that event.

204 The second and third appeals are dismissed.

IV. The Fairness Hearing

A. Statutory Framework

205 The relevant portions of the *Act* are as follows:

Arrangement may be proposed

288(1) Despite any other provision of this Act, a company may propose an arrangement with shareholders, creditors or other persons and may, in that arrangement, make any proposal it considers appropriate, including a proposal for one or more of the following:

(a) an alteration to the memorandum, notice of articles or articles of the company;

(b) an alteration to any of the rights or special rights or restrictions attached to any of the shares of the company;

. . .

(g) an exchange of securities of the company held by security holders for money, securities or other property, rights and interests of the company or for money, securities or other property, rights and interests of another corporation;

(2) Before an arrangement proposed under this section takes effect, the arrangement must be

(a) adopted in accordance with section 289, and

(b) approved by the court under section 291.

Adoption of arrangement

289(1) Despite sections 264 and 265, an arrangement is adopted for the purposes of section 288 (2) (a) if,

(a) in respect of an arrangement proposed with the shareholders of the company,

(i) the shareholders approve the arrangement by a special resolution, or

(ii) if any of the shares held by the shareholders who under subsection (2) are entitled to vote on the resolution to approve the arrangement do not otherwise carry the right to vote, the shareholders approve the arrangement by a resolution passed at a meeting by at least a special majority of the votes cast by the shareholders, if at least the prescribed number of days' notice of the meeting and of the intention to propose the resolution has been sent to all of the shareholders,

(b) in respect of an arrangement proposed with the shareholders holding shares of a class or series of shares of the company, those shareholders approve the arrangement by a special separate resolution of those shareholders,

. . .

(3) If the court orders, under section 291 (2) (b) (i), that a meeting be held to adopt an arrangement in addition to or in substitution for a meeting contemplated by subsection (1) of this section, the arrangement must not be submitted to the court for approval until after

(a) the arrangement has been adopted at that court ordered meeting,

. . .

(3.1) If the court orders, under section 291 (2) (b) (ii), that a separate vote of specified persons be held to adopt an arrangement in addition to or in substitution for a meeting contemplated by subsection (1) of this section, the arrangement must not be submitted to the court for approval until after

(a) the arrangement has been adopted by that vote, or

(b) all of the persons who were entitled to vote in that separate vote consent to the arrangement in writing.

. . .

Information regarding arrangement

290(1) If a meeting is called to adopt an arrangement, the company must, unless the court orders otherwise,

(a) include with any notice of the meeting that is sent to a person who is entitled to vote at the meeting, a statement

(i) explaining, in sufficient detail to permit the recipient to form a reasoned judgment concerning the matter, the effect of the arrangement, and

(ii) stating any material interest of each director and officer, whether as director, officer, shareholder, security holder or creditor of the company, or otherwise, and

(b) include in any advertisement of the meeting,

(i) the statement required by paragraph (a), or

(ii) a notification that the persons who are entitled to vote at the meeting may, on request, obtain copies of the statement before the meeting.

. . .

Role of court in arrangements

291(1) If an arrangement is proposed, the court may make an order respecting that arrangement under subsection (2)

(a) on its own motion,

(b) on the application of the company, or

(c) on the application, made on notice to the company, of

(i) a shareholder of the company,

(ii) a creditor of the company, or

(iii) a person who is a member of the class of persons with whom the arrangement is proposed.

(2) The court may, in respect of a proposed arrangement, make any order it considers appropriate, including any of the following orders:

(a) an order determining the notice to be given to any interested person, or dispensing with notice to any person, in relation to any application to court under this Division;

(b) an order requiring the company to do one or both of the following in the manner and with the notice the court directs:

(i) call, hold and conduct one or more meetings of the persons the court considers appropriate;

(ii) hold a separate vote of the persons the court considers appropriate;

(c) an order permitting shareholders to dissent under Division 2 of Part 8 or in any other manner the court may direct;

(d) an order appointing a lawyer, at the expense of the company, to represent the interests of some or all of the shareholders;

(e) an order directing that an arrangement proposed with the creditors or a class of creditors of the company be referred to the shareholders of the company in the manner and for the approval the court considers appropriate.

. . .

(4) Without limiting subsections (1) to (3) but despite any other provision of this Act, on an application to court for approval of the arrangement,

(a) if the arrangement has been adopted under section 289 and, if required, approved by the shareholders in accordance with an order made under subsection (2) (e) of this section, the court may make an order approving the arrangement on the terms presented or substantially on those terms or may refuse to approve that arrangement...

B. The BCE Decision

206 As stated in the Introduction, *BCE Inc., Re* is the leading authority relating to approval of arrangements. It establishes a three-part test: whether the arrangement is made in good faith, whether the statutory requirements have been met and finally, whether the arrangement is fair and reasonable. The onus lies on TELUS to satisfy all elements of this test. In considering whether an arrangement is fair and reasonable, there are two prongs or questions to answer: (1) Is there a valid business purpose?; and (2) Does the arrangement resolve objections in a fair and balanced way?

207 *BCE Inc., Re* provides considerable guidance in the application of the test, particularly as it relates to the fair and reasonable issue. I will refer to the specific portions of *BCE Inc., Re* as relevant to this decision within the context of the specific issues to be addressed, as below.

C. Has TELUS Satisfied the Requirements to Approve the Arrangement?

1. The Good Faith Requirement

208 TELUS asserts that the Arrangement has been proposed in good faith.

209 An historical review reveals that there was good reason at this time to consider a different approach with respect to TELUS' capital structure. TELUS' dual class share structure was introduced in the late 1990s to address its significant non-Canadian shareholder base. It was always anticipated that this dual class structure would eventually fall away once it was no longer required. By 2011, TELUS' shareholder base had changed and TELUS no longer needed the dual class structure to comply with the regulatory limits on foreign ownership. There is evidence that arising from this new circumstance, some shareholders had encouraged TELUS to update its capital structure. That encouragement was based upon the expectation that an update in the share structure would increase liquidity if there was only a single class of shares. It is also well taken that from a corporate governance point of view, a collapse of the dual class structure was preferable and, in fact, is considered a "best practice".

210 It was in this environment that the Board embarked upon a *bona fide* consideration of options to achieve these benefits. That the Board embarked upon this task not only to improve corporate governance but to improve profitability and competitiveness of TELUS is hardly surprising. It is of some significance that the Board did not approach the issue in a cursory manner. Those procedures can be summarized as follows:

(i) a preliminary analysis by TELUS management;

(ii) the establishment of the Special Committee comprised of experienced and knowledgeable individuals, to study and report to the Board on possible legal structures for the exchange of TELUS Non-Voting Shares into Common Shares. The qualifications of the gentlemen on that Special Committee are beyond question and indicate a significant effort to bring considerable talent to consider the issue;

(iii) an extensive process undertaken by the Special Committee, in which it considered whether to proceed with an exchange and, if so, the appropriate terms of that exchange;

(iv) advice from legal and independent financial advisors;

(v) the consideration of a broad range of factors, including different possible exchange ratios, precedent transactions, trading price history, legal considerations, and the best interests of TELUS and each of its shareholder classes;

(vi) two fairness opinions relating to both the Initial Proposal and the New Proposal; and

(vii) specific consideration by the Board and the Special Committee of whether to pursue the New Proposal in light of the involvement of Mason and the withdrawal of the Initial Proposal. Despite concerns from many shareholders that this very public fight with Mason was adversely affecting management, the Board reconfirmed its commitment to the New Proposal and took steps to bring it forward to the shareholders as soon as possible. Again, the Special Committee received and relied upon the advice of its independent financial and legal advisors.

211 An extensive and robust process to consider an arrangement has been found to support the contention that an arrangement is put forward in good faith: *Magna International Inc., Re*, 2010 ONSC 4123 (Ont. S.C.J.) at para. 108 ("*Magna SCJ*"), aff'd 2010 ONSC 4685 (Ont. Div. Ct.) ("*Magna Appeal*"); *Gazit America Inc., Re*, 2012 ONSC 4549 (Ont. Gen. Div. [Commercial List]) at paras. 10-11.

212 Mason concedes that TELUS is acting in good faith. This is consistent with the fact that at the May 9 meeting, it voted its shares to appoint the present Board members. However,

Mason now somewhat incongruously alleges that the Board and management of TELUS are in a conflict of interest in respect of the Arrangement. In particular, Mason alleges that the directors and management stand to benefit personally from the one-for-one share exchange because those directors and management hold Non-Voting Shares.

213 TELUS' response to these allegations is twofold: firstly, that the interests of the directors and management are trivial in the context of the Arrangement and secondly, that all interests of management and directors were disclosed to shareholders in the public communications relating to the Arrangement.

214 Section 147(1) of the *Act* sets out when a director or senior officer has a "disclosable interest":

> **Disclosable interests**
>
> **147**(1) For the purposes of this Division, a director or senior officer of a company holds a disclosable interest in a contract or transaction if
>
> > (a) the contract or transaction is material to the company,
> >
> > (b) the company has entered, or proposes to enter, into the contract or transaction, and
> >
> > (c) either of the following applies to the director or senior officer:
> >
> > > (i) the director or senior officer has a material interest in the contract or transaction;
> > >
> > > (ii) the director or senior officer is a director or senior officer of, or has a material interest in, a person who has a material interest in the contract or transaction.
>
> [Emphasis added.]

215 The *Act* does not address what constitutes a "material interest".

216 TELUS cites various authorities which provide some guidance on this issue. *Black's Law Dictionary* (9th ed.) defines "material" as "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential". Bruce Welling in *Corporate Law in Canada: The Governing Principles*, 3d ed. (London, Ontario: Scribblers Publishing, 2006) at pp. 439-440 states:

> ... The purpose is to identify negotiations in which a corporate manager might not be able to bargain effectively on behalf of the corporation. Any personal relationship or monetary interest he may have on the other side might be an inhibiting factor. The question to ask is whether disclosure of the relationship or interest might be relevant to the corporate decision to involve, or not involve, the particular manager in the negotiations. Whether to participate in a proposed transaction is a corporate decision and the corporation is entitled to full disclosure permits fiduciaries of all facts that might affect that decision. ...
>
> . . .
>
> On the other hand, relationships of a tenuous nature and financial involvements such as holding a pitifully small number of shares of a large corporation whose shares are widely distributed will not be "material" and therefore will not be caught by the section.
>
> [Emphasis added.]

217 In my view, the interests (i.e. Non-Voting Shares) held by the directors and management of TELUS can hardly be described as material. It is undisputed in this case that the shares in TELUS are widely held, and the amount of shares held by the officers and directors can hardly be described as "material" in the context of this overall arrangement.

218 In any event, given the overwhelming support by the Non-Voting Shareholders for the Arrangement, it is clear that a positive vote by the officers and directors would not have had a significant impact. The shareholdings of the officers and directors in Common Shares was also not extensive in light of the overall shareholdings, which are widely held. It cannot be rationally suggested that the votes by the officers and directors were sufficient to alter the overall voting.

219 Mason says that the significance must be looked at in the context of the shareholdings of the directors and management and the significance for that director and officer, rather than in the context of TELUS' overall capitalization. The uncontroverted evidence, however, is that the total net potential gain or benefit under the Initial Proposal was less than 3% of the value of the total TELUS stockholdings of each director and officer. Under the New Proposal, that dropped to less than 1.5% for half of them and less than 1% for the others.

220 Accordingly, while the officers and directors had an "interest" in the New Proposal, and on the face of matters had a conflict of interest, I do not consider that the conflict was "material" enough to justify any of Mason's concerns.

221 Even if it could be said that the Arrangement was significant for the officers and directors, it was equally significant for all of the shareholders given the benefits that were expected to be gained generally by both classes of shares. In that regard, the conflict of interest provisions in the *Act* must be read in conjunction with the arrangement provisions of the *Act*. Section 288(1) provides that a company may propose an arrangement despite any other provision of the *Act*. Section 290(1)(a)(ii) expressly provides that if a meeting is called, the company must include certain meeting materials and those materials must include a statement of any "material interest" of each director and officer.

222 Accordingly, it is evident that even if a director or officer has a "material interest", that will not prevent a company from proposing an arrangement. It is, however, mandatory in such a situation that full disclosure of any "material interest" be given to the shareholders so that the shareholders can consider that matter in relation to the proposed arrangement. Further, even assuming a conflict of interest, the arrangement provisions provide considerable safeguards, including the shareholder vote, the independent opinions that might be obtained and finally, the consideration by the court as to whether the arrangement is brought in good faith and whether it is fair and reasonable, in accordance with the *BCE* test.

223 TELUS' evidence supports the finding that the shareholdings of the officers and directors were disclosed in publicly available documents for some time even before the Arrangement was announced. This is not a revelation, given that TELUS is a public company and as such is required to publicly disclose that information on a regular basis. It was therefore open to shareholders to consider approval of the Arrangement in light of those disclosed facts.

224 Such allegations on Mason's part were raised in the course of these proceedings and before the vote of the shareholders. In TELUS' September 29 letter to shareholders, it stated:

> Similarly, it is disingenuous of Mason to suggest that our Special Committee should have been comprised of members of our Board who were not in some way exposed to the performance of TELUS' non-voting shares. **Most directors of leading Canadian companies — including TELUS — are expected to have direct or indirect exposure to the performance of the shares of their company in order to align their interests with those of the company and its shareholders. ...**
>
> The fact a TELUS Director has direct or indirect exposure to the performance of TELUS' non-voting shares should only be of concern if that interest is sufficiently material that the Director would be susceptible to having that interest influence their decision in a manner that might prevent them from putting TELUS' interests ahead of their own. <u>The level of economic exposure to the non-voting shares that members of</u>

TELUS' Board and the Special Committee have is fully disclosed in our public disclosure and does not constitute a material interest.

[Underlining added. Bold in original.]

225 The issue was also addressed by the independent proxy firms, ISS and Glass Lewis. Upon reviewing the directors' ownership of TELUS shares, ISS acknowledged that such ownership was "overwhelmingly skewed to the non-voting shares". ISS was unconvinced, however, that this raised any conflict issues. It concluded:

> It is conceivable a board could skew an exchange ratio ... to the benefit of the class to which the directors have significantly greater exposure. It would be a long row to hoe for so little crop. The board's realistic options for an exchange ratio were likely limited to somewhere between the long-term average market discount of 4.5 percent for the non-voting shares, and the flat parity of the 1.0 exchange ratio it ultimately selected.
>
> [Emphasis added.]

226 Glass Lewis was less forgiving. It questioned TELUS' determination that the potential gains are immaterial and expressed concern with the personal interest of TELUS' executives and directors. It was further of the opinion that TELUS could reasonably provide more thorough disclosure regarding the potential gains of each executive and director resulting from the New Proposal. However, though it questioned TELUS' disclosure, when it considered TELUS' historical practice of compensating its executives and directors with Non-Voting Shares, Glass Lewis ultimately concluded that the potential gains were "more of a by-product than a driving force in the board's determination".

227 Mason's only "smoking gun" on this issue is a press release issued by TELUS on April 26, which stated that 59% of the share ownership of Darren Entwistle, TELUS' President and CEO, was in the form of Common Shares. Mason says that this ignored that 70% of his overall share ownership was in Non-Voting Shares through his deferred stock units and options. This anomalous argument is made in the face of the substantial disclosure that is contained in all of TELUS' publicly disclosed documentation as to the shareholdings of the officers and directors, including that of Mr. Entwistle. Mason's argument seems to ignore that fact and instead focuses on the fact that TELUS, in its information circulars and press releases relating to the Arrangement, did not specifically advise of the shareholdings and the net benefits that the directors and senior management stood to gain personally if the Arrangement was adopted.

228 In the face of what I consider adequate disclosure of these interests to the shareholders, I see little merit in Mason's argument that the potential benefit to the officers and directors should have been highlighted in the press releases and information circulars. Certainly,

Mason as an interested investor had no difficulty in discerning what those interests were and what the potential gains might be. In addition, there is no suggestion or evidence that other shareholders were misled by the information circulars or press releases about the shareholdings of the officers and directors. It would appear as a matter of common sense and logic that the benefits received by the Non-Voting Shareholders would inevitably accrue to those officers and directors holding Non-Voting Shares (as disclosed). It also follows, accepting Mason's argument, that it would be apparent that those officers and directors holding Non-Voting Shares would receive a benefit by reason of the lack of any premium on the exchange.

229 There is no evidence that the members of the Board and Special Committee acted out of self interest. This is not a case where the officers and directors had only recently acquired significant Non-Voting Shares in the hopes of profiting from the imminent completion of the Arrangement. The shareholdings had been in place for some time, again to the knowledge of all shareholders, including Mason.

230 TELUS relies on *Bolivar Gold Corp., Re*, 2006 YKSC 17 (Y.T. S.C.), aff'd 2006 YKCA 001 (Y.T. C.A.). In that case, the court was considering objections to an arrangement which would have provided certain benefits to the directors in the form of severance and bonus payments. At para. 89, the trial judge noted that those benefits that were to accrue had been in place for some time and were not created "overnight" in anticipation of the offer that was the subject of the arrangement. The court also noted that those interests were fully disclosed in the information circular and that it was open to the security holders to determine whether they were excessive or putting management in a conflict of interest.

231 The findings of the Yukon Supreme Court were upheld on appeal. Chief Justice Finch stated:

> [17] It is clear that the directors have a financial interest dependent on completion of the arrangement. Those interests arise from their contracts of employment, entered into long before the negotiations that led to the arrangement. The security holders, including those who dissent, were aware of those interests. But those interests are not in conflict with the interests of the security holders. Their interests are aligned or coincide with those of the security holders. A significant part of the benefits the directors will obtain on completion depend directly on the consideration received by the security holders under the arrangement. The remainder of the benefits are routine severance benefits.
>
> [18] In any event, the financial benefits the management directors will receive were fully disclosed in the information circular. It was for the security holders to decide, after hearing the arguments of the dissenters, whether the arrangement was acceptable to them. Those who disapproved, whether because they considered the benefits to

> the directors were excessive, or for any other reason, were free to vote against the arrangement. Some, including the appellants, did. The requisite majority, however, exercised their judgement by voting in favor of the arrangement.
>
> [Emphasis added.]

232 It is evident that the interests of the directors and senior management were fully disclosed in communications to the shareholders. In light of that disclosure, it was for TELUS' shareholders to decide, just as the shareholders did in *Bolivar Gold*, whether to give any credence to the interests held by the directors and management in relation to whether they would support or reject the Arrangement.

233 At the end of the day, Mason's point is fairly nominal. Mason agrees that the directors can propose an arrangement in which they have a conflict or potential conflict, but Mason further says that the conflict bears on TELUS' ability to maintain that the process has been "exemplary", as TELUS suggests. In my view, whether the process can be called "exemplary" is a quibble that does not materially advance the debate. Mason concedes that the Board is acting in good faith. Whether the process was adequate to address the balancing of interests that is required under the "fair and reasonable" prong of the test is another matter that I will address below.

234 I find that TELUS has satisfied the requirement of proving that it acted in good faith in proposing the Arrangement.

2. The Statutory Requirements

235 Mason takes the position that the Arrangement is one with the Common Shareholders which required a Special Resolution (2/3) of both the Common Shareholders and the Non-Voting Shareholders. A number of arguments are advanced in support of this contention:

> (a) The Arrangement affects the legal rights of the Common Shareholders because it creates a new right for Non-Voting Shareholders to exchange those shares for Common Shares, resulting in an amendment to Article 27.9.
>
> (b) The Arrangement affects the legal rights of the Common Shareholders because it would constitute a "reclassification" of the Non-Voting Shares, which is prohibited by Article 27.3.
>
> (c) The Arrangement seeks to alter TELUS' capital structure in a significant way which affects all shareholders. It is therefore an arrangement which is proposed to each class of shareholders.

(d) Since TELUS obtained the Second Interim Order providing for a vote by the Common Shareholders to adopt the Arrangement, the Arrangement was one with the Common Shareholders.

(e) The *Act* requires that any class vote of the Common Shareholders required the approval of at least 2/3 of the votes cast.

236 I will address each of these arguments in turn. The arguments under (a) and (b) focus on the form of the Arrangement, while the argument in (c) focuses on the substance.

(a) Does the Arrangement affect the legal rights of the Common Shareholders because it creates a new right for Non-Voting Shareholders to exchange those shares for Common Shares, resulting in an amendment to Article 27.9?

237 TELUS' Article 27 addresses certain matters in relation to Common Shares and Non-Voting Shares and provides that "Common Shares and the Non-Voting Shares shall have attached thereto the following rights, privileges, restrictions and conditions".

238 The Articles provide two circumstances in which Non-Voting Shareholders have the right to convert all or part of their Non-Voting Shares into Common Shares on a one-for-one basis. First, Article 27.5 provides a "coat tail" provision for such a conversion in the event of a take-over offer that is made to Common Shareholders on different terms than to Non-Voting Shareholders. Second, Article 27.6 provides for such a conversion in the event of a regulation change relating to foreign ownership of Common Shares. It is undisputed that no such events have occurred to trigger such conversion rights.

239 Mason relies on other portions of Article 27 which set out that both types of shares shall have the same "rights and attributes", subject to these specified rights of conversion:

27.9 Same Attributes

Save as aforesaid, each Common Share and each Non-Voting Share shall have the same rights and attributes and be the same in all respects.

27.10 Amendment Rights

The provisions of this Article 27, may be deleted, amended, modified or varied in whole or in part upon the approval of any such amendment being given by the holders of the Common Shares, by a special separate resolution of 2/3 of the votes cast thereon and by the holders of the Non-Voting Shares by special separate resolution of 2/3 of the votes cast thereon and as required by the *Business Corporations Act*.

240 Mason submits that other than in these two instances, there is no right of conversion from Non-Voting Shares to Common Shares and the Arrangement, to the extent that it grants another right of conversion, is amending the Articles. Mason argues that the Arrangement would, in substance, create an additional right of "conversion" not presently found in Article 27. As such, Mason contends that the Arrangement would allow an amendment to Article 27 and that accordingly, a 2/3 vote by the Common Shareholders was also required pursuant to Article 27.10.

241 It is not disputed by TELUS that any amendment of the Articles requires a vote by a 2/3 majority of the shareholders, including the Common Shareholders. It is also not disputed that the Initial Proposal called for a "conversion" of the shares that would have resulted in an amendment of the Articles. Article 2.2(b) of the Initial Proposal provided that the Initial Proposal would result in the "deeming" of the conversion of Non-Voting Shares into Common Shares.

242 In contrast, Article 2.2(b) of the New Proposal contemplates that each Non-Voting Share will be "deemed" to have been "exchanged" for one Common Share, as a result of which the rights of the holders of the Non-Voting Shares "shall cease". Thereafter, the holders of Non-Voting Shares "shall be treated for all purposes" as having become the holder of Common Shares.

243 The nub of Mason's argument is that "conversion" is equivalent to "exchange" on a true characterization of the New Proposal. I do not accede to this argument.

244 Section 288(1)(g) of the *Act* specifically contemplates an arrangement being proposed as a result of "an exchange of securities of the company ... for ... securities of the company". This type of arrangement is separate and distinct from other types of arrangements allowed under the *Act* which include alterations to the articles or alteration to the rights attached to shares: see ss. 288(1)(a) and (b).

245 In *The Canadian Oxford Dictionary*, "convert" is defined as a "change in form, character or function". By contrast, "exchange" is defined as "the act or an instance of giving one thing and receiving another in its place". Conversion rights are specifically identified in the Articles. Exchange rights are not mentioned and, more importantly, are not prohibited in the Articles.

246 In arguing whether the Mason Resolutions would have resulted in an amendment of the Articles, which would require a Special Resolution of the Non-Voting Shares, both Mason and TELUS refer to certain comments in the *BCCA Reasons*. The Court of Appeal answered that question in the negative:

> [58] On the face of it, the proposed resolutions do not affect any "right" or "attribute" of the non-voting shares, because there is no right or ability to convert or exchange shares. ...
>
> . . .
>
> [61] The same cannot be said in respect of the ability to exchange TELUS non-voting shares for common shares. Except in narrowly defined circumstances, the articles do not suggest any ability to exchange non-voting shares for voting ones. Nor is this a matter left in the discretion of the board of directors.
>
> [62] There is, then, no existing right to exchange or convert non-voting shares to common shares, nor will the resolutions, if passed, create such a right. Article 27.9 would, therefore, appear not to be applicable.

247 I do not accept Mason's argument that the Court of Appeal has equated "conversion" rights with "exchange" rights in the context of the TELUS Articles.

248 The issue must be focused on whether there is any change or alteration in the "rights and attributes" of either type of share. This is consistent with the importance placed by the Court in *BCE Inc., Re* on the alteration of "legal rights" as opposed to "economic interests": paras. 130-135.

249 It cannot be said that any such change or alteration will occur upon implementation of the Arrangement. Both types of shares will continue to be part of TELUS' authorized capital structure. Both types of shares will be, as in the past, entitled to the same rights and attributes in relation to equity participation and dividends. Further, there is no change in the voting rights of either share class. In other words, the legal rights attributable to any Non-Voting Share or Common Share will remain the same. And the fact that there will be no issued and outstanding Non-Voting Shares after the implementation of the Arrangement is irrelevant.

250 In *Muir Reasons #1*, Master Muir held that a 2/3rds vote was not required because the Arrangement did not constitute a change to the Articles. She reasoned that the class of Non-Voting Shares will continue to exist, *albeit* with no such shares issued: para. 55. Further, she stated:

> [56] ... Thus, requiring the non-voting shareholders to exchange non-voting shares for voting shares can be accomplished by way of a proposal and an amendment to the articles of the corporation is not necessary.

251 I agree. I conclude that the result of the New Proposal, while altering the right of Non-Voting Shareholders to hold Non-Voting Shares, does not result in any change or alteration

to the legal rights or attributes of either the Common Shares or the Non-Voting Shares. Accordingly, I find that the New Proposal does not result in any amendment to Article 27, which would have required a Special Resolution from the Common Shareholders.

(b) Does the Arrangement affect the legal rights of the Common Shareholders because it would constitute a "reclassification" of the Non-Voting Shares, which is prohibited by Article 27.3?

252 The TELUS Articles provide:

> **27.3 Subdivision or Consolidation**
>
> Neither the Common Shares nor the Non-Voting Shares shall be subdivided, consolidated, reclassified or otherwise changed unless contemporaneously therewith the other class is subdivided, consolidated, reclassified or otherwise changed in the same proportion and in the same manner.

253 In substance, Mason's argument is the same as that related to the amendment of the Articles. Mason contends that the "exchange" of shares in accordance with Article 2.2(b) of the New Proposal amounts to a "reclassification" of the Non-Voting Shares into Common Shares, which is prohibited by Article 27.3.

254 TELUS does not dispute that any "reclassification" would require an amendment to its Articles. Consistent with its argument above, it contends that no amendment or "reclassification" results from the New Proposal, which provides for an "exchange" of shares. Further, it contends that immediately following the implementation of the Arrangement, the Articles will continue to authorize the issuance of Non-Voting Shares with the same rights and attributes as before.

255 The *Act* is not helpful in terms of determining what constitutes a "reclassification". That word is not defined in the *Act*.

256 Certain publications from the TSX and the TSX Venture Exchange do, however, address "reclassification". Section 622(a) of the TSX Company Manual requires a Certificate of Amendment in connection with a "security reclassification". Section 9 of Policy 5.8 of the TSX Venture Exchange refers to a "security reclassification" occurring when the "terms and privileges of an Issuers' Listed Securities are amended". In this regard, the addition or amendment of a dividend feature to a class of securities is said to constitute a reclassification. As with the TSX, a Certificate of Amendment must be filed with the TSX Venture Exchange in connection with a "security reclassification".

257 Both of these publications suggest that a "reclassification" goes beyond a simple exchange of shares and instead involves a change or alteration of rights attached to shares, consistent with the need for an amendment to the Articles.

258 Mason relies on certain authorities in support of its reclassification argument. In *Canadian Pacific Ltd., Re* (1996), 30 O.R. (3d) 110 (Ont. Gen. Div. [Commercial List]), Canadian Pacific was undergoing a major and complex reorganization. The court's description of the transactions referred to certain preference shares being "exchanged" for common shares. In addition, the shares in CPR were to be transferred to "new CPL" in "exchange" for shares in "new CPL". At p. 115, Mr. Justice Blair (as he then was) stated:

> In addition, the reclassification of the CPL Preference Shares, and the reduction of the voting classes of shares from two classes to one, will simplify the capital structure of the Company ...

259 It is not apparent that any distinction between "exchange" and "reclassification" was particularly argued before the court in *Canadian Pacific Ltd., Re*. It does not appear to have been an issue particularly addressed by the Court, and I consider that the use of both words by the Court in describing the arrangement to be indicative of that fact. Also, that case involved a significant change to the capital structure of Canadian Pacific, including a collapse of different share classes, which is not a feature of this case.

260 Similarly, the court in *Holdex Group Ltd., Re*, [1972] 3 O.R. 425 (Ont. H.C.) was addressing a complex restructuring of the company's capital structure which involved a "reclassification of the shares, and a variation of the preferences, rights and conditions attaching to the shares".

261 For the same reasons as those relating to the first issue in (a), I do not consider that any "reclassification" of the Non-Voting Shares to Common Shares has occurred. As TELUS argues, this is a one-time transaction by which the current issued and outstanding Non-Voting Shares are being cancelled and exchanged for Common Shares. The share structure remains intact with each share class having the same rights and attributes as before.

(c) Does the Arrangement seek to alter the capital structure of TELUS in a significant way and affect all shareholders such that it is an arrangement which is proposed with each class of shareholders?

262 Unlike the more technical arguments advanced under (a) and (b) above, Mason argues that, in substance, the New Proposal is indistinguishable from the Initial Proposal and thus requires a Special Resolution of the Common Shareholders. Mason argues that, when viewed

objectively and having regard to the overall statutory scheme, the Arrangement alters or "arranges" the legal rights of the Common Shareholders.

263 As Mason argues, there is no doubt that the overarching intention of the Arrangement is to remove the currently issued and outstanding Non-Voting Shares. TELUS' information circular dated August 30 states:

> Under the terms of the Arrangement, each Non-Voting Share outstanding as of the Effective Time, would be exchanged for a Common Share on a one-for-one basis. Following the exchange, no Non-Voting Shares would remain issued and outstanding. <u>As a result, immediately following the Effective Time, the Common Shares would be TELUS' only class of issued and outstanding equity securities.</u>
>
> [Emphasis added.]

264 Mason argues that the effect of the New Proposal is such that there are no distinguishable differences between the Initial and New Proposals. Mason further argues that while there will still be an authorized Non-Voting Share class, it will be empty; accordingly, it says that the true effect of the Arrangement is to eliminate the Non-Voting Shares class and change the capital structure.

265 TELUS argues that, unlike the Initial Proposal, no change in the capital structure is currently proposed and so no special resolution of the Common Shareholders is required. As TELUS stated in its information circular, it is "not proceeding at this stage with an amendment to the Notice of Articles and the Articles in order to remove the Non-Voting Shares from the authorized share structure of the Company".

266 On the face of it, TELUS is right. The capital structure after the New Proposal will be same as before, in that the authorized shares will be no different and will include the Common Shares, Non-Voting Shares and the preference shares. There is no change in the shares which TELUS can choose to issue.

267 The only difference will be that immediately after the implementation of the Arrangement, there will be no issued and outstanding shares in the Non-Voting Share class. That situation could change in the future, of course, if TELUS encounters circumstances where issuing Non-Voting Shares is desirable or it again becomes necessary to comply with foreign ownership rules. In that event, the rights of those new Non-Voting Shareholders will not have been changed by an exchange of Non-Voting Shares to Common Shares at this time.

268 The court must focus on the terms and the impact of the Arrangement, and the Arrangement must be viewed "substantively and objectively": *BCE Inc., Re* at para. 136. In *Magna SCJ*, the court was considering an arrangement which contemplated a collapse

of its dual share structure, which included Class A subordinate voting shares and Class B multiple voting shares. The arrangement provided that the Class B voting shares were to be cancelled, and in consideration the Class B shareholders were to receive cash and Class A shares. Further, all of these shares were to be renamed "common shares". As a result, it was well acknowledged that the Class A shareholders would be affected (as will the Common Shareholders in this case) by a dilution of their voting power. On the particular facts of that case, and clearly where there was a change to the capital structure of Magna, the court accepted that the "substantive" effect of the arrangement was a conversion of the Class A shares into common shares": para. 132.

269 Mason's argument is largely based on the proposition that there is a change in the capital structure due to the impact on the Common Shareholders' "legal rights". Mason relies on the comments in the *BCCA Reasons* concerning the dilution of its voting power:

> [80] It should also be noted that, despite its hedged position, Mason does hold an economic interest in TELUS. Further, its contention that the historic premium that has applied to the TELUS common shares should be preserved in any share exchange is a cogent position that could reasonably be advanced by any holder of common shares. In the exchange proposed by TELUS, the common shareholders will see a massive dilution of their voting power without any direct economic compensation or benefit.

270 I do not accept that the legal rights of the Common Shareholders are being affected by the Arrangement. The legal rights of the Common Shares will remain as before. The Common Shares will have the same rights and attributes as before, in accordance with TELUS' Articles. I accept TELUS' arguments that what is truly being affected here are the Common Shareholders' economic interests, by way of the removal of the traditional trading spread between the two share classes and a dilution of the Common Shareholders' voting power.

271 The Court in *BCE Inc., Re* makes clear, however, that the arrangement provisions apply only to those whose *legal rights*, as opposed to *economic rights*, are affected:

> [132] A difficult question is whether s. 192 applies only to security holders whose *legal rights* stand to be affected by the proposal, or whether it applies to security holders whose legal rights remain intact but whose *economic interests* may be prejudiced.
>
> [133] The purpose of s. 192, discussed above, suggests that <u>only security holders whose legal rights stand to be affected by the proposal are envisioned</u>. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. The distinction between the focus on legal

rights under arrangement approval and reasonable expectations under the oppression remedy is a crucial one. The oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in their strict sense.

[134] This general rule, however, does not preclude the possibility that in some circumstances, for example threat of insolvency or claims by certain minority shareholders, interests that are not strictly legal should be considered: see Policy Statement 15.1, s. 3.08, referring to "extraordinary circumstances".

[135] It is not necessary to decide on these appeals precisely what would amount to "extraordinary circumstances" permitting consideration of non-legal interests on a s. 192 application. In our view, the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not, without more, constitute such a circumstance.

. . .

[161] We find no error in the trial judge's conclusions on this point. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192. The trial judge was thus correct in concluding that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests in his assessment of whether the arrangement was fair and reasonable under s. 192, as he did.

[Emphasis added.]

272 Mason's argument fails for the simple reason that the Common Shareholders have no *legal right* to prevent a dilution of their voting power. Article 3.1 provides that TELUS may issue unissued shares at the times, to the persons, in the manner, on the terms and conditions, and for the issue prices that the directors may determine, subject to the *Act* and the rights of the holders of issued TELUS shares. Accordingly, the Articles do not restrict the issuance of Common Shares up to the 1,000,000,000 limit by requiring a vote of the Common Shareholders.

273 Further, TELUS says that whether any shareholder approval is needed for a transaction that results in the dilution of shares depends on the particular rules of the TSX or NYSE. It says there are numerous instances where the TSX does not impose a voting requirement notwithstanding that substantial dilution may occur. In addition, where shareholder approval is required under the TSX rules, it is by a simple majority as mandated

by s. 604 of the TSX Company Manual. It says that the NYSE rules similarly only require a simple majority when shareholder approval is necessary.

274 I am not aware of, nor did Mason direct my attention to, any provision in the *Act* or the Articles by which the directors are prevented from approving the issuance of further Common Shares save with the approval of a Special Resolution of the Common Shareholders.

275 In any case, TELUS says that the New Proposal does not involve any equity dilution because the Common Shares and Non-Voting Shares have the same economic rights regarding equity participation and dividends.

276 TELUS takes the position that it is entitled to proceed in a manner that achieves its objectives and which does not give rise to any further requirements in relation to the Common Shareholders beyond those arising from the Arrangement. Master Muir agreed, stating "[a]s to the additional right to exchange non-voting for voting shares, although TELUS could have, and did, in the initial proposal seek to achieve its ends by an amendment of its articles, it is not necessary that it do so": *Muir Reasons #1* at para. 56.

277 I agree that there is no requirement that the Arrangement take on a certain form for the purpose of attaining those objectives. Moreover, it does not follow that if TELUS chooses an alternate means of obtaining those objectives, it must satisfy requirements that arise under other options. TELUS is entitled to rely on the *Act* and its Articles in conducting its business affairs and in proposing the Arrangement.

278 As in this case, the issue in *McEwen v. Goldcorp Inc.*, [2006] O.J. No. 4265 (Ont. S.C.J.) ("*McEwen SCJ*"), aff'd [2006] O.J. No. 4437 (Ont. Div. Ct.), arose from a fundamental disagreement as to whether shareholder approval was required under the Ontario legislation. Goldcorp wished to acquire Glamis. The chosen structure for the transaction required the Glamis shareholders to exchange their shares for shares in Goldcorp so that they became shareholders in Goldcorp. As such, a special resolution of the Glamis shareholders was required. A Goldcorp shareholder objected, contending that, in essence, this was an arrangement with Goldcorp and therefore a vote of the Goldcorp shareholders was required. The court, at paras. 33-37, accepted Goldcorp's argument that there was no legal requirement for a Goldcorp shareholder vote and that Goldcorp and Glamis were entitled to structure the transactions in a manner which avoided that requirement:

> [35] Goldcorp has complied with the law as it applies to Goldcorp. It did not propose an arrangement of Goldcorp. Each of Goldcorp's corporate actions is specifically authorized by a provision of the OBCA. Firstly, stage one of the transaction involves an issuance of shares by Goldcorp. Section 23(1) of the OBCA authorizes the directors to issue shares at such times and to such persons and for such consideration as the directors

> may determine, subject only to restrictions that may be contained in the constating documents. There are no such restrictions on share issuances in Goldcorp's constating documents.
>
> . . .
>
> [37] In my view, the transaction is not subject to section 182. To the extent that Goldcorp is amalgamating with another corporation, this occurs when Glamis is a wholly owned subsidiary of Goldcorp and, by virtue of section 177(1), such an amalgamation is exempt from shareholder approval. Goldcorp is not issuing shares in connection with the short-form amalgamation. The fact that some of the elements of a multi-stage transaction could have been structured by way of an arrangement is insufficient for the transaction to be subject to section 182. Section 182(1)(c) is inapplicable. The same is true with respect to section 182(1)(d) which addresses an amalgamation of Goldcorp with a non OBCA corporation. The only amalgamation contemplated in this transaction is between two OBCA corporations as part of the vertical short-form amalgamation. ...

279 In *BCE Inc., Re*, the Court agreed with the trial judge that the arrangement did not affect contractual rights and that the debentureholders had failed to negotiate and obtain protections that would have preserved rights which would have prevented the detriment to their economic interests:

> [162] The next question is whether the trial judge erred in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The trial judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. He noted that it was open to the debentureholders to negotiate protections against increased debt load or the risks of changes in corporate structure, had they wished to do so. He went on to state:
>
>> ... the evidence discloses that [the debentureholders'] rights were in fact considered and evaluated. The Board concluded, justly so, that the terms of the 1976, 1996 and 1997 Trust Indentures do not contain change of control provisions, that there was not a change of control of Bell Canada contemplated and that, accordingly, the Contesting Debentureholders could not reasonably expect BCE to reject a transaction that maximized shareholder value, on the basis of any negative impact [on] them. [Citations omitted.]
>
> [163] We find no error in these conclusions. The arrangement does not fundamentally alter the debentureholders' rights. The investment and the return contracted for remain intact. Fluctuation in the trading value of debentures with alteration in debt load is a well-known commercial phenomenon. The debentureholders had not contracted against this contingency. The fact that the trading value of the debentures stood to diminish as a

> result of the arrangement involving new debt was a foreseeable risk, not an exceptional circumstance. ...

280 In *McEwen*, the court also specifically addressed and rejected the argument that the issuance of shares by Goldcorp constituted a reorganization or scheme affecting shareholders which affected the legal rights of shareholders:

> [37] ... As to section 182(1)(h), I am hard pressed to see how the issuance of shares of an existing authorized class constitutes a reorganization or scheme affecting the holders of securities. Goldcorp will continue to conduct its business as it was conducted prior to the completion of the transaction and its shareholders will continue to hold shares with the same rights, privileges and conditions as existed prior to the transaction. Furthermore a reorganization of Glamis does not amount to a reorganization of Goldcorp. It follows that section 182(1)(i) is therefore also inapplicable.

281 Similarly, Mason had no legal right to prevent the issuance of further Common Shares, and the issuance of Common Shares to Non-Voting Shareholders does not amount to an arrangement being proposed to the Common Shareholders. Mason's argument would, in substance, result in the Common Shareholders being granted a veto power in relation to the issuance of further Common Shares, which power is not found in the Articles or the *Act*.

282 I conclude that the Arrangement will not result in any change in TELUS' authorized capital structure such that the Arrangement is proposed to the Common Shareholders.

(d) Since TELUS obtained the Second Interim Order providing for a vote by the Common Shareholders to adopt the Arrangement, was the Arrangement with the Common Shareholders?

283 Mason contends that since TELUS sought and obtained the Second Interim Order providing for a vote by the Common Shareholders pursuant to s. 291(2) of the *Act*, it was a proposal to the Common Shareholders which then required a 2/3 majority vote pursuant to ss. 289(1)(a) to (c) of the *Act*.

284 TELUS took the position before both Master Scarth (in relation to the Second Interim Order) and Master Muir (on the comeback hearing) that the proposed arrangement was one limited to the Non-Voting Shares. Further, since the Order was sought and obtained pursuant to s. 291(2) of the *Act*, TELUS said that the court could order a meeting and a vote of the Common Shareholders and set whatever level of approval the court thought appropriate. In that regard, TELUS advised that it had proposed on an *ex gratia* basis that a vote by the Common Shareholders was appropriate, *albeit* on a simple majority basis.

285 In *Muir Reasons #1*, the Master rejected Mason's contention that a 2/3 vote of the Common Shareholders was necessary simply because the Second Interim Order required a vote by the Common Shareholders:

> [20] The main contention on behalf of Mason is that Mr. Anderson advised the Court that ss. 289 and 291 of the *Business Corporations Act* did not require a special resolution or two-thirds vote of the common shareholders as the articles of the corporation were not being changed. He said that TELUS had decided that it would be in the company's best interest to have a vote of the common shareholders, but as that was not required under s. 289 it was being proposed under s. 291. As that section did not specify or require a percentage of the vote the board determined that it should be based on a simple majority. TELUS stands by that position as being correct in law and fact.
>
> . . .
>
> [44] Section 291 deals with the role of the Court in arrangements, and amongst other things, allows the Court on the application of the company to make an order in s. 291(2)(b)(ii): "hold a separate vote of the persons the court considers appropriate."
>
> [45] Counsel for Mason submitted that the moment the Court in the *ex parte* order of Master Scarth made an order for the common shareholders to vote, that vote must have been in order to adopt the arrangement. Otherwise the combination of these sections would make no sense.
>
> [46] He further submitted that as the vote was to adopt an arrangement it has to be a two-thirds vote as provided in s. 289.
>
> [47] Further, it was submitted for Mason that arrangements are only to be voted on by shareholders who are sought to be arranged, and that by seeking and obtaining an order that the common shareholders vote on the second arrangement, TELUS is precluded from asserting that the common shares are not being arranged.
>
> [48] I do not agree.
>
> [49] The *Business Corporations Act* in s. 291(2) is clear that the order being made is in respect of a proposed arrangement. It is quite different from the wording of s. 289 which deals with the adoption of an arrangement.
>
> [50] I do not consider that by making an order under s. 291(2) the Court is necessarily making an order requiring the method of adoption of an arrangement, or that a Court is precluded from ordering a vote from other than those who are being arranged.

[Emphasis added.]

286 The fundamental premise of Mason's argument is the Common Shares are being arranged. I disagree that that is so. In addition, Mason's submissions are an exercise in circular reasoning in that if the Common Shareholders have a right to vote, then the arrangement must be proposed to them, which in turn gives rise to the right to vote.

287 I confess that I find Mason's argument on this point to be a tortuous interpretation of the *Act*. Subsections 289(1)(a) and (b) clearly state that a Special Resolution of the shareholders or class of shareholders is required when an arrangement has been proposed to them. TELUS relies on s. 289(1)(b) to say that the New Proposal only involves the Non-Voting Shareholders.

288 Section 291(2) provides the court with considerable discretion in making orders in relation to any proposed arrangement. Section 291(2)(b) specifically allows, but does not require, the court to order that meetings be held of the person the court considers "appropriate". Section 291(2)(e) provides an example where a proposal is made to creditors, in which case the court may order that the arrangement also be approved by the shareholders. However, if such "additional" approvals are required under s. 291, it does not necessarily follow that the proposal becomes one that is proposed to those "other" persons, even though they might be shareholders, so as to invoke the voting threshold requirements of s. 289(1): *Inex Pharmaceuticals Corp., Re*, 2006 BCCA 267 (B.C. C.A.) at para. 5.

289 I reject Mason's argument that ss. 289(1)(a) and (b) are a "complete code" in respect of any shareholder vote on an arrangement, even if such a vote by shareholders to whom the arrangement has not been proposed has been ordered under s. 291(2).

290 In this case, the Second Interim Order provided for a meeting and vote by the Common Shareholders which was to be "in addition" to the meeting and vote by the Non-Voting Shareholders. Pursuant to s. 289(3) of the *Act*, this "additional" meeting was required to be held as set out in the Arrangement and in accordance with the Second Interim Order. Under s. 289(3.1) of the *Act*, this "additional" vote was required to be in accordance with the approval level set out in both the Arrangement and the Second Interim Order. Although both sections require that these steps be met in order to "adopt" the arrangement, I do not consider that the "adoption" is subject to s. 289(1) of the *Act* such that a 2/3 vote is required.

291 It is well taken that the intention underlying the arrangement provisions is to provide a flexible and practical means by which these types of changes can be made to corporate structures, while ensuring that persons who may be affected are treated fairly. It makes eminent sense to me that even where changes are being proposed to one stakeholder group, the company may as a matter of overall fairness require a certain level of support from others,

even though they are not affected. Nevertheless, by doing so, the company does not alter the essence of the arrangement itself such that approvals are to be sought as if the arrangement is being made to those other persons.

292 Mason has provided no authority that would support any interpretation of the *Act* in this fashion. I reject this argument.

(e) Does the Act require that any class vote of the Common Shareholders required the approval of at least 2/3 of the votes cast?

293 In the alternative, Mason contends that even if the Arrangement is not one, either in substance or form, with the Common Shareholders, the court was obliged to direct that any order for a class vote of the Common Shareholders pursuant to s. 291(2)(b) of the *Act* required the approval of at least 2/3 of the votes cast.

294 As with the other arguments relating to the voting threshold of the Common Shareholders, this argument engages the issue of the correctness of the provision in the Second Interim Order directing the vote to be taken on a simple majority basis. On the comeback hearing, Master Muir rejected this contention: *Muir Reasons #1* at paras. 40-59. In large part, this argument parallels the same arguments made under the immediately preceding issue in (d).

295 Mason begins its argument by submitting the uncontroversial principle of statutory interpretation set out by Elmer Driedger in *Construction of Statutes*, 2d ed. (Toronto: Butterworths & Co. (Canada) Ltd., 1983) at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

These statements were adopted by Justice Iacobucci in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 (S.C.C.) at para. 26. See also *Gateway Casinos LP v. B.C.G.E.U., Local 304*, 2007 BCCA 140 (B.C. C.A.) at paras. 15-16.

296 I accept that the *Act* provides certain procedural safeguards for affected shareholders in terms of approval levels required for certain corporate actions. For example, the *Act* requires Special Resolutions in relation to the following major changes in the corporate structure: s. 259(2) - alteration to articles; s. 271(6) - amalgamation agreements; s. 301(1) - disposal of all or substantially all of a company's undertaking; and s. 308(1) - continuation outside British Columbia. Similar approval levels are of course set out in s. 289 in relation to arrangements.

297 Mason argues that the key lies in the difference in wording as between s. 291(2)(b) and s. 291(2)(e) of the *Act*. Again, those provisions state that the court may grant:

> (b) an order requiring the company to do one or both of the following in the manner and with the notice the court directs:
>
> > (i) call, hold and conduct one or more meetings of the persons the court considers appropriate;
> >
> > (ii) hold a separate vote of the persons the court considers appropriate;
>
> . . .
>
> (e) an order directing that an arrangement proposed with the creditors or a class of creditors of the company be referred to the shareholders of the company in the manner and for the approval the court considers appropriate.
>
> [Emphasis added.]

298 Mason argues that the additional wording found in s. 291(2)(e) ("and for the approval the court considers appropriate") must refer to the voting threshold. Since this phrase is not found after "in the manner" in s. 291(2)(b), that must mean that the court has less discretion concerning the voting requirements set out under s. 291(2)(b) and that the court must then look only to s. 289 in respect of the level of approval required. Yet Mason does not also identify that s. 291(2)(b)(ii) also refers to the court allowing a vote of persons the court "considers appropriate". To add to the confusing wording, s. 186(1)(a) of the *Act* provides that the court may order that a meeting be called, held and conducted "in the manner the court considers appropriate".

299 Although it is not clear on the face of s. 291(2)(b)(ii) whether it is referring only to the identification of those persons voting or to the approval required, I consider that given the flexibility afforded under the *Act* and under that section in particular, the wording would encompass both. Section 291(2) provides for a broad discretion in respect of proposed arrangements and while specific *included* matters are set out in subsections (a) to (e), in my view, they were not intended to restrict the matters that might be addressed by the court where appropriate and towards achieving the objectives of the *Act*. Those matters would include not only procedural matters concerning the conduct of the meetings, but also more substantive matters such as the level of approvals required in respect of persons other than those to whom the arrangement is proposed.

300 I do not consider that interpreting the *Act* in this fashion results in a conflict, either in form or in substance, with other provisions of the *Act* and in particular s. 289. The

focus of that specific section is to prescribe the level of voting approvals "in respect of an arrangement proposed with the shareholders" or "in respect of an arrangement proposed with the shareholders holding shares of a class or series of shares". So long as the arrangement is not proposed with a class of shareholders, such as with the Common Shareholders here, s. 289 is not engaged and the court retains a discretion in respect of any meeting and vote by such class of shareholders under s. 291(2)(b).

301 In my view, any restriction as contended by Mason would only undermine the inherent flexibility that is intended to be a fundamental feature of the arrangement provisions of the *Act*.

302 In conclusion, I find that TELUS has satisfied all statutory requirements under the *Act*.

3. Is the Arrangement Fair and Reasonable?

303 As stated above, *BCE Inc., Re* states that this aspect of the test must be satisfied within the context of two prongs: firstly, whether there is a valid business purpose and secondly, whether objections were resolved in a fair and balanced way.

a) Is there a Valid Business Purpose?

304 The first prong of the "fair and reasonable" test articulated by the Court in *BCE Inc., Re* requires that the court consider whether the Arrangement has a valid business purpose. The focus is on the interests of the company:

> [145] The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. In other words, courts must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. The proposed plan of arrangement must further the interests of the corporation as an ongoing concern. In this sense, it may be narrower than the "best interests of the corporation" test that defines the fiduciary duty of directors under s. 122 of the *CBCA* (see paras. 38-40).

305 This enquiry is invariably fact-specific, but an important factor is whether the arrangement is "necessary" in respect of the company's continued operations: *BCE Inc., Re* at para. 146. It is conceded by TELUS that the arrangement is not necessary in the sense of ensuring its continued business, but it is equally apparent that it is considered "necessary" towards enhancing TELUS' ability to compete in the marketplace. As explained by the Court in *BCE Inc., Re*, the degree of "necessity" will dictate the level of scrutiny in considering the arrangement's effect on stakeholders:

> [146] ... Necessity is driven by the market conditions that a corporation faces, including technological, regulatory and competitive conditions. Indicia of necessity include the existence of alternatives and market reaction to the plan. The degree of necessity of the arrangement has a direct impact on the court's level of scrutiny. Austin J. in *Canadian Pacific* concluded that:
>
>> while courts are prepared to assume jurisdiction notwithstanding a lack of necessity on the part of the company, the lower the degree of necessity, the higher the degree of scrutiny that should be applied.
>>
>> [Emphasis added; p. 223.]
>
> If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders.

306 Mason concedes that the Arrangement has a valid business purpose. In fact, Mason agrees that this move will benefit TELUS. In its Response to Petition, Mason simply states, "Mason is not opposed to a collapse of the dual class share structure". Further, in the Second Mason Dissident Circular, it adopts comments of Professor Black which support the view that a single share class is preferable:

> Having two classes of common shares is often thought to reflect poor corporate governance. That view, which I share, has strong empirical support.

307 The rider from Mason's point of view, however, is any exchange must provide for a premium to the Common Shareholders. Mason asserts that if the share exchange is done without payment of any premium, the prejudice to the Common Shareholders must be weighed as against the fact that this exchange is not necessary in respect of TELUS' continued operations.

308 I will briefly review what I consider to be the overwhelming evidence as to this valid business purpose. Indeed, at the outset, it must be emphasized that there is considerable support for the Arrangement towards achieving the benefits that will arise. This is evident from the support of the Board, the Special Committee, Scotia, two independent proxy advisors, ISS and Glass Lewis, and the positive vote by the shareholders.

309 Fundamentally, the benefits of the Arrangement include an increase in the ability of TELUS to attract investors and access capital on a level playing field with other single class competitors, which will contribute to TELUS' ability to compete in the marketplace. An important aspect is that the Common Shares will be traded on the NYSE. As TELUS points out, the market responded positively upon the announcement of the Initial Proposal, causing an increase in price for both Non-Voting and Common Shares.

310 As reviewed above, in relation to the benefits to TELUS from both the Initial Proposal and the New Proposal, the Special Committee concluded the collapse will:

> (i) enhance the liquidity and marketability of TELUS' shares through an increase in the number of Common Shareholders and a listing on the NYSE for the first time for the Common Shares;
>
> (ii) address earlier concerns expressed by Shareholders about the impact of TELUS' dual class share structure on liquidity and trading volumes;
>
> (iii) enhance TELUS' leadership in respect of good corporate governance practices by granting the right to vote to all shareholders who have an economic interest in TELUS;
>
> (iv) align TELUS' capital structure with what is generally viewed as best practice; and
>
> (v) enable TELUS to continue to comply with the foreign ownership restrictions under the *Telecommunications Act*, S.C. 1993, c. 38, the *Radiocommunication Act*, R.S.C. 1985, c. R-2 and the *Broadcasting* Act, S.C. 1991, c. 11.

311 In addition, both of the proxy firms, ISS and Glass Lewis, have confirmed that the Arrangement has a valid business purpose. Glass Lewis was of the opinion that the Arrangement will have a positive impact on both TELUS' competitive advantage and access to capital:

> We also note that the share conversion will provide for a simplified capital structure that is comparable to other large telecommunications companies operating in Canada including BCE and Manitoba Telecom Services. This single class share structure should, in the long term, enhance access to capital, attract new investors and provide a more liquid market for the Company's shares. As a large telecommunications company, we believe the potential increase in liquidity is particularly advantageous as the Company may require equity-based fund raising in order to preserve or raise cash for capital intensive projects. While Mason has argued that the Company's liquidity is already relatively high, one could hardly argue that moving to a single class share structure that is traded on the NYSE will not increase liquidity.

312 Simplification of a share structure can be a valid business purpose. In *Canadian Pacific Ltd., Re*, the court was addressing a major reorganization to be implemented with a view to "simplifying its structure, placing its CP Rail System on the same footing as its other subsidiaries, providing it with better access to capital markets, and generally with a view to positioning itself more competitively in today's business environment": p. 113. The Court concluded at p. 132:

> The Plan is advantageous to the Company in that it is able to simplify its share structure, place its traditional rail business on the same footing as other interests, rationalize its treatment of its consolidated debenture stock, and develop greater flexibility in its approach to capital markets and to its competitive environment generally...

313 Similarly, in *Magna International Inc., Re*, the Special Committee had identified substantial potential benefits from the elimination of the dual class share capital structure: para. 43. The court accepted that there were "real benefits" to Magna in adopting the arrangement. That conclusion was upheld on appeal (see *Magna International Inc., Re* at paras. 46-50). The court stated:

> [120] However, even on a standard of careful scrutiny, it is clear that the elimination of the dual-class capital structure would benefit Magna, both from a corporate governance and from a financial perspective. The Special Committee's assessment of the benefits to Magna was set out in an excerpt from the Supplement set out above. Consistent with this position, as mentioned above, in concluding that the proposed Arrangement is fair and reasonable to Magna, the Special Committee has implicitly concluded that there is a valid business purpose for the proposed Arrangement. The Opposing Shareholders also do not challenge the proposition that the elimination of the dual-class capital structure would benefit Magna in the manner described by the Special Committee. As Magna points out, they do not object to the purpose of the proposed Arrangement, only the allocation of the risks and benefits.
>
> [Emphasis added.]

314 In conclusion, the underlying objectives of the Arrangement demonstrate that there is a valid business purpose. The clear benefits at this time of moving all issued and outstanding shareholders into a single class of Common Shares are acknowledged by all, including Mason, to be benefits that will assist TELUS in its business.

b) Does the Arrangement Resolve Objections in a Fair and Balanced Way?

315 Both TELUS and Mason agree that the Arrangement must pass the test of being both procedurally and substantively fair and reasonable.

i. Procedural Fairness

316 TELUS has complied with the Second Interim Order.

317 Beyond that, Mason's arguments on this issue are similar to those already addressed above on the issue as to whether Master Muir was justified in refusing Mason's application to adjourn the meetings. In summary, it reiterates:

(a) After delivery of the Requisition, Mason issued a press release on August 21, affirming its intention to pursue the Requisition. That same day, TELUS issued its own press release headed, "TELUS rejects Mason Capital's anti-democratic and invalid requisition".

(b) On August 31, TELUS issued a press release announcing that it would launch a legal proceeding seeking a court order directing that Mason's attempt to hold a shareholder meeting is invalid. An officer of TELUS was quoted as describing the Mason Meeting as "an absurd tactic", "undemocratic" and "invalid under Canadian law".

(c) On September 11, TELUS issued a press release announcing the judgment of Savage J: "TELUS announces that BC Supreme Court decides overwhelmingly in its favour". It stated that "the Court determined that the actions of Mason Capital were contrary to law and that Mason's meeting and resolutions will not proceed". TELUS quoted passages from Savage J.'s reasons describing Mason as an "empty voter".

(d) Mason issued press releases on September 12 and 18 announcing that Savage J.'s decision was under appeal and that the appeal had been expedited. TELUS did not acknowledge the appeal in a press release.

(e) On October 12, after the release of *BCCA Reasons*, Mason issued a press release disclosing the decision. TELUS did not. TELUS' next press release was issued on October 15. It announced a decision of Master Muir, but did not reference the Mason Meeting or the decision of the Court of Appeal. The press release stated:

> The Supreme Court of B.C. today rejected Mason Capital's attempt to challenge TELUS' share exchange proposal. The Court confirmed the validity of the order it had initially granted to TELUS enabling the company's shareholders to vote on its proposal to exchange non-voting shares for common shares on a one-for-one basis. TELUS' proposal requires approval of two-thirds of the company's non-voting share votes and a majority of common share votes.
>
> "We are pleased that the Supreme Court of B.C. has once again provided their support for our share exchange proposal to proceed, rejecting the latest legal

maneuver from Mason Capital whose net economic ownership position in our company is a mere 0.02 per cent," said Darren Entwistle, TELUS President and CEO. ...

318 Mason says that between August 21 and September 11, a cloud hung over the Mason Resolutions because of TELUS' initial disparagement of them as invalid and the subsequent legal attack, and that from September 11 until October 12, the Mason Resolutions were entirely "off the table". After October 12, while Mason's resolutions were restored for shareholder consideration, TELUS was not prepared to admit or acknowledge this in a press release and instead issued a press release which further confused the situation. By this time, the proxy deadline had passed.

319 Mason again contends that as a result of these events, a shareholder paying attention to TELUS' public pronouncements would understand that Mason had engaged in an invalid manoeuvre in attempting to requisition and call a shareholder meeting; that this was an absurd tactic successfully challenged by TELUS in court; that the court decided overwhelmingly in TELUS' favour, finding that Mason's actions were contrary to law and confirming that TELUS' repeated attacks on Mason's "empty voting" strategy were legitimate; and as late as October 15, that the Supreme Court was again rejecting Mason's further legal manoeuvring.

320 Mason says that TELUS took every advantage of its temporary victory before Savage J., providing the context in which shareholders were assessing the competing contentions and deciding how to vote. It says that this advantage was illegitimate and should not have been obtained by TELUS and that if it had time and opportunity to adequately publicize the Court of Appeal's decision, the damage from TELUS' illegitimate gains could have been remedied. But it says it had neither under the circumstances.

321 I have already accepted that the shareholders received from both camps considerable information that would have helped them fully understand the respective positions. As I have already noted, the communications from Mason in the time frame after release of the *Savage Reasons* included notice of the Mason Resolutions themselves and communications concerning those Resolutions. In addition, although TELUS was not quick to publicize its loss before the Court of Appeal, it is equally apparent that Mason quickly did so. Accordingly, I do not see that as any basis upon which to say that shareholders were not truly aware of the state of the battle between TELUS and Mason at any point in time.

322 I have concluded that even if further communications had been sent in respect of the Mason Resolutions, there would have been no material difference in the outcome of the meetings.

323 While TELUS did take action to prevent Mason from putting the Mason Resolutions before a shareholder meeting, I do not agree that the course of events lent credibility to TELUS' attack on Mason's motives and strategy or that they altered the views of some shareholders as to Mason's position. Mason equally attacked the motives and strategies of TELUS in its extensive and substantive communications to shareholders, in addition to announcing that the appeal was underway.

324 Mason's claim that it was negatively affected by TELUS' name calling is dubious. As far as I can see, the communications from both sides, particularly after the introduction of the New Proposal, included quite negative language about the other. Mason is hardly in a position to say that it could not or did not defend itself at every turn in the public communications battle. As I said earlier, many of the negative comments about its position were factually based and not open to debate.

325 I have accepted TELUS' contention that Mason had a fair opportunity to solicit proxies in favour of its position and that the use of the proxies for the New Proposal was a fair method of proceeding in the circumstances. Simply put, the Mason Resolutions would not have provided Common Shareholders with a "viable third alternative" in relation to the New Proposal and the exchange ratio proposed.

326 Mason is a sophisticated investor and market participant. It is obviously a well-funded entity which had considerable assistance in seeking support of its position, including legal advice, shareholder solicitation programs, Professor Black's comment on empty voting, Professor Gilson's sworn affidavit in which he provides a favourable opinion as to Mason's alleged status as an "empty voter" and the Blackstone Report. Its position was well publicized for consideration by the shareholders. At the end of the day, Mason failed to obtain the level of support it wanted or needed, but this was not as a result of a lack of opportunity to adequately explain and advocate its position to TELUS shareholders.

327 I conclude that the Arrangement has been brought forward in a procedurally fair manner, particularly as it relates to Mason.

ii. Mason as an "Empty Voter"

328 It can hardly be overstated that the contention by TELUS that Mason is an "empty voter" in this and prior proceedings has infused much of the tenor in the contest between them. Mason rails against this pejorative moniker. Whether one accepts that name or not, it seems that, at best, one could describe Mason as an "opportunistic investor".

329 The question that arises in the first instance is whether, in the context of the fairness analysis, Mason's unique circumstances and motivations are relevant factors to

consider. TELUS takes the position that in determining whether the New Proposal is fair and reasonable, this Court should consider Mason's status as an "empty voter".

330 A review of the factual circumstances relating to Mason is instructive. When TELUS announced its intention to proceed with the Initial Proposal on February 21, Mason did not hold TELUS shares. At the time of the announcement, the market responded and the historical spread between the two types of shares decreased. At this time, Mason saw an opportunity to profit from a strategy described as arbitrage, which is not typically expected from such an investment. At its core, the success of this plan was founded upon the defeat of TELUS' Initial Proposal and what Mason expected would be a return to the historical spread between the trading prices of Common Shares and Non-Voting Shares.

331 As outlined above, Mason acquired a substantial share position by the end of March. When voting was set for the Initial Proposal, Mason had 100 times the voting power in relation to its net economic investment in the shares. It was in the face of such voting power that TELUS withdrew the Initial Proposal at the May 9 meeting. By the time the New Proposal was formulated and the Second Interim Order was obtained in late August, Mason had taken steps to alter its share position and reduce its exposure by selling its Non-Voting Shares while still holding 32,765,829 Common Shares. It had also increased its short sold Common Share position and decreased its Non-Voting short sold position. As a result, as of August 31, Mason's net position was 0.021% of TELUS' issued and outstanding shares, representing voting power that was approximately 1,000 times greater than its net economic interest in TELUS.

332 TELUS submits that this strategy has provided Mason with substantial voting power, while simultaneously disenfranchising the other holders of Common Shares. TELUS further accuses Mason of exercising its voting power for reasons entirely at odds with promoting the interests of TELUS or the value of the Common Shares.

333 This raises the issue of what has been referred to as "empty voting", which term the academic literature has used to describe the scenario where a shareholder has "decoupled" economic ownership from voting power such that their "voting rights substantially exceed their net economic ownership": Henry T.C. Hu & Bernard Black, "The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership" (2006) 79:4 S. Cal. L. Rev. 811 at 825.

334 In the *TELUS Corp.*, the court cited certain authorities which have considered the phenomenon:

> [73] TELUS cites a number of cases and scholarly articles which raise concerns about the phenomenon of "empty voting" — the accumulation of votes by a party that has a very limited financial stake in a company. The discussion of the Delaware Supreme

Court in *Crown EMAK Partners, LLC v. Kurz* 992 A.2d 377 (Del. 2010) at 387-388 is representative:

> Shareholder voting differs from voting in public elections, in that the shares on which the shareholders' vote depends can be bought and sold. Vote buying in the context of corporate elections and other shareholder actions has been and continues to be an important issue. Several commentators have addressed the corporate voting process and techniques by which shareholder voting rights can be manipulated.
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> . . .
>
> The Court of Chancery noted a 1983 scholarly analysis of shareholder voting which concluded "[i]t is not possible to separate the voting right from the equity interest" and that "[s]omeone who wants to buy a vote must buy the stock too." The Court of Chancery also recognized, however, that over the last twenty-five years "[i]nnovations in technology and finance have made it easier to separate voting from the financial claims of shares." Today, "the market permits providers to slice and dice the shareholder's interest in a variety of ways, and investors are willing to buy these separate interests."
>
> <u>According to a recent scholarly study of corporate voting by Professors Robert Thompson and Paul Edelman, a disconnect between voting rights and the economic interests of shares "compromises the ability of voting to perform its assigned role." They concluded that "[a] decision-making system that relies on votes to determine the decision of the group necessarily requires that the voters' interest be aligned with the collective interest. [Therefore, i]t remains important to require an alignment between share voting and the financial interest of the shares." [Footnotes omitted.]</u>
>
> [Emphasis added.]

335 In these proceedings, both TELUS and Mason submitted evidence and materials from the same two scholars identified in the paragraph above (Professors Hu and Black) who co-authored the series of articles which coined the term "empty voter" and introduced related concepts such as "economic ownership" and extreme categories of "empty voters" who have "negative economic ownership or interests" (the "Hu & Black Articles"). TELUS submitted the affidavit of Professor Hu containing an analysis as to Mason's current arbitrage position. Mason submitted an article prepared by Professor Black, entitled "Equity Decoupling and Empty Voting: The TELUS Zero-Premium Share Swap" (the "Black Analysis"), which was included in the Second Mason Dissident Circular. Professor Black received compensation from Mason for this article. Curiously, although Professors Hu and Black co-authored the

Hu & Black Articles, they take opposing views here as to whether Mason is engaging in "empty voting".

336 The formulation of these concepts began in 2006/2007 and substantial scholarship has resulted since that time. Also, these concepts have been considered and concerns about these types of market participants have been expressed by the United States Securities and Exchange Commission (the "SEC") and the Delaware Supreme Court (see: *Crown EMAK Partners, LLC v. Kurz* (2010), 992 A.2d 377 (U.S. Del. S.C.) and *TR Investors LLC v. Genger*, 2010 Del. Ch. Lexis 153 (U.S. Del. Ch. July 23, 2010)).

337 The discussion must start from what is normally considered the traditional hallmarks of the relationship between a company and its shareholders. It is not a one-dimensional relationship. It is one that has many different aspects, including rights and obligations flowing from both parties. As Professor Hu puts it:

> Ownership of shares customarily conveys economic, voting, and other rights and obligations, including certain disclosure obligations. Law and business practice typically assume that the elements of this package of rights and obligations cannot be readily "decoupled" — that, for instance, voting rights cannot be separated from an economic interest in the corporation. The nearly-universal (in the U.S.) "one share-one vote" corporate ownership and governance model is an example of this assumption. ...
>
> ... If one of the basic goals of all corporations is to increase shareholder wealth (i.e., the share price), we want those who have a stake in shareholder wealth to be in a position to select management and to pressure them to maximize shareholder wealth. There is a close, integral relationship among the core pecuniary objective of corporate management (i.e., shareholder wealth maximination), the concept of "economic ownership" in Hu & Black (i.e., one determined by shareholders' entitlement to returns on shares), and the rationale for shareholders having voting rights.

338 Professor Black is of the view that because Mason has an economic interest in the value of voting rights, it in turn has an economic interest in the outcome of the proposed Arrangement; and as Mason has an economic interest in the outcome, Professor Black concludes that Mason is not engaging in "empty voting".

339 In his response to the Black Analysis, Professor Hu had no difficulty in describing Mason as an "empty voter", in that its voting rights substantially exceed its net economic interest in TELUS. He stated that this conclusion was consistent with: (i) the Hu & Black Articles, which coined the terms "empty voter" and "economic ownership" and introduced an analytical framework for "decoupling"; (ii) how the SEC and the Delaware Supreme Court have used the terminology and analytical framework, citing the Hu & Black articles; and (iii) how these terms and the analytical framework is understood amongst legal and financial

academics, corporate management, hedge funds and other institutional investors, judges, lawyers and regulators.

340 Moreover, Professor Hu described Mason as an extreme type of "empty voter", as it has a "negative economic interest or ownership" in TELUS in that its motivation in exercising its voting power is to *destroy* shareholder wealth. This situation is illustrated by comparing the "economic ownership" of Mason in relation to other shareholders who hold Common Shares only, Non-Voting Shares only, or both types of shares. All of the latter shareholders have the same "economic interest or ownership" in TELUS; the value of their investment will increase or decrease depending on market conditions that cause the share prices to rise or fall. In contrast, Mason's position arising from the arbitrage plan is not necessarily affected if the share prices rise or fall. As Professor Hu puts it, Mason's wealth is not tied to a return on either class of shares. Rather, as noted in the *Savage Reasons* at paras. 108 and 110, Mason's "economic interest" in TELUS lies in the price *spread* as between the two classes of shares, and it stands to profit if that spread widens.

341 In looking at this scenario, there is considerable evidence and opinion to suggest that the success of the New Proposal will result in an increase of the trading price of both classes of shares (see, e.g., the Second ISS Report). If that is so, then all three of the shareholder categories described above will benefit. Mason, on the other hand, is the only shareholder who would not benefit. The corresponding inference is that in the event that the New Proposal is defeated, trading prices will fall and the price spread as between share classes will return.

342 Professor Hu persuasively concludes that assuming the Arrangement will have a positive impact on the prices of both classes of TELUS shares, and further assuming that Mason will profit from an increase in the share price spread if the New Proposal fails, then Mason is the extreme type of "empty voter" identified by Hu & Black as an "empty voter" with "negative economic ownership".

343 Accordingly, as is made abundantly apparent from its opposition on this application, Mason's interests lie in defeating the New Proposal. Mason does not suggest otherwise. Given that, and assuming that the success of the New Proposal would increase share prices, Professor Hu concludes Mason is using its voting power to destroy shareholder value or wealth.

344 Justice Savage did not find it necessary to address TELUS' alternate argument that Mason's status or market position provided the court with jurisdiction to disentitle Mason from requisitioning a meeting under s. 167 of the *Act*: *Savage Reasons* at paras. 100-113. With respect to "empty voting", however, he stated:

> [104] The practice of empty voting presents a challenge to shareholder democracy. Shareholder democracy rests on the premise that shareholders have a common interest: a desire to enhance the value of their investment. Even when shareholders have different investment objectives, the shareholder vote is intended to reflect the best interests of the company in the pursuit of wealth maximization.
>
> [105] When a party has a vote in a company but no economic interest in that company, that party's interests may not lie in the wellbeing of the company itself. The interests of such an empty voter and the other shareholders are no longer aligned and the premise underlying the shareholder vote is subverted.

345 This alternate argument was addressed by the Court of Appeal. At the outset, the ambivalent status of Mason in these proceedings was noted by Justice Groberman. Although he recognized that Mason had a "cogent position" regarding the conversion ratio issue, he also stated that Mason's position and strategy was a "cause for concern": paras. 72 and 81. The court concluded that there was no basis upon which the court should disenfranchise Mason in respect of the exercise of its rights arising under its shares:

> [79] TELUS argues that the court has powers, under this section, to enjoin the holding of a requisitioned meeting. I see nothing in the provision that grants such a power. Further, while the section gives the court fairly broad authority to control the calling of a meeting and the manner in which it is conducted, nothing in the section allows a court to disenfranchise a shareholder on the basis of a suspicion that it is engaging in "empty voting".
>
> [80] It should also be noted that, despite its hedged position, Mason does hold an economic interest in TELUS. Further, its contention that the historic premium that has applied to the TELUS common shares should be preserved in any share exchange is a cogent position that could reasonably be advanced by any holder of common shares. In the exchange proposed by TELUS, the common shareholders will see a massive dilution of their voting power without any direct economic compensation or benefit.
>
> [81] The fact that Mason has hedged its position to the extent that it has is cause for concern. There is, at the very least, a strong concern that its interests are not aligned with the economic well-being of the company. That said, there is no indication that it is violating any laws, nor is there any statutory provision that would allow the court to intervene on broad equitable grounds. To the extent that cases of "empty voting" are subverting the goals of shareholder democracy, the remedy must lie in legislative and regulatory change.
>
> [Emphasis added.]

346 To similar effect, Mason relies on various authorities which it says support its contention that its rights as a shareholder should be given effect notwithstanding that it may be an "empty voter".

347 In *Palmer v. Carling O'Keefe Breweries of Canada Ltd.* (1989), 67 O.R. (2d) 161 (Ont. Div. Ct.), an investment firm, described as a speculator and arbitrager, had purchased preference shares after a certain corporate step, in the belief that it could exert leverage to cause a redemption of those shares. This firm later alleged it had been oppressed. The court rejected the argument that the firm should be denied any relief since it had "bought into the oppression".

348 In *Richardson Greenshields of Canada Ltd. v. Kalmacoff* (1995), 22 O.R. (3d) 577 (Ont. C.A.), an investment firm sought leave to bring a derivative action against the directors. It had purchased its shares for the purpose of bringing the proceedings, although it had some previous involvement with that share class. The Court of Appeal overturned the decision of the chambers judge who had denied leave to commence the action. The Court stated that it should not go behind the circumstances of the firm in terms of its monetary stake in the outcome in determining whether it was, or was not, acting in good faith, as required by the legislation: pp. 586-587. At pp. 586-587, the court stated:

> In my opinion, the extent of Richardson Greenshield's stake, monetary or otherwise, in the outcome of these proceeding is of little weight in deciding whether it has met the good faith test applicable to the present circumstances. This case is not at all akin to a strike or bounty action. Although the appellant purchased shares for the purpose of bringing these proceedings, it is by definition a complainant, and stands, *vis a vis* the company, in the same position as any other person who fits within the definition of "complainant". The issues involved are of a continuing nature, and it seems to me apparent that the appellant is in a better position than most shareholders to pursue the complaint. Indeed, I see no advantage in requiring that the action be brought by another shareholder, as suggested by the judge hearing the application. I think it significant that the appellant has had a long-standing commercial connection with this class of shares and is familiar with the matters in dispute. It acknowledges that it has clients who purchased shares on its recommendation, and, it can be inferred from the shareholders' vote, that it voices the views of a substantial number of the preferred shareholders. Whether it is motivated by altruism, as the motions court judge suggested, or by self-interest, as the respondents suggest, is beside the point. Assuming, as I suppose, it is the latter, self-interest is hardly a stranger to the security or investment business. Whatever the reason, there are legitimate legal questions raised here that call for judicial resolution. The fact that this shareholder is prepared to assume the costs and undergo the risks of carriage of an action intended to prevent the board from following a course of action that may be *ultra vires* and in

breach of shareholders' rights does not provide a proper basis for impugning its *bona fides*. In my opinion, there is no valid reason for concluding that the good faith condition specified in s. 339(2)(b) has not been satisfied.

349 *Richardson Greenshields of Canada Ltd.* is of limited applicability here since the *bona fides* of TELUS, not Mason, is one of the issues to be addressed on this application. Nevertheless, I accept the premise from both these cases as being consistent with the reasoning of our Court of Appeal that Mason is entitled to assert its legal rights as a shareholder on this application notwithstanding its position as an "empty voter".

350 Mason contends that clear statutory authority would be required to support any inquiry into Mason's status as an "empty voter"; and absent such authority, the court cannot look behind the shareholding to see whether it represents a material interest in the company.

351 In *Blackburn Developments Ltd., Re*, 2011 BCSC 1671 (B.C. S.C.), this Court recently considered an argument to disallow voting by a "vulture fund" in respect of the sanctioning of a plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The allegation was that the creditor was not acting in good faith and was voting for an improper purpose. Assuming that the court had the necessary jurisdiction to disallow the voting, Sewell J. found that the preferable approach was to allow the creditor to vote as it wished unless such voting was unlawful or would result in a substantial injustice: paras. 44-45. Given that the allowed votes resulted in the plan being defeated, the court was not required to consider whether factors relating to the creditor were relevant to the determination of the fairness and reasonableness of the plan under s. 6 of the *CCAA*.

352 In the first instance, TELUS says that a simple majority threshold for the Common Shares is appropriate in this case to avoid the result that an "empty voter" such as Mason can single-handedly veto any arrangement. Common Shareholders holding 67.6% of those shares were decidedly in favour of the New Proposal to the extent of 84.4%, excluding the votes of Mason. Looking at the overall shareholdings, total votes cast accounted for 76.3% of the total outstanding shareholdings, with 93% of votes cast in favour of the New Proposal, again excluding Mason.

353 Taken in context, I do not consider that TELUS is arguing that Mason should be disenfranchised as a voting shareholder. To do so would fly in the face of the Court of Appeal's reasoning and conclusions in the earlier proceedings. I accept that there is no basis upon which a lower voting threshold could be set contrary to the *Act* on the basis that Mason is an "empty voter". However, as I have found, the voting threshold for the Common Shares was appropriately set in accordance with the *Act*, and in particular s. 291(2). Mason voted its shares at the October 17 meeting, at which time that voting threshold was met. It is well

acknowledged that Mason exercised its voting rights as a shareholder. It is therefore incorrect to say that Mason's votes have been counted differently than those of other shareholders.

354 TELUS further argues, however, that on the fairness hearing, the court may consider Mason's position or status and the voting patterns of the other shareholders as relevant factors in determining whether the New Proposal is fair and reasonable. In particular, TELUS says that those factors would include firstly, how all of the shareholders voted on the Arrangement and secondly, how the shareholders other than Mason had voted. Impliedly, of course, this raises a consideration of Mason's admittedly idiosyncratic status.

355 Mason contends that the entire notion of "empty voting" is vague and uncertain and that no distinction should be drawn between Mason and the other shareholders. It is well acknowledged that Mason has a "cogent position" in respect of its exchange ratio argument. It also clearly has an economic interest in TELUS. But, as Professor Hu notes, its interest is a unique one and its economic interest at this time is more apparent than real. While Mason argues that it is championing the rights of other Common Shareholders, Professor Hu's analysis makes clear that it likely stands alone and in clear distinction to all of the other shareholders in terms of how and why it exercises its voting rights, even in relation to those other Common Shareholders who also voted against the New Proposal.

356 I accept that there may be many other shareholders who have particular shareholdings which dictated the manner in which they have voted. As the court noted in *Richardson Greenshields*, "self-interest is hardly a stranger to the security or investment business": p. 587. Mason contends that if TELUS' argument is accepted, then the peculiar circumstances — and self interest — of these other shareholders should equally be subject to review and consideration. Clearly, that is impractical in the circumstances. Nevertheless, Mason is the only shareholder who has come before the court to oppose the Arrangement, and its own peculiar circumstances have clearly dictated that strategy from the outset.

357 The question therefore is: in the exercise of its discretion under the *Act* in considering the Arrangement, must the court be blind to Mason's unique circumstances?

358 The *Act* does not restrict the factors relating to an arrangement that may be considered by the court at a fairness hearing. I accept, however, that the discretion to be exercised under s. 291(4) of the *Act* is a statutory discretion which must be exercised in accordance with the requirements and objects of the *Act*: *Skeena Cellulose Inc., Re*, 2003 BCCA 344 (B.C. C.A.) at paras. 37-47; *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 33; *Protiva Biotherapeutics Inc. v. Inex Pharmaceuticals Corp.*, 2006 BCSC 1729 (B.C. S.C.) at paras. 30-33.

359 The Supreme Court of Canada in *BCE Inc., Re* makes clear that the *Act* is intended to allow a "practical and flexible" process to effect complicated transactions: para. 123. With

that purpose in mind, the *Act* allows changes in the corporate structure, while ensuring that individuals and groups whose rights are affected are treated fairly: para. 128. In considering fairness, the court does not operate in a vacuum. The Court in *BCE Inc., Re* states that the court may consider a variety of factors depending on the circumstances of each case and that in balancing interests, fairness to all is in order, not just to the special needs of one particular group:

> [147] The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.
>
> [148] An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec Corp., Re*, at para. 36:
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>> [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.
>
> [149] The question is whether the plan, viewed in this light, is fair and reasonable. In answering this question, courts have considered a variety of factors, depending on the nature of the case at hand. None of these alone is conclusive, and the relevance of particular factors varies from case to case. Nevertheless, they offer guidance.
>
> [150] An important factor is whether a majority of security holders has voted to approve the arrangement. Where the majority is absent or slim, doubts may arise as to whether the arrangement is fair and reasonable; however, a large majority suggests the converse. Although the outcome of a vote by security holders is not determinative of whether the plan should receive the approval of the court, courts have placed considerable weight on this factor. Voting results offer a key indication of whether those affected by the plan consider it to be fair and reasonable: *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Ont. Ct. (Gen. Div.)).
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> . . .

[152] Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific*; *Trizec Corp., Re*. The court may also consider the repute of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies: see *Stelco Inc., (Re)* (2006), 18 C.B.R. (5th) 173 (Ont. S.C.J.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec Corp., Re*; *Pacifica Papers*; *Canadian Pacific*.

[153] <u>This review of factors represents considerations that have figured in s. 192 cases to date. It is not meant to be exhaustive, but simply to provide an overview of some factors considered by courts in determining if a plan has reasonably addressed the objections and conflicts between different constituencies. Many of these factors will also indicate whether the plan serves a valid business purpose. The overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations.</u>

[154] We arrive then at this conclusion: in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. <u>Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups.</u>

[Emphasis added.]

360 Mason's position rests on the proposition that the court in this case should only have regard to Mason's status as a Common Shareholder and its vote *simpliciter*; that is, the court should not enter into a detailed inquiry as to *why* Mason voted the way it did and *why* it seeks to defeat the Arrangement. Mason contends that the allegation that it is an "empty voter" should not, directly or indirectly, influence the court's assessment of the fairness and reasonableness of the Arrangement, particularly as it relates to Mason's contention that it does not give due consideration to the appropriate exchange ratio.

361 Yet, as Professor Hu points out, a shareholder's relationship to the company extends well beyond the exercise of voting rights. For that matter, TELUS' treatment of the exchange ratio in the Arrangement is only one of the factors to consider in determining whether the arrangement is fair and reasonable as it relates to all of the stakeholders, including

Mason, and TELUS itself. Mason has no real interest in these other aspects or benefits of the Arrangement and, in my view, to ignore the reason why Mason concentrates only on its voting rights and the exchange ratio is to artificially disregard the complex circumstances in which the Arrangement has been proposed and that it affects different stakeholders in different ways.

362 In *Magna International Inc., Re*, the court indicated that in considering fairness and reasonableness of an arrangement and in considering the significance of any favourable vote by the stakeholders, the circumstances surrounding the vote and the "nature" of the vote are relevant:

> [164] Third, the outcome of a shareholder vote is not, by itself, determinative of the fairness and reasonableness of an arrangement. <u>A judge must review the circumstances surrounding the vote to assess the significance to be attached to the shareholder vote. In particular, a judge must review the nature of the shareholder vote to determine whether the vote can reasonably be regarded as a proxy for the fairness and reasonableness of the plan of arrangement and, if so, whether there is any reason arising out of the circumstances surrounding the vote that prevents the court from relying on that vote as an indicia of the fairness and reasonableness of the plan of arrangement.</u>
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> . . .
>
> [178] Third, there is no evidence that the holders of the Class A Shares do not have a common economic interest. Put another way, this is not a circumstance in which conflicting interests exist among the Class A shareholders such that the Court should analyze the vote in terms of separate and distinct classes. Such a consideration would be relevant to the "fair and balanced" analysis particularly insofar as it resulted from the possibility that some of the holders of the Class A Shares were, for reasons specific to their particular situation, likely to receive materially more or less from the proposed Arrangement than the other Class A shareholders. There is no evidence, however, that such circumstances exist in the present proceeding in respect of any shareholder.
>
> [Emphasis added.]

363 Similarly, in *Plutonic Power Corp., Re*, 2011 BCSC 804 (B.C. S.C.) at para. 61, the court considered the "nature" of the voting process in terms of whether it could be regarded as a proxy for the fairness and reasonableness of the arrangement.

364 Fairness is an amorphous concept that is discussed in more detail below. What factors are relevant will vary from case to case. The Court in *BCE Inc., Re* has gone some way towards crafting a framework for the analysis and has identified many factors that are to be considered within the articulated fairness test. The listed factors, however, are not exhaustive.

Having in mind the unique circumstances in this case, particularly as they relate to Mason, in my view, it would be unhelpful and indeed detrimental to disregard the dynamics that clearly exist between Mason, TELUS and the other shareholders.

365 Further, as Mason has now waded into the fairness arena on this application, it lies ill in Mason's mouth to contend that its true position should be ignored as a relevant factor. Put more succinctly, if Mason wishes the court to consider the matter of fairness as it relates to the exchange ratio and the lack of payment of a premium to Mason, it is hardly in a position to ask this Court to consider only that factor and disregard other relevant facts as it relates to Mason's position. Mason is not in a position to hide behind the skirts of the other Common Shareholders based on the tissue of an argument that they all have the same interest in obtaining a higher exchange ratio. Clearly, Mason has other interests at play in this scenario, and in all likelihood it is acting in a manner detrimental to the interests of those other Common Shareholders.

366 The weight to be given to Mason's status as an "empty voter" remains an issue. I do not consider that Mason's status overwhelms other relevant factors, particularly in relation to its exchange ratio argument, which the Court of Appeal described as "cogent". The exchange ratio that Mason refers to must be considered in the context of a proposal that removes the historical value that the market has ascribed to the Common Share voting rights. Nevertheless, Mason's status is also a factor to be considered within the context of all relevant factors in what is admittedly a complex set of circumstances.

iii. Substantive Fairness

367 The second prong of the fair and reasonable analysis focuses on whether objections of those whose rights are being arranged are being resolved in a fair and balanced way: *BCE Inc., Re* at para. 147. It is a fact-specific inquiry. Ultimately, the court must be satisfied that the arrangement "strikes a fair balance" in all the circumstances, in that it "adequately responds to the objections and conflicts between different affected parties": *BCE Inc., Re* at paras. 148 and 154.

368 In making this determination, the court is not required to subject the arrangement to "microscopic examination" or demand from the company the "best" or "most fair" arrangement possible: *BCE Inc., Re* at para. 155; *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (Alta. Q.B.) at para. 32. There is no such thing as a perfect arrangement; in any given circumstance, there are "any number of possible transactions that fall within a range of fairness and reasonableness": *Magna International Inc., Re* at para. 208.

369 At the same time, however, the court should not simply defer to the views of the company's officers and directors as to what are the best interests of the company: *BCE Inc., Re* at paras. 139-142 and 155. Nor should the court otherwise relinquish its duty to carefully

review the arrangement. As noted by Forsyth J. in *Trizec* at para. 36, the court must "be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist".

370 In determining whether an arrangement is fair and reasonable, therefore, the court must engage in an objective and substantive review of the terms and the impact of the arrangement and satisfy itself that the arrangement is within the range of fair and reasonable alternatives, such that conflicting interests between different stakeholder groups are fairly balanced in all the circumstances.

371 In this assessment, courts consider a variety of factors, none of which is conclusive and the relevance of which varies from case to case. In *BCE Inc., Re*, the Court set out a non-exhaustive list of "indicia of fairness" which courts have considered in past cases. The Court concluded, at para. 153, that "[t]he overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations".

372 The Court first recognized that although the directors will exercise their best judgment as to what is best for the company and the shareholders, it is ultimately the voting shareholders who determine whether such an arrangement is in their best interests: para. 150. Therefore, though not a determinative factor, the Court noted with approval that courts generally place "considerable weight" on the outcome of a vote, as results offer a "key indication" as to whether the affected parties consider the arrangement fair and reasonable. Courts in past cases have described voting results as a "litmus test" for fairness: see *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.*, 2005 ABQB 789 (Alta. Q.B.) at para. 32; *Canadian Pacific* at p. 132.

373 In similar circumstances, *Magna International Inc., Re* involved a proposal to collapse the dual share structure. It involved substantial cost to the existing Class A shareholders whose interests would be diluted. However, as described above, there were also substantial benefits to be achieved. In the court below and on appeal, the courts placed considerable emphasis on the favourable vote outcome as indicating that the shareholders believed the benefits outweighed the costs: *Magna International Inc., Re* at paras. 166-182 and 210; *Magna International Inc., Re* at paras. 55-66. In that case, unlike here, the shareholders did not have the benefit of recommendations from a special committee or a fairness opinion.

374 Accordingly, while the approval of the arrangement by a large majority suggests that the arrangement is fair and reasonable, no majority approval, or approval by only a slim majority, suggests that it is not.

375 Courts also give considerable weight to the conclusions of a special committee. As the Court stated in *BCE Inc., Re*, it is a factor in the analysis if the special committee members are independent and reputable:

> [152] Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific*; *Trizec*. The court may also consider the repute of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies [Citations omitted].

See also *Plutonic Power Corp., Re* at para. 57; *Gazit* at paras. 10-11.

376 In this case, the repute and independence of the Special Committee members has not been challenged.

377 Finally, the court will also consider any fairness opinion or other independent opinions relating to the arrangement: *Plutonic Power Corp., Re* at paras. 57 and 59.

378 As I stated earlier in these reasons, fairness is an amorphous concept and may be hard to discern in the context of two significant parties advocating widely divergent positions on a topic. However, the court has broad discretionary powers in determining if an arrangement is "fair and reasonable", as that expression is defined in *BCE Inc., Re*.

379 I have already addressed the allegations concerning the fact that the officers and directors holding Non-Voting Shares stand to benefit. I see no substantive unfairness arising from this circumstance that would dictate not approving the Arrangement, either alone or in conjunction with other factors.

380 In relation to the substantive fairness of the New Proposal, Mason's primary complaint about it is the exchange ratio is too low and does not properly compensate Common Shareholders for the value of their voting rights. Mason divides its submissions on this point into five separate but closely related arguments:

> (i) Diluting the voting power of the Common Shares, without any direct economic compensation or corresponding benefit, disproportionately impacts the class of Common Shares and is unfair and unreasonable.
>
> (ii) The Special Committee's review process was flawed.

(iii) The Second Fairness Opinion was flawed and failed to demonstrate that a one-to-one exchange ratio was most appropriate.

(iv) The Second ISS Report was flawed because it did not consider whether the proposal represents a fair and reasonable balancing of interests and wrongfully treated the rollback of foreign ownership restrictions as inevitable.

(v) In the Second Glass Lewis Report, Glass Lewis did not deny or dismiss the validity of Mason's concerns about the unfairness of the conversion ratio, and therefore erred when it concluded the collapse is good for all shareholders without having addressed the unfairness to the Common Shareholders.

381 TELUS' competing view is that the New Proposal was crafted from a thorough and careful process and is fair and reasonable in its terms and effects, which effects include increased liquidity and marketability of TELUS shares and consistency with corporate governance best practice. In its view, there is no evidence that the New Proposal confers a windfall on the holders of Non-Voting Shares:

(i) Shareholders were aware that Non-Voting Shares could be converted on a one-for-one basis upon certain triggering events.

(ii) Since TELUS' two classes of shares have identical economic rights, an exchange on any of Mason's proposed ratios would dilute the economic rights of the holders of Non-Voting Shares.

(iii) The Common Shares are widely held, and thus the New Proposal will not cause a change of control which would warrant payment of a premium.

(iv) Mason had no reasonable expectation of an ongoing premium, as it bought its shares after the Initial Proposal was announced.

382 Ultimately, the Special Committee and the Board both determined that the New Proposal was in the best interests of TELUS and was reasonable and fair in the circumstances; the voting results clearly demonstrate that a good majority of TELUS shareholders, including the Common Shareholders other than Mason, believe the same. In support of its position, TELUS relies on the conclusions of the Special Committee, Scotia's Second Fairness Opinion, the Second ISS Report and the Second Glass Lewis Report. Mason takes issue with all of these separate opinions and relies on the analysis in the Blackstone Report. The analysis and findings of each are set out below.

The Special Committee's Process and Conclusions

383 The information circular for the Initial Proposal states that the Special Committee considered, among other things, the following factors in assessing the fairness of that proposal: (i) a collapse of the structure would align voting rights with the economic interests of each class; (ii) the First Fairness Opinion from Scotia, which confirmed that a "one-for-one conversion ratio is fair, from a financial point of view, to the holders of Non-Voting Shares *and to the holders of Common Shares*" (emphasis added); (iii) the New Proposal would enhance liquidity for the Common Shares; and (iv) the EPS, dividend yields and trading liquidity would be unaffected.

384 The Special Committee concluded that "based on its overall consideration of procedural and substantive factors relating to the Proposal, that the Arrangement is in the best interests of TELUS and is reasonable and fair in the circumstances". The information circular accurately described what considerations were given to the appropriate exchange ratio issue:

> The Company therefore determined that a collapse of the dual class share structure warranted careful consideration. ... The Board in turn determined on January 25, 2012 that a Special Committee should be established to carefully consider the implications of the Proposal, whether to proceed with the Proposal and, if so, <u>the most appropriate way to implement the Proposal.</u>
>
> . . .
>
> On February 1, 2012, the Special Committee held its initial meeting. TELUS' management presented an overview of options to be considered in deciding how best to collapse the dual class share structure.
>
> . . .
>
> <u>The Special Committee was also afforded an opportunity to discuss and review with management information relating to the creation, attributes and historical trading price and volumes of the Common Shares and Non-Voting Shares. Issues related to the share conversion ratio and the impact of that ratio on share price, dividend yield, the number of outstanding Shares, forecasted EPS and dividend payout, as well as related implications for Common Shareholders and Non-Voting Shareholders were also reviewed and discussed.</u>
>
> . . .

> On February 8, 2012, the Special Committee received a presentation from Scotia Capital setting out their preliminary observations on matters to be considered in determining an appropriate conversion ratio.
>
> . . .
>
> On February 15, 2012, the Special Committee received an updated presentation from Scotia Capital on matters to be considered in determining an appropriate conversion ratio, along with a presentation from management on certain legal, accounting and taxation issues.
>
> <u>During the updated presentation, Scotia Capital reviewed a range of different possible conversion ratios and provided their perspective on the implications of these options for such matters as share price, EPS, dividend yield and share dilution. Scotia Capital observed that it was their view that a one-for-one conversion ratio was the appropriate conversion ratio.</u>
>
> <u>The members of the Special Committee held extensive discussions with Scotia Capital concerning the implications of different possible conversion ratios.</u> Members of the Special Committee then determined that they saw considerable merit to a one-for-one conversion ratio.
>
> [Emphasis added.]

385 Mason asserts that the Special Committee fell into error when it failed to consider other exchange ratios. Further, Mason submits it is clear that the Special Committee incorrectly inquired whether the Initial Proposal was good for TELUS and fair and reasonable rather than properly asking whether the conversion ratio represented a reasonable compromise and a fair balancing of the competing interests of the two classes. Put another way, Mason says that TELUS was obliged to consider and fairly balance the competing interests of these stakeholders, not just ask what is in the best interests of the company.

386 I see little merit in Mason's criticisms of the Special Committee. While the word "balance" may not have been used in describing the considerations of the Committee, it is manifestly clear that a major issue was what the conversion or exchange ratio should be. Having reviewed the TELUS materials, in particular those relating to the Special Committee, I agree with TELUS that it has been unquestionably demonstrated that the Special Committee gave careful consideration to other exchange ratios. Furthermore, I accept that that the Special Committee considered the conversion ratio in the context of fairness to holders of Common Shares as a separate class, in addition to whether the one-for-one conversion ratio was fair to the Non-Voting Shareholders or TELUS.

Scotia's Second Fairness Opinion

387 In preparing both of its fairness opinions, Scotia held discussions with TELUS' management, the Special Committee and its legal counsel; it reviewed the Articles and various materials; and it reviewed and considered publicly available information regarding the stock trading history of TELUS' shares and the historical trading price of both classes, recent dual class share collapse transactions, and various empirical studies and research publications which compared those public companies which have dual class share structures to those which had a single class structure.

388 In assessing the fairness of the proposed exchange ratio from a financial point of view, in its Second Fairness Opinion, Scotia stated that it considered, among other things, "the context under which the Non-Voting Shares were created, the legal attributes of each class of Shares, and *the net benefits that accrue to each class of Shares as a result of the [New Proposal]*" (emphasis added).

389 Scotia also reviewed 22 dual share collapse transactions in Canada. It found that: (i) unlike here, in all 22 instances, the reorganization resulted in the company transferring the balance of control from an individual or tightly held group to the market; (ii) in 16 of the 22 instances, a one-for-one exchange ratio was used and since 2000, 15 of the 17 transactions used a one-for-one exchange ratio; and (iii) in 14 of the 17 cases where the company had coattail provisions, a one-for-one exchange ratio was used and since 2000, in all 13 cases where the company had coattail provisions, a one-for-one exchange ratio was used.

390 As already stated, Scotia concluded that a one-to-one exchange ratio was fair, from a financial point of view, "to the holders of the Non-Voting Shares and to the holders of the Common Shares, respectively".

391 Mason advances considerable criticism at Scotia's reports, asserting that the benefits would equally arise on a collapse at another exchange ratio. It also argues that Scotia's opinion is fatally flawed because it based its opinion primarily on irrelevant transactions, came to the wrong conclusion with respect to the remaining relevant transactions, wrongly distinguished TELUS from its precedent list by claiming that TELUS does not have a control group owning the superior voting shares, and ignored or failed to include several additional relevant transactions.

392 Mason further says that Scotia failed to comprehend or was willfully blind to the importance of the historical trading premium. Lastly, it argues that the Second Fairness Opinion was restricted to considering the fairness of the one-to-one exchange ratio, and did not address the relative merits of the other available exchange ratios. In Mason's view, any

reference to the historical trading premium or alternative exchange ratios was merely 'lip service'.

393 Nevertheless, TELUS disagrees. Citing considerable evidence that Scotia reviewed publicly available information regarding the stock trading history of TELUS' shares and "historical trading values" of both classes, TELUS argues that the record clearly establishes that Scotia considered the historical trading premium. TELUS also points out that the Special Committee specifically considered and discussed the historical trading price with Scotia as a factor in setting the ratio.

394 I am unable to see any merit in Mason's criticism of Scotia's Fairness Opinions. Again, the reports themselves and the description of the process by which Scotia came to its conclusions clearly demonstrate that all relevant matters were considered, including the appropriateness of the one-for-one exchange ratio in relation to other exchange ratios. Fairness of the Arrangement to the Common Shareholders was a specific consideration. While it may be a matter of argument whether the other dual share collapse transactions were identified and analysed properly by Scotia, in my view, this does not detract from the overall considerations of Scotia and its conclusions on both the exchange ratio issue and the overall fairness of the Arrangement.

395 It is of significance that Mason has not put any contrary opinion evidence before the court that disputes the opinion of Scotia.

The Blackstone Report

396 The Blackstone Report is not an opinion and contains a disclaimer at the beginning of it, which makes it readily apparent that reliance on it must be viewed with skepticism. It states in part:

> Neither this analysis nor any of the results of Blackstone's services shall constitute an opinion, valuation, or recommendation with respect to any proposed or potential conversion transaction or conversion ratio, and neither may be relied upon as an opinion, valuation, or recommendation by Mason or any third party.
>
> . . .
>
> ... [This report] is intended for preliminary discussion purposes only and it is not intended that it be relied upon to make any investment decision or as to how to vote on any matter. It does not constitute investment advice or a recommendation as to how to vote on any matter.

397 Blackstone then discloses that it acted as financial advisor to Mason with respect to its investment in TELUS and received payment for its services (in June it was reported that Blackstone was hired by Mason to dispose of its interest in TELUS). Blackstone further discloses that it "may receive an additional fee from Mason contingent upon the outcome of the TELUS share conversion". As such, any views of Blackstone can hardly be described as independent, such as those of ISS and Glass Lewis.

398 As for the substance of its analysis, the Blackstone Report is restricted to assessing only what constitutes a fair and reasonable exchange ratio in this case. In conducting its analysis, Blackstone reviewed 25 conversion transactions.

399 In the Second Mason Dissident Circular, Mason set out what it considered the key findings of the Blackstone Report, which may be summarized as follows:

(i) The average premium paid to the high vote shareholder as a percentage of total market capitalization equaled 0.82% in the precedents, which would imply a conversion ratio of 1.0774 for Common Shares.

(ii) The precedent analysis revealed the following: (a) although 18 of the 25 precedents had a one-to-one exchange ratio, in 12 of those 18 precedents, the one-to-one conversion ratio implied a premium to the owners of the high vote shares because the trading price of the high vote shares was less than that of the low vote shares prior to the announcement; (b) one-to-one conversion ratios are most common where high vote shares trade at a discount; and (c) conversion ratios greater than one-to-one generally occur where high vote shares trade at a premium to low vote shares.

(iii) In the seven precedents where the high vote share class received an exchange ratio greater than one-to-one, the premium was measured by the additional shares paid to the high vote shares class relative to the low vote share class as a percentage of market capitalization. The high vote share class was paid an average premium of 3.26%, which would imply a second conversion ratio of 1.0607 for Common Shares.

400 Blackstone also analysed the implied economic impact of a one-for-one conversion on the Common Shares. Assuming the pre-announcement and post-conversion market capitalisation are the same, Blackstone found that the New Proposal implied a loss of $1.05 or 1.87% in the value of each voting share. This represents a discount worse than any Canadian precedent reviewed by Blackstone.

401 Mason says that the Blackstone Report clearly establishes that, in order to be fair and reasonable, the New Proposal must provide an exchange ratio higher than one-to-one.

402 I agree with TELUS that the Blackstone Report is neither a comprehensive valuation study nor an objective opinion which can be relied on in these proceedings. Rather, it is an analysis intended for preliminary discussion purposes only, and was drafted by a non-neutral third party who stands to receive a 'success fee' if Mason defeats the New Proposal.

403 I place little weight on the conclusions of the Blackstone Report for the foregoing reasons. In addition, while it may have included a more fulsome analysis of these other comparative transactions than did Scotia in terms of the exchange ratio issue, it did not extend its analysis to the balancing and weighing of overall benefits to both shareholder classes, as did Scotia, ISS and Glass Lewis.

The Second ISS Report

404 As stated above, ISS provided two reports providing substantially similar analyses on the Initial Proposal and the New Proposal. ISS recommended both proposals. The discussion here, however, is restricted to the Second ISS Report.

405 ISS openly acknowledged that Mason's position has merit. In its view, the one-to-one exchange ratio is "meaningfully different" from the historical trading premium, and thus an exchange at that rate "effectively transfers a premium from the voting to the non-voting shares". ISS also disagreed with TELUS that it was relevant that Scotia could not explain why the Non-Voting Shares traded at a discount, stating that "[a]n exchange ratio which forces the voting shares to suffer voting dilution, then cede a market premium to the other share class as well, flies in the face of the principle that voting rights themselves have value". It believed that the impact on the Common Shares was therefore "cause for concern", and cautioned TELUS shareholders to scrutinize the New Proposal.

406 Despite the potential unfairness to the Common Shareholders, however, ISS recommended all shareholders vote in favour of the New Proposal because, in its view, the Board's process in implementing it appeared to be fair and the one-to-one ratio was "logically justified" in all the circumstances. In concluding that shareholders should vote for the New Proposal, it appears that ISS was most influenced by the fact that the Articles provide for a one-for-one conversion ratio on certain triggering events.

407 ISS agreed with TELUS that it is reasonable for shareholders to believe that the federal government will further liberalize foreign ownership restrictions, triggering a conversion. Having made this determination, ISS appears to have concluded that the one-for-one ratio was appropriate as being inevitable. It reasoned that if either of the triggering events seemed even marginally possible, which ISS found to be the case, Non-Voting Shareholders would have little incentive to approve a dual class share collapse at any ratio other than one-for-one or lower. At the same time, however, Common Shareholders would never agree

to a ratio below one-for-one because they can similarly wait for a triggering event and an exchange ratio of one-for-one. This led ISS to conclude in its analysis that, in effect, the result invariably would be a deadlock, and therefore the one-to-one ratio is an "inevitable" outcome at any point in the future. As a result, in ISS's view, shareholders should not ask whether the exchange ratio is fair; instead, they should ask whether there are any other potential benefits that justify voting for the New Proposal *at this time*, as opposed to voting for another proposal with the same exchange ratio at a later date.

408 ISS then turned to the other potential benefits of the Arrangement. It focused on the enduring positive impact of the New Proposal on the price of both classes of shares. It agreed with TELUS that the price increase of both classes resulted from TELUS announcing the Initial Proposal, pointing out that the dividend increase was part of a long-standing, well-communicated policy of regular semi-annual dividend increases which would surprise no longer-term investor. It also noted that Mason had provided no evidence to demonstrate that share prices rose for some other reason.

409 On this application, Mason presented no evidence upon which one could conclude that other factors had contributed to the price increases since the February 21 announcement. I accept the evidence of TELUS and ISS that the announcement of the New Proposal has resulted in an increase in the overall share prices.

410 Given the price increases which resulted from expectations that a proposal would be approved, ISS concluded that voting down the New Proposal would eliminate such expectations and cause the price of *both* share classes to fall, resulting in the loss of "some or all of that incremental market value". Such a price decrease would generate significant losses for all shareholders.

411 Furthermore, ISS noted that the New Proposal would align voting rights with the economic interests of each class; increase trading liquidity of a single, larger class of Common shares; offer TELUS shareholders additional market opportunity from a dual listing on the NYSE; and eliminate any lingering investor uncertainty associated with a more complicated capital structure. It considered these all positive developments.

412 Finally, ISS disagreed with Mason's argument that a collapse of the share structure would cause the level of foreign ownership to exceed that which is legislatively permitted, compelling TELUS to force non-Canadians to sell shares. ISS saw little reason to believe that this would occur. In fact, it concluded that "there is still ample room to nearly double the historical foreign ownership levels".

413 I conclude that it has been clearly demonstrated that ISS did, in a fulsome analysis, consider that the one-for-one exchange was appropriate and that it did so while fully considering the rights of the Common Shareholders specifically in relation to the appropriate

exchange ratio. It concluded generally that the benefits to all shareholders outweighed any negative aspects arising from the lack of a premium on the exchange.

414 No competing third party analysis or opinion was advanced by Mason.

The Second Glass Lewis Report

415 As with ISS, Glass Lewis issued two reports: one for the Initial Proposal and one for the New Proposal. In both, it also recommended that all shareholders vote for the arrangement. Again, however, the discussion here is restricted to the Second Glass Lewis Report.

416 Although Glass Lewis expressed disapproval with Scotia's Fairness Opinions and was far more impressed with the "considerably more robust" analysis contained in the Blackstone Report, and though it stated, in part, that it was inclined to view certain of Mason's concerns as "reasonably valid", it concluded that the Blackstone Report did not provide compelling enough evidence to support the conclusion that the New Proposal should be rejected. In this respect, it concluded:

> Taken together, we believe the foregoing issues fall short of providing robust footing for Mason's allegations of watershed value destruction and an unmitigated failure to protect the perceived value of the Company's voting shares. To the contrary, we consider Blackstone's analysis highlights the exceptionally contextual nature of fixing the terms of a unification transaction, and, perhaps more importantly, fails to make a compelling case that the Conversion deviates excessively from common and recent market transactions.

417 Furthermore, Glass Lewis believed that a well-informed investor would know that the Articles provide for a conversion on a one-for-one basis in certain situations and would consider such information when investing in either class of shares.

418 In addition, although Glass Lewis agreed with Mason that the voting rights have carried a value, it believed that "the long-term benefits of a simplified share structure, combined with the overwhelming support for the Initial Proposal from shareholders other than Mason, outweigh any short-term gains that may result from a conversion ratio of greater than one-for-one".

419 Finally, Glass Lewis recognized that the New Proposal dilutes votes, but observed that this was not "particularly contentious" because TELUS shares are publicly traded and widely held, and any such concern, again, would be outweighed by the overall long-term benefits of the New Proposal. Moreover, it noted that although the New Proposal may cause the forced sale of shares so that TELUS can remain compliant with foreign ownership restrictions, the amount of shares that would need to be sold would be minimal in the grand scheme and the

negative short-term consequences would be heavily outweighed by the long-term benefits of the New Proposal.

420 Based on all of these considerations, Glass Lewis concluded:

> We believe that the interests of long-term shareholders with significant economic investments in the Company should ultimately dictate the direction of the Company, rather than the influence of a singular short-term investor.
>
> . . .
>
> We believe the overwhelming support from shareholders, excluding Mason, accurately depicts the value that is expected to be unlocked for long-term shareholders following the adoption of a single class share structure. ...
>
> The long-term enhanced access to capital, increased attractiveness for new investors and potential increase in liquidity resulting from the simplified share structure and possible NYSE listing outweigh the upside of a theoretical higher exchange ratio in light of the highly unique nature of the Company's articles, share structure and shareholder base.

421 Upon reviewing particular excerpts from the Second Glass Lewis Report, Mason says that rather than supporting a conclusion of fair and reasonable treatment to each of the classes, the report highlights TELUS' failure to effect any compromise or seek any fair balance between them.

422 I reject Mason's arguments. The Second Glass Lewis Report is, like that of ISS, a manifestly complete analysis of all issues relating to the Arrangement, including the specific issues with respect to Mason. Glass Lewis' clear conclusion was that, considering the Arrangement as a whole, any detrimental effects on the Common Shareholders were outweighed by the general benefits to all shareholders.

Conclusions Regarding Substantive Fairness

423 The premise of Mason's argument is the Common Shares will be diluted. In addition, Mason says that a one-for-one exchange ratio will result in a "windfall" to the Non-Voting Shareholders and a corresponding "confiscation" of the historical premium from the Common Shareholders.

424 Regarding dilution, I accept that this will be a consequence of the Arrangement. However, that matter was addressed in the deliberations of the Board, the Special Committee, Scotia, ISS and Glass Lewis. Given that the Common Shares are widely held, while this is a concern, it is not particularly significant.

425 In any event, as discussed above, the Common Shareholders could have no reasonable expectation that further Common Shares would not be issued, resulting in a dilution of their position. This was the same situation addressed by the Court in *BCE Inc., Re* in relation to the debentureholders who argued that the transaction should be structured to preserve the high market value of their debentures: paras. 105-106. What is truly argued in this respect is that the Common Shareholders' *economic interests* are being negatively affected in that the premium they have paid for their shares will be disregarded. The Court in *BCE Inc., Re* expressly rejects that such economic interests are a consideration on this application: see paras. 132-135. Only *legal interests* are to be considered.

426 Mason's "windfall/confiscation" argument is equally suspect. As I have already stated, the Non-Voting Shareholders already enjoy the same economic benefits as do the Common Shareholders. That they will now enjoy voting rights is an added benefit to them, but again not a significant one, particularly in light of the overall benefits that all shareholders will receive. Consistent with the analysis of ISS, Professor Hu addresses this argument nicely:

> ... Gilson and Black base their position on the foundational assumption that Telus's shareholder wealth consists of a "fixed" pie, with the impact of the plan constituting a "zero-sum" game between Voting Shareholders and Non-Voting Shareholders — the movement of any voting rights from the Voting Shareholders to the Non-Voting shareholders is detrimental to the former and correspondingly beneficial to the latter.
>
> . . .
>
> The plan is not a simple, "zero-sum" game that "donates" or "gifts" voting rights from one class of shareholder to another without compensation. Instead, under this concept, the "pie" of overall shareholder wealth grows.

427 The arrangement provisions in the *Act* clearly contemplate that changes may have an "adverse impact on the rights of particular individuals or groups": *BCE Inc., Re* at para. 129. The "proportionality of the compromise" must be considered: *BCE Inc., Re* at para. 152.

428 In *Canadian Pacific Ltd., Re*, the court was considering arguments against a plan on the basis that the conversion rate was not high enough. Justice Blair dismissed these arguments, holding that the plan of arrangement must be considered in light of the company and the shareholders as a whole, even if different classes of shareholders were to be treated differently: see p. 125-126. At p. 126, he concluded:

> In the end, the court must be satisfied that the proposed plan of arrangement is fair and reasonable, having regard to *the interests of the Company and the shareholders taken as a whole*. To the extent that differences may exist in the manner in which different classes

of shareholders are treated, those differences must be examined against that primary benchmark, in the context of the proposed plan looked at in its entirety.

[Original emphasis.]

429 I have already discussed at length the positive gains that are expected to be achieved by way of the Arrangement for the benefit of not only TELUS but also the Common Shareholders and Non-Voting Shareholders. Again, Mason does not dispute that these benefits are desirable. Nevertheless, it is as against these undeniable benefits to TELUS and all shareholders that the negative effects of the Arrangement must be weighed: *BCE Inc., Re* at para. 148.

430 I am satisfied that there has been a thorough consideration of the balancing of the interests of the Common Shareholders in relation to the dilution of their voting power and lack of payment of a premium, to the extent that those are relevant factors. These factors have been weighed as against the interests of the Non-Voting Shareholders and the benefits to be achieved by all shareholders. This involved a very extensive consideration of the appropriate exchange ratio. This is evident from the process conducted by TELUS through management, the Board, the Special Committee, Scotia's Fairness Opinions and the independent analyses of ISS and Glass Lewis.

431 In particular, ISS has provided a comprehensive and compelling analysis of the Arrangement. It fairly identified the negative effects the Arrangement will have on the Common Shareholders, but balanced those as against the benefits to be achieved by all TELUS shareholders. Put simply, ISS says that there is no circumstance under which the Non-Voting Shareholders would agree to pay a premium (or alternatively, take a discount) to exchange their shares for Common Shares when the voting rights that they would obtain mean little given that the shares are widely held.

432 The market clearly has identified a benefit with respect to the voting rights of the Common Shares given the historical premium that had been paid. Why that is so is not particularly evident; both shares have the same economic benefits and the Common Shares are also widely held. In any event, ISS concludes that if an exchange at a ratio favourable to Common Shareholders would inevitably be refused by the Non-Voting Shareholders given a loss of their economic interest for little reward, then the only other option is to see whether other benefits arise to either the Non-Voting Shareholders or the Common Shareholders. Effectively, there will be either an exchange of shares on this basis or none at all. As such, any dilution of the voting rights of (or lack of any premium to be paid to) the Common Shareholders must be balanced against a "win-win" result arising from the exchange of shares on a one-for-one basis. That "win-win" result has already been demonstrated to some degree by the increase in both share prices.

433 Further, the positive vote by all shareholders must be considered. It is a strong indication that the shareholders, including the Common Shareholders, consider that the benefits outweigh any negative aspects. I have already indicated that 84.4% of the Common Shareholders (excluding Mason) support the arrangement. Mason's vote is, of course, to be considered. Nevertheless, as discussed above, it is a relevant consideration that its vote has been cast for the purposes of implementing a market play that has nothing to do with the interests of TELUS or all its shareholders collectively. In other words, these other benefits that have been clearly identified by all parties, including Mason, are completely ignored by Mason.

434 What does fairness dictate in these circumstances? Mason's arguments would have the court focus solely on the conversion issue, which of course plays to Mason's arbitrage strategy. In a perfect world, and in a perfect arrangement, there would be some consideration for the loss of the historic premium paid by Common Shareholders. In my view, however, Mason's arguments display a lack of regard for the overall circumstances relating to TELUS and its shareholders, which are to be considered by this Court in the context of this fairness hearing. As I have earlier stated, Mason can hardly be considered a spokesman for the Common Shareholders when its strategy will result in a loss of value to the other Common Shareholders.

435 The Arrangement has arisen through a robust process that has been independently and favourably reviewed. The benefits to be achieved by the Arrangement are real and substantial. From a shareholder point of view, the benefits have already been realized through the increase in the share prices for both classes. As identified by both ISS and Glass Lewis, and as argued by TELUS, the benefits to TELUS are not just benefits that would be "nice to have", but are benefits that will materially affect TELUS' ability to compete with other entities in the marketplace. To that extent, they are "necessary" to allow TELUS to maintain and, hopefully, enhance its market position which will redound to the benefit of all shareholders.

436 All evidence on this application points to the conclusion that the Arrangement which has been proposed to the Non-Voting Shareholders is fair and reasonable. TELUS has additionally proposed, quite reasonably, that the interests of the Common Shareholders should also be considered. I agree that the level of support required by the Common Shareholder vote (i.e. a simple majority) was reasonably set. While the legal rights of the Common Shareholders are not affected, arguably their economic interests are. Nevertheless and importantly, the shareholders, including the Common Shareholders who have a real economic interest in TELUS, overwhelmingly support the Arrangement.

437 Finally, Mason's opposition must be viewed through the lens of its unique strategy, which has nothing to do with the well-being of TELUS and its shareholders. I do not make this comment in the sense of disregarding Mason's vote, but in the sense of *understanding* its vote. Mason stands alone and its submissions are clearly directed at the benefits it alone will achieve by defeating the Arrangement.

438 I conclude that the terms of the Arrangement are fair and reasonable.

V. Conclusions and Orders

439 The appeals from Master Muir's orders are dismissed. The New Proposal or Arrangement is approved in accordance with the Petition.

440 At the conclusion of the hearing, submissions were made by counsel concerning any appeal proceedings that might be taken upon release of these reasons. As consented to by the parties, I am ordering a stay of the order approving the Arrangement and any efforts of TELUS to implement the Arrangement, as approved, for a period of five business days. That will allow Mason time to commence any appeal proceedings, if it wishes, and to seek any further stay as it sees fit.

Appeal dismissed and application granted.

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TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: Marine Drive Properties Ltd., Re | 2009 BCSC 145, 2009 CarswellBC 285, [2009] B.C.W.L.D. 2022, [2009] B.C.W.L.D. 2023, [2009] B.C.J. No. 207, 175 A.C.W.S. (3d) 323, 52 C.B.R. (5th) 47 | (B.C. S.C., Feb 10, 2009)

2003 BCCA 344
British Columbia Court of Appeal

Skeena Cellulose Inc., Re

2003 CarswellBC 1399, 2003 BCCA 344, [2003] B.C.W.L.D. 467, [2003] B.C.J. No. 1335, 123 A.C.W.S. (3d) 73, 13 B.C.L.R. (4th) 236, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187

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

Skeena Cellulose Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and 9753 Acquisition Corp. (Respondents / Petitioners) and Clear Creek Contracting Ltd. and Jasak Logging Ltd. (Appellants / Applicants) and The Truck Loggers' Association (Intervenor)

Newbury, Hall, Levine JJ.A.

Heard: April 28-29, 2003
Judgment: June 9, 2003
Docket: Vancouver CA030149

Proceedings: affirming (2002), 5 B.C.L.R. (4th) 193 (B.C.S.C.)

Counsel: *J.S. Forstrom*, for Appellants
M.I. Buttery, S.A. Dubo, for Respondents
M. Maclean, J.I. McLean, for Intervenor, Truck Loggers' Association

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency; Natural Resources; Property

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Respondent logging company held long term timber harvesting contracts with five contractors, including applicants — Contracts were required to be renewed indefinitely under

Timber Harvesting Contract and Subcontract Regulation — Logging company entered into arrangement under Companies' Creditors Arrangement Act — Logging company obtained come-back order allowing it to terminate contracts pursuant to report from monitor being filed 21 days before implementation — Logging company sent letter terminating applicants' contracts — Contracts were terminated before relevant monitor's report was filed — Creditors' meeting took place within 21 days of report being issued — Application for declaration that cancellation of contracts was invalid was dismissed — Trial judge found that elimination of contracts was consolidation and downsizing, which was permitted under order — Trial judge found that no prejudice occurred by not giving proper notice of cancellation of contracts — Trial judge found that applicants were creditors with claim for specific performance — Applicants appealed — Appeal dismissed — Trial judge correctly found that granting application would allow inappropriate differentiation in treatment between applicants and other creditors — Act gave court authority to allow logging company to break contracts, despite renewal requirements in Regulations — Regulations did not create statutory requirements to which contracts were subject, but dictated specific terms of contracts — Plan was fair, equitable and reasonable considering broad range of interests at stake — Lack of notice did not affect outcome of creditors' meeting — Logging company did not act in bad faith.

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Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — considered

Blue Range Resource Corp., Re, 1999 CarswellAlta 597, 245 A.R. 154 (Alta. Q.B.) — considered

Cam-Net Communications v. Vancouver Telephone Co., 182 D.L.R. (4th) 436, 1999 BCCA 751, 1999 CarswellBC 2808, 71 B.C.L.R. (3d) 226, 132 B.C.A.C. 52, 215 W.A.C. 52, 2 B.L.R. (3d) 118, 17 C.B.R. (4th) 26 (B.C. C.A.) — considered

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Keddy Motor Inns Ltd., Re (No. 4)) 299 A.P.R. 246, 1992 CarswellNS 46 (N.S. C.A.) — considered

Mine Jeffrey inc., Re, 2003 CarswellQue 90, 35 C.C.P.B. 71, 40 C.B.R. (4th) 95 (Que. C.A.) — considered

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

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s. 11(2) — considered

s. 11(3) — considered

s. 11(4) — considered

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Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally

Pt. 2

Pt. 5

Div. 5

s. 1(1) "AAC reduction criteria"

s. 13

ss. 13-15

s. 24

s. 28(2)(d)

s. 32(g)

s. 32(h)

APPEAL by logging contractors from judgment reported at 2002 BCSC 1280, 2002 CarswellBC 2032, 5 B.C.L.R. (4th) 193 (B.C. S.C.), dismissing contractors' application for declaration that cancellation of contracts pursuant to *Companies' Creditors Arrangement Act* was invalid.

***Newbury J.A.*:**

1 This appeal turns on the interaction of two statutory regimes — the scheme of "replaceable" or "evergreen" logging contracts established by the Province under the *Forest Act*, R.S.B.C. 1996, c. 157, and the scheme of judicial stays and creditors' compromises available under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "CCAA"), to insolvent corporations whose indebtedness exceeds $5,000,000.

2 Both schemes are said to involve considerations of fairness and equity. In the case of the *Forest Act*, a detailed series of "contractual" terms is required to be incorporated in agreements between the holders of harvesting licences granted by the Crown, and the contractors they in turn retain to carry out the logging. Most aspects of the relationship are either provided for in the mandatory terms or must be resolved by arbitration, the principles and procedures of which are also regulated by the Act. Most importantly, a licence holder

must agree that when such an agreement expires, it will be renewed (or in the statutory terminology, "replaced") on terms substantially the same as those of the expired contract, assuming the contractor has performed its obligations thereunder. In this way, the legislation seeks to provide contractors with a degree of "security" analogous to the security of tenure implicit in a Crown harvesting licence, and to achieve greater fairness between the licence holder and its contractors.

3 In the case of the CCAA, the fairness analysis required to be carried out by the court generally refers to fairness as between classes of creditors. That analysis is tempered by the starker realities of whether the proposal before the court offers a chance of survival to the debtor corporation and whether it will be acceptable to the requisite majority of creditors. Unlike the detailed provisions of the *Forest Act* and regulations thereto, the CCAA is a brief set of "broad-brush" provisions that leave wide avenues of discretion to be exercised by courts in circumstances that may not permit the fine weighing of individual interests. As observed in *Keddy Motor Inns Ltd., Re* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), at 258, the legislation contemplates "rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat but on the best terms they can get."

4 The substantive question raised by this appeal is to what extent considerations of fairness between individual logging contractors who have replaceable contracts with a corporation in CCAA proceedings, should figure in the "rough-and-tumble" considerations applicable to a large corporate insolvency. Looked at another way, does the desirability of staving off a bankruptcy which could have disastrous consequences for many individuals, local governments and communities, supplant considerations of fairness between the holders of replaceable logging contracts to which the debtor corporation is a party?

FACTUAL BACKGROUND

5 The insolvent corporation in this case is Skeena Cellulose Inc. ("Skeena"). At all material times, it owned and operated a pulp mill and three sawmills, and held related forest tenures, mainly in north-western British Columbia. It was a large employer in that region and was one of the major manufacturers of bleached softwood kraft pulp in North America.

6 Skeena has experienced financial difficulties for many years. It underwent a financial restructuring under the CCAA in 1997. Although many of the positive results hoped for from that arrangement improved Skeena's long-term prospects, it appears that various other factors prevented full recovery. In August 2001, the Toronto-Dominion Bank demanded payment of more than $350,000,000 from Skeena and its subsidiaries, froze their operating lines and began to refuse to honour their cheques, including payroll cheques. Other creditors

followed suit, and on September 5, 2001, Skeena and its subsidiaries petitioned the Supreme Court of British Columbia for a stay of proceedings under the CCAA.

7 The petition alleged, and it is not disputed, that Skeena owed over $409,000,000 (exclusive of interest) mainly to the Toronto-Dominion Bank and to corporations owned by the Province, which also held over 70 percent of its common shares. This debt was represented by bonds issued under a trust deed secured by charges on all of Skeena's assets, present and future. The petition stated that Skeena and its subsidiaries were insolvent and described the impact their bankruptcy could have on the provincial economy:

> 50. If the Petitioners were to totally cease operations or go into liquidation, the direct loss of jobs in British Columbia would be enormous, including the approximately 1,050 existing Skeena employees and, at least 1,000 employees of logging contractors, road building and silviculture contractors. It would also directly and indirectly impact service industries and business which rely on Skeena for a source of revenue. By the Petitioners' estimate, as many as 7,000 additional jobs in British Columbia would be affected.
>
> 51. A liquidation of the Petitioners would be particularly devastating to the communities of Terrace, South Hazelton, and Prince Rupert. Skeena is the largest employer in those communities, and many hundreds of families depend on Skeena for their livelihoods in those communities.
>
> 52. The loss of this number of jobs would also, of course, have a generally damaging effect on the British Columbia economy, given the spillover effect of lost wages and lost purchases.
>
> 53. Skeena is currently in good standing under its collective agreements and other employment relationships. However, if some or all of the employees would be terminated, severance claims, including payments for group termination under the Employment Standards Act, could be significant.

8 Chief Justice Brenner, who I understand heard most if not all the applications in this matter in Supreme Court, granted an initial order *ex parte* on September 5, 2001, staying proceedings against Skeena and its subsidiaries for 30 days and appointing Arthur Andersen Inc. as Monitor. On October 5, he granted a "Come-back Order" which extended the stay and contemplated that the petitioners would file a formal plan of compromise or arrangement (entitled the "Reorganization Plan") with their creditors on or before November 5; that they would file a formal plan of arrangement (entitled the "Plan of Arrangement") with their shareholders under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44; and that meetings of their creditors would be called to vote on the Reorganization Plan. Under the heading "Post-Filing Operations", the Order stated:

11. The Petitioners shall remain in possession of the Assets and shall continue to carry on business in the ordinary course provided that they shall have the right with the approval of the Monitor, or this Court, to proceed with an orderly disposition of such of the Assets as they deem appropriate, either with the consent of any creditor holding security against such Assets or pursuant to an Order of this Court, in order to facilitate the downsizing and consolidation of their business and operations (the "Downsizing").

12. To facilitate the Downsizing, the Petitioners may:

(a) terminate the employment of such of the Petitioners' employees or temporarily lay off such of the Petitioners' employees as they deem appropriate;

(b) terminate such of the Petitioners' supplier or service arrangements or agreements as they deem appropriate;

(c) abandon such leases, tenures, contracts, rights, authorizations, franchises, dealerships, permits, approvals, uses or consents as are deemed to be unnecessary for the Petitioners' business; . . .

all without interference of any kind from third parties, including landlords and notwithstanding the provisions of any lease, other instrument or law affecting or limiting the rights of the Petitioners to remove or divest Assets from leased premises, and that any liabilities of the Petitioners arising as a result thereof shall be claims provable in these proceedings in the same manner as all creditor claims existing as at the Filing Date and provided that:

(f) the Monitor shall have submitted to the Court a report of any proposed termination of any Forest Act Replacement Contract under the foregoing sub-paragraph (b) at least 21 days before such plan is implemented;

(g) the implementation of any of the plans and procedures contemplated by the foregoing sub-paragraphs (a)-(d) including any termination or partial termination of any contract, shall be without prejudice to the claims of any counter party to such contract to file a proof of claim in such manner as may be provided for in the Reorganization Plan;

(h) the Petitioners shall provide 3 days' written notice of any termination of any executory agreements under the foregoing sub-paragraphs (b) or (c); and

(i) the counter party or parties to any agreements proposed by the Petitioners to be terminated in accordance with the foregoing, including the counter party or parties to any Forest Act Replacement Contracts, may during the applicable 3 day notice

> period, in the case of executory contracts, or within 21 days of the filing of the Monitor's report, in the case of the Forest Act Replacement Contracts, apply to the Court in this proceeding to show cause why such agreement or agreements should not be terminated or for such directions as to the termination of such agreements as may be appropriate. [Emphasis added.]

9 The deadline for the filing of the Reorganization Plan was extended by the Court on several occasions while solutions to Skeena's difficulties were sought and potential purchasers were pursued. Finally, on February 28, 2002, a Plan was filed which proposed that an outside buyer, NWBC Timber & Pulp Ltd. ("NWBC"), would acquire the interests of the secured lenders for $8,000,000. Of this, $2,000,000 would be paid to the Monitor for distribution to the unsecured creditors, so that the secured creditors would receive $6,000,000 on debt in excess of $400,000,000. The claims of governmental bodies for property taxes would be compromised, and the holders of existing common shares would surrender them for no consideration. Skeena would then issue new common shares to NWBC. The Plan was of course subject to many conditions, including approval by the specified classes of creditors and shareholders and the passing of applicable appeal periods in respect of the Court's order. After some amendments, the Plan was approved by the Court on April 4, 2002. Once the conditions contained in the Order were met, NWBC completed its purchase of the shares and secured debt of Skeena in early May.

The Appellants' Logging Contracts

10 The appellants or their predecessors had been performing logging services under contract with Skeena or its predecessors since the 1960s. In 1991, their contracts became "replaceable logging contracts" under new provisions of the *Forest Act*. At the time Skeena's financial difficulties became manifest in 2001, the corporation had five such contracts. All five were due to expire on December 31, 2001, and Skeena was required to offer replacement contracts to the contractors thereunder no later than September 30 of that year.

11 Skeena did not offer replacement contracts to the appellants, but did renew those of its three other logging contractors. Mr. Veniez, the president and chief executive officer of NWBC and Skeena following the Reorganization, explained this decision by reference, at least in part, to the fact that whereas the *Forest Act* scheme requires a licence holder to cut at least 50 percent of its allowable annual cut ("AAC") through replaceable contracts, Skeena had entered into such contracts for approximately 65 percent of its AAC. Moreover, the change in control of Skeena contemplated by the Reorganization would result in a five percent reduction of its AAC, absent a ruling to the contrary by the Ministry of Forests. Mr. Veniez deposed in these proceedings that:

17. As part of its efforts to ensure the economic viability of Skeena, NWBC determined, in consultation with Skeena management at the time, that it would be desirable to reduce the amount of timber required to be harvested under replaceable contracts to the current statutory minimum of 50% of Skeena's AAC.

18. Because NWBC's acquisition of Skeena represents a change of control, I knew that Skeena's Terrace Woodlands' AAC would be reduced by 5% to approximately 878,000 m^3. Therefore, in consultation with Skeena management, I determined that it would be appropriate to reduce the volume of timber allocated to evergreen contractors to 439,000 m^3, representing a reduction of approximately 160,000 m^3.

19. I was advised by Skeena management that, until the terminations of Clear Creek and Jasak, Skeena's five evergreen contractors held the following volumes:

Contractors	**Volume**
Don Hull & Sons	166,239 m{3}
K'Shian Logging	166,239 m{3}
Main Logging	99,828 m{3}
Clear Creek	83,331 m{3}
Jasak	83,331 m{3}

20. In consultation with Skeena management and the Province, NWBC determined that it would be appropriate to terminate the Clear Creek and Jasak contracts, representing a reduction of "evergreen" volume of approximately 166,662 m^3.

21. I recognize that by terminating these two contracts, Skeena will be slightly below the 50% allowable minimum under the Contract Regulation, but it is Skeena's intention to re-tender the approximately 6,000 m^3 difference in the form of a new evergreen contract. The approximately 160,000 m^3 balance will be tendered on the open market (as opposed to have to negotiate rates with its existing evergreen contractors). I expect that this tendering process will result in substantial savings to Skeena and significantly reduce its delivered wood costs for this 160,000 m^3. (If the cost differential is $3.90/$m^3$, the savings could be as much as $624,000 per year).

22. Moreover, a tendering process for this volume of wood will help to establish more accurate fair market values for both evergreen and non-evergreen contracts (in this regard, I am advised by Mr. Curtis that historically it has been difficult to establish these values in light of the predominance of evergreen contracts).

> 23. In deciding to terminate certain of Skeena's evergreen contracts, I reasoned that this would better allow Skeena to reorganise the size (volume) and equipment configurations for its different contracts. (Skeena does have the right to insist that its current evergreen contractors log by whatever methods Skeena stipulates, but historically it has been more cost-efficient for Skeena to introduce new logging methods via an open tendering process than by introducing changes to existing replaceable contracts).
>
> 24. Finally, I was advised by Skeena management that Clear Creek and Jasak had, historically, been more expensive than the three other evergreen contractors listed above. That is, through a combination of the rates charged by those two contractors, and their relative efficiency, the cost to Skeena of logs produced by Clear Creek and Jasak was greater than for the other three evergreen contractors above.
>
> 25. With the foregoing considerations in mind, I, on behalf of NWBC, advised Skeena's management at the time that NWBC would require, as a condition of going forward with the acquisition of Skeena, that Skeena take steps within the context of the CCAA proceedings to terminate the Clear Creek and Jasak contracts.
>
> 26. By asking Skeena to terminate those contracts, NWBC was in no way motivated to frustrate the objectives of the *Forest Act*. On the contrary, for the reasons set out above, NWBC perceives these terminations to be an important aspect of what I hope and fully expect will be a successful reorganization of Skeena. [Emphasis added.]

12 On or about March 1, 2002, each of the appellants received a letter from Skeena purporting to terminate its replaceable contract, effective immediately. Neither the Court nor the appellants had received prior notification from Skeena or the Monitor — even though under the terms of the Come-back Order, the Monitor was required to submit to the Court "a report of any proposed termination of any Forest Act Replacement Contract . . . at least 21 days before such plan is implemented" and even though within 21 days of the filing of the Monitor's report, the parties to such contracts were to be entitled to apply to the Court to "show cause why such agreement or agreements should not be terminated or for such directions as to the termination of such agreements as may be appropriate." Two weeks later, in its Eleventh Report to the Court, the Monitor referred to the terminations as *faits accomplis*:

> We have been advised that the petitioner has terminated replaceable logging contracts with Jasak Logging Ltd. and Clear Creek Contracting Ltd. in accordance with the Order. Copies of the letters of termination to each of the contractors dated March 4, 2002 and March 1, 2002, respectively are attached.

> These replaceable logging contracts have been terminated in accordance with the terms of the Purchase Agreement between NWBC Timber & Pulp Ltd., 552513 British Columbia Ltd. and Skeena Cellulose Inc. dated February 20, 2002.

13 It is not clear to me what "plan" was being referred to in subpara. 12(f) of the Come-back Order quoted above, nor whether it was necessary to "terminate" contracts that had not been renewed. On appeal, however, Skeena acknowledged that the Monitor's report had been filed two weeks after the termination letters were issued and that the "creditors' meeting to vote on the Plan took place before the 21-day time period referred to in the Come-back Order had expired." Thus counsel did not take issue with the Chief Justice's conclusion that Skeena had not complied strictly with the Come-back Order.

14 Upon receiving the letters of termination, the appellants' solicitors wrote to the Monitor's solicitors objecting that that the Come-back Order had not been complied with. They explained:

> Our clients are in a position where they cannot file proofs of claim on March 25 as their contracts are not terminated yet and they do not know if the contracts will be terminated and, if there is a termination, what class of creditor they will be. Due to the failure to deal with this matter in a timely fashion, it appears that the parties have no choice but to postpone the deadline for filing claims to the middle of April with a vote of creditors to take place in early May.

The appellants asked the Monitor for information as to how the termination would result in lower costs to Skeena and requested a copy of the contract of purchase between Skeena and NWBC. The Monitor declined to provide a copy of this agreement on the basis that it was confidential. The agreement was never adduced into evidence.

15 In further correspondence, Skeena characterized its earlier letters to the appellants as having "served to clarify that the previously expired contract with Jasak and Clear Creek would not be reinstated." (My emphasis.) Again, however, since that characterization of the letters was not pursued by counsel in this court or the court below, I will proceed on the footing that the contracts were terminated, as opposed to not having been renewed. (In law, the distinction in this case may be insignificant.) The appellants were told that if they wished to vote on Skeena's Reorganization Plan, they would have to file proofs of claim by March 22. At the same time, Skeena told the appellants it was prepared to discuss future arrangements with them "for the continuation of their services to Skeena."

16 By March 22, the appellants did file conditional proofs of claim in the CCAA proceeding, claiming indebtedness in the amount of $2,925,315.14 in the case of Jasak Logging Ltd., and $2,896,680 in the case of Clear Creek Contracting Ltd. (Mr. Forstrom

advised us that these amounts represented the present value of the income stream which the appellants stood to earn under their contracts over the next 50 years or so. I understand that apart from these 'future' losses, nothing was owing by Skeena to the appellants under their expired contracts.) The Monitor disallowed a portion of each claim and instead allowed a claim of $172,430.47 to Jasak and $166,670 to Clear Creek. The appellants notified the Monitor that they disagreed with its position.

17 On March 28, Jasak and Clear Creek filed a motion in Supreme Court seeking an order restraining Skeena from terminating their contracts and declaring them "in full force and effect and are binding upon the parties thereto". Alternatively, they sought the summary determination of the value of their respective claims as creditors in Skeena's plan of arrangement. However, before the motion could be heard, the meeting of Skeena's creditors took place and the Reorganization Plan was approved by the requisite numbers of each class. The appellants did not attend or vote at the meeting. On April 4, 2002 Skeena applied for and obtained court approval of the Plan. As earlier mentioned, NWBC closed its purchase of the shares of Skeena in accordance with the Reorganization Plan in early May. We are told that it has not yet resumed its logging operations.

18 The appellants' motion to have the termination of their contracts declared invalid was heard in Chambers on June 17 and was dismissed by the Chief Justice on September 4, 2002. His reasons are now reported at (2002), 5 B.C.L.R. (4th) 193 (B.C. S.C.).

The Chief Justice's Reasons

19 After reciting the facts before him, the Chief Justice briefly summarized the purpose of the replaceable contract scheme and the nature of replaceable contracts. He noted that in Skeena's CCAA proceeding in 1997, Thackray J. (as he then was) had determined that the Court had the authority under the CCAA to allow Skeena to terminate replaceable logging contracts notwithstanding their unusual 'statutory' aspects. (See *Repap British Columbia Inc., Re* (June 11, 1997), Doc. Vancouver A970588 (B.C. S.C.).) Thackray J. had observed:

> I do not accept that allowing the petitioner to terminate renewable contracts is a striking down of the Provincial legislation. I mentioned several times to Mr. Ross that I could and do go so far as to find that there is legislat[ive] involvement in replaceable contracts under the *Forest Act*. However, I cannot accede to the position taken by Mr. Ross that these contracts attain some classification that makes them almost statutory contracts and thereby subject to some different rule of the law than general commercial contracts. There is no doubt that the parties are governed by the regulation and that the regulations forming part of the contract will govern many events by parties to the contracts. However the issue here is whether or not the contract is subject to the particular order that I gave under the *Companies' Creditors Arrangement Act*. I am of the opinion that

> it is subject to the order which I gave and that this Court had the jurisdiction to give that order. [para. 7]

20 The Chief Justice then turned to the questions of whether on this occasion, Skeena had complied with the "procedures and conditions" stipulated in the Come-back Order and whether the termination conformed to the "broader principles of economic necessity and fairness" underlying the Court's discretionary authority under the CCAA. In connection with the first question, he noted that the Come-back Order had authorized the termination of arrangements and agreements by Skeena only for the purpose of facilitating the "downsizing and consolidation of their business and operations (the 'Downsizing')". He noted the appellants' submission that although Skeena claimed to be "downsizing" its operations, it had maintained its timber harvesting rights and was planning to continue to harvest timber from them, presumably to the extent it always had in the past. On the other hand, there was the fact that the change in control of Skeena would result in a five percent reduction of Skeena's AAC, which Skeena proposed to reflect in a reduction in volume of timber allocated to "evergreen" contractors by approximately 160,000 cubic metres. The Chief Justice concluded that this reduction qualified as "Downsizing" for purposes of the Come-back Order. This conclusion was not specifically challenged on appeal.

21 In response to the appellants' objection that Skeena had terminated their contracts without first filing a report of the Monitor, the Chief Justice agreed that the letters of termination had been "issued untimely". He concluded, however, that since the appellants had had "clear and unequivocal notice", prior to the creditors' meeting, of Skeena's intention to terminate their contracts and to treat their claims as compromised under the Plan, they had not been prejudiced by the lack of strict compliance. (para. 41.)

22 The remaining question framed by the Chief Justice was whether Skeena's termination of two of its five replaceable logging contracts constituted an "inappropriate differentiation of treatment between the applicants and other [Skeena] creditors." (para. 42.) He noted that one of the unfortunate results of insolvency restructurings is that some persons suffer hardship. In this case, Skeena had had to terminate the employment of many individuals, its unsecured and secured creditors stood to recoup only a small fraction of their claims, and the Court had already dismissed an application brought by the Pulp, Paper and Research Institute of Canada similar to that brought by the appellants. The Court noted the comments of LoVecchio J. in *Blue Range Resource Corp., Re*, [1999] A.J. No. 788 (Alta Q.B.), to the effect that an order authorizing the termination of a contract is appropriate in a restructuring since, like others dealing with the insolvent corporation, the contracting party will have its claim for damages. But that claim should not be elevated above those of other contracting parties; as LoVecchio J. had stated:

> A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in section 16.e or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their set-off argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' rights to claim for damages.
>
> The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathise with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route. [paras. 37-8]

23 Similarly in this case, the Chief Justice concluded that the applicants before him were "seeking to be put in a position superior to [Skeena's] other creditors." (para. 50.) In the result, since Thackray J. had already ruled that replaceable contracts could be terminated as part of a CCAA reorganization, and the appellants had had "full knowledge prior to the creditors' meetings that they would have claims under the Plan if their contracts were to be terminated", the Chief Justice saw no reason why the appellants should "in effect, be placed in a better position than other creditors." (para. 53.)

ON APPEAL

24 On appeal, the appellants challenged both the Court's ruling on the question of notice and its substantive ruling that the Come-back Order validly permitted Skeena to terminate the appellants' "evergreen" contracts. Since Mr. Forstrom, counsel for the appellants, focussed on the second argument in his oral submissions in this court — and rightly so in my view — I will deal with it first. It is linked to the argument made by the intervenor, the Truck Loggers' Association, which challenges the court's constitutional and statutory jurisdiction to "permit" Skeena to terminate <u>any</u> replaceable logging contracts, contrary to what Mr. Maclean says is the intention of the *Forest Act*. Mr. Maclean submits that this legislation must prevail over what he characterized as the exercise of the court's "inherent jurisdiction" under the CCAA when the court approves an arrangement which includes the termination of a lease or other contract.

25 It may be useful at this point to review in greater depth the unusual scheme of replaceable contracts imposed by the *Forest Act*, and then to review the CCAA and the "inherent" or 'supervisory' jurisdiction exercised by the courts thereunder.

The Forest Act Scheme

26 The Province first introduced a regime of statutorily-mandated logging contracts in 1991. The initial legislation was revised somewhat in 1996 when the present Regulation 22/96 to the *Forest Act* was enacted. Speaking in the Legislative Assembly in June 1991, the then Minister of Forests stated that the purposes of the legislation were to "address logging-contractor security in British Columbia", to "improve the balance in . . . contractual relationships" between holders of timber rights and logging contractors, and to provide a quick and inexpensive system for resolving disputes between them. The Minister drew an analogy between the desire of long-term licence holders for security of tenure from the Crown, and the needs of logging contractors and subcontractors, who also make large capital investments in logging equipment, for similar security vis-à-vis the licence holders. Accordingly, the *Forest Amendment Act, 1991*, c. 11, permitted the imposition of a series of requirements on the holders of certain classes of timber licences with respect to logging contracts already in existence, and logging contracts entered into thereafter.

27 Most of the provisions relevant to this appeal are contained in Regulation 22/96. Part 2, headed "Written Contracts and Subcontracts Required", states that persons entering into a timber harvesting contract or subcontract must do so in writing. If the terms of a contract do not comply with the Regulation, the parties are required to make reasonable efforts to cause the contract to do so. Every "replaceable contract" (defined in s. 152 of the Act) must provide that the contractor's interest thereunder is assignable, subject to the consent of the licence holder, which consent may not be unreasonably withheld. As well, every contract must provide that all disputes between the parties in connection with the contract "will be referred to mediation and, if not resolved by the parties through mediation, will be referred to arbitration." (The Regulation leaves unsaid the apparent intention that neither party will have recourse to courts of law to resolve such disputes.) The *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, applies to such arbitrations, but there are also detailed rules in Regulation 22/96 for the mediation and arbitration proceedings and for the keeping of a publicly available "Register of Timber Harvesting Contract and Subcontract Arbitration Awards" by the Ministry of Forests.

28 Part 5 of the Regulation is headed "Replaceability of Contracts and Subcontracts". It requires that the holders of Crown licences carry out specified proportions of their timber harvesting operations by means of replaceable contracts. Different requirements apply to different classes of licence and to operations in the Coastal and Interior regions respectively.

As I noted earlier, since Skeena operates in the Coastal region, it is required to harvest at least 50 percent of its timber by means of replaceable contracts.

29 Sections 13-15 of the Regulation deal with the commencement and expiration of replaceable contracts in the following terms:

13 (1) A replaceable contract must provide that

(a) if the contractor has satisfactorily performed its obligations under the contract, and conditional on the contractor continuing to satisfactorily perform the existing contract, the licence holder must offer a replacement contract to the contractor, and

(b) the replacement contract must

(i) be offered 3 months or more before the expiry of the contract being replaced,

(ii) provide that it commences on or before the expiry of the contract being replaced,

(iii) provide for payment to the contractor of amounts in respect of timber harvesting services as agreed to by the parties or, failing agreement, as determined under section 25, and

(iv) otherwise be on substantially the same terms and conditions as the contract it replaces.

(2) If a replaceable contract does not provide for an expiry date, the contract expires on the second anniversary of the date on which the contract commenced.

14(1) A replaceable contract must provide that, upon reasonable notice to the contractor, the licence holder may require, for bona fide business and operational reasons, that the contractor

(a) use different timber harvesting methods, technology or silvicultural systems,

(b) move into a new operating area, or

(c) undertake any other operating change necessary to comply with a direction made by a government agency or lawful obligation imposed by any federal, provincial or municipal government.

(2) A replaceable contract must provide that if a requirement made pursuant to subsection (1) results in a substantial change in the timber harvesting services provided

> by the contractor, the contractor may, within 60 days of receiving notice under subsection (1), elect by notice in writing to the licence holder to terminate the replaceable contract without incurring any liability to the licence holder.
>
> (3) A replaceable contract must provide that, if a requirement is made pursuant to subsection (1) and the contractor does not elect to terminate the replaceable contract as provided for in subsection (2), either party may, within 90 days of the contractor receiving notice under subsection (1), request a review of the rate then in effect.
>
> (4) If, after any changes in timber harvesting services required by the licence holder under subsection (1), the parties are unable to agree upon the rate to be paid for timber harvesting services, a rate dispute is deemed to exist.
>
> 15 A replaceable contract must provide that the contract terminates, to the extent that it relates to the licence, upon the cancellation, expiry or surrender of a licence under which the timber harvesting services provided by the contractor are carried out. [Emphasis added.]

30 The Regulation stipulates that if a dispute arises regarding the amount of work to be specified in a replaceable contract, the matter may be referred to arbitration under s. 24. The same is true of any dispute regarding the rates chargeable by the contractor for its work. The arbitrator must determine a rate that is reasonable and competitive by industry standards and which "would permit a contractor operating in a manner that is reasonably efficient in the circumstances in terms of costs and productivity to earn a reasonable profit."

31 Division 5 of the Regulation deals with reductions in work under a replaceable contract due to a reduction in AAC. If the Crown reduces the AAC under a harvesting licence, the holder "must apportion the effect of the reduction in AAC . . . proportionately among (i) all contractors holding replaceable contracts, and (ii) any company operations in respect of the licence." (s. 28(2)(d).) Alternatively, the holder may make a proposal either to reduce the AAC covered by one or more of its replaceable contracts or to terminate one or more such contracts. If the proposal is objected to by one or more of the affected contractors, a "dispute is deemed to exist" between the licence holder and the contractor(s). If not settled by mediation, this dispute must also be arbitrated in accordance with s. 32, which states in part:

> (g) an arbitrator must resolve the dispute in the manner that the arbitrator believes most fairly takes into account each of the AAC reduction criteria; [and]
>
> (h) for greater certainty, in making a decision with respect to the dispute
>
>> (i) an arbitrator is not restricted to choosing between any of the various AAC reduction proposals made by the parties to the arbitration, and

> (ii) an arbitrator may make an award that includes the termination of one or more of the replaceable contracts, or reduces the amount of work available to any contractor or company operation in a manner that is not proportionate to the reduction in AAC. [Emphasis added.]

The Regulation defines the term "AAC reduction criteria" to mean each of the following factors:

> (a) the amount of work specified in each replaceable contract to which the proposal relates;
>
> (b) the relative seniority of each contractor with a replaceable contract;
>
> (c) the economic impact of the proposal on the timber harvesting operations carried out under that licence by each contractor with a replaceable contract;
>
> (d) the impact of the proposal on employment;
>
> (e) the economic impact of the proposal on the licence holder; [and]
>
> (f) the impact of the proposal on community stability; . . .

32 As Mr. Forstrom points out, then, the statutorily-mandated terms of replaceable logging contracts "tie" them in a sense to Crown licences themselves. A licence holder must carry out a specified percentage of its logging through contractors under replaceable contracts. If the AAC under the licence is reduced, the work committed to by the licence holder in its replaceable contracts may also be reduced. If the licence is cancelled or surrendered, any replaceable contract referable thereto also terminates. Mr. Forstrom and Mr. Maclean go further, however, and argue that the "tie" confers a "special status" on the contractor and that the status must be recognized in the event of a breach of the obligation to renew or continue the contract, and must be reflected in any CCAA arrangement. I will return below to these arguments.

The CCAA

33 Unlike the *Forest Act* and Regulation, the CCAA is very brief. It operates substantially through judge-made law interpreting and applying its 22 sections. For purposes of this appeal, the key ones are the following:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or

liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

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

* * *

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

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

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

* * *

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

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

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

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

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

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

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

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

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

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

. . . . .

(6) The court shall not make an order under subsection (3) or (4) unless

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

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

34 There is now a large body of judge-made law which "fills the gaps" between these provisions. Most notably, courts appear to have given full effect to the "broad public policy objectives" of the Act, which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. As the author commented:

Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation through reorganization to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often the sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.

Reorganization may give to those who have a financial stake in the company an opportunity to salvage its intangible assets. To accomplish this they must ordinarily give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in the management can be remedied. This object may be furthered by providing in the reorganization plan for such matters as a shift in control of the company or reduction of the fixed charges to such a degree as to make it possible to raise new money through new issues of bonds or shares. It may therefore be in the interest of all parties concerned to give up their claims against an insolvent company in exchange for new securities of lower nominal amount and later maturity date.

Public Interest

Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A. [at 592-3]

(See also Duff, C.J.C. in *Reference re Companies' Creditors Arrangement Act (Canada)* [1934] S.C.R. 659 (S.C.C.).)

35 In accordance with these objectives, Canadian courts have adopted a "standard of liberal construction" that serves the interests of a "broad constituency of investors, creditors and employees" and reflects "diverse societal interests." (See *Smoky River Coal Ltd., Re* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.), at 721-2.) In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), for example, this court held that security granted under s. 178 of the *Bank Act* was not exempt from the CCAA provisions applicable

to "security" and secured creditors, since otherwise a single creditor (in that case, a bank) could frustrate the objectives of the statute. Gibbs J.A. observed:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.
>
> There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. [at 88-9]

36 In connection with other "priority" issues — the power to grant priority to persons advancing debtor-in-possession ("DIP") financing and to the Monitor for the payment of its fees and disbursements before the payment of secured creditors — this court has called in aid Equity's ability to adapt to changing circumstances in order to achieve the objectives of the statute. In *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.), this court declined to follow an earlier case in which the Ontario Court of Appeal had ruled that the receiver of a partnership had no authority to subordinate the interests of secured creditors to liability for the receiver's disbursements, unless one of three exceptions applied. (See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.).) Mackenzie J.A. commented:

> Houlden J.A. stated that these three exceptions were not exhaustive. Nonetheless the *Kowal* statement of exceptions has been influential in subsequent cases and they were applied by this Court in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (C.A.). But as Macdonald J. observed in *Westar Mining*, supra at 93-94, different considerations apply under the *CCAA*. The court is concerned with the survival of the debtor company long enough to present a plan of reorganization. That is a broader interest than that of creditors alone. The jurisdiction must expand from the *Kowal* exceptions to serve that broader interest.

> Thus the receivers' jurisdiction and the monitors' jurisdiction are analogous to the extent that they are both rooted in equity but they diverge to the extent that the monitors' jurisdiction serves a broader statutory objective under the *CCAA*. In my opinion the jurisdiction under the *CCAA* cannot be restricted to the *Kowal* exceptions. [paras. 21-22; emphasis added.]

In conclusion, he stated:

> In my opinion, an equitable jurisdiction is available to support the monitor which is sufficiently flexible to be adapted to the monitor's role under the *CCAA*. It is a time honoured function of equity to adapt to new exigencies. At the same time it should not be overlooked that costs of administration and DIP financing can erode the security of creditors and *CCAA* orders should only be made if there is a reasonable prospect of a successful restructuring. That determination is largely a matter of judgement for the judge at first instance and appellate courts normally will be slow to interfere with an exercise of discretion.
>
> In my opinion, super-priority for DIP financing rests on the same jurisdictional foundation in equity. Priority for the reasonable restructuring fees and disbursements could have been allowed as part of DIP financing. It is immaterial that they have been allowed here as part of the administration charge. [paras. 30-31; emphasis added.]

(I understand that leave to appeal *United Used Auto & Truck Parts Ltd.* was granted by the Supreme Court of Canada [*United Used Auto & Truck Parts Ltd., Re*, 2000 CarswellBC 2132 (S.C.C.)], but that the case settled before the appeal was heard.)

37 In the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), Farley J. followed several other cases in holding that in "filling in the gaps" of the CCAA, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in *Dylex*, at para. 8; *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; *Smoky River Coal Ltd.*; *supra*, and *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in *Mine Jeffrey inc., Re*, [2003] Q.J. No. 264 (Que. C.A.), the Quebec Court of Appeal observed that "A review of the jurisprudence shows that the debtor's right to

cancel contracts prejudicial to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

38 But in approving and implementing compromises and arrangements under the statute, courts are concerned with more than the efficacy of the plans before them and their acceptability to creditors. Courts also strive to ensure fairness as between the unsecured, secured and preferred creditors of the corporation and as between the debtor and its creditors generally. In the article from which I have already quoted, Stanley Edwards also wrote:

> In addition to being feasible, a reorganization plan should be fair and equitable as between the parties. In order to make the Act workable it has been necessary to permit a majority of each class, with court approval, to bind the minority to the terms of an arrangement. This provision is justified as a precaution that minorities should not be permitted to block or unduly delay the reorganization for reasons that are not common to other members of the same class of creditors or shareholders, or are contrary to the public interest. If small groups are placed in too strong a position they become capable of acquiring a nuisance value which will make it necessary for the reorganizers to buy them off at a high price in order to effectuate the plan successfully. However, care should be taken that this statutory power of binding minorities should not be utilized to confiscate the legitimate claims of those minorities or of any class of creditors or shareholders. [at 595; emphasis added.]

39 This theme has been repeated and refined in various cases over the years as CCAA courts have struggled with increasingly complex forms of debt and security and with increasingly complicated plans of arrangement. In current terms, the principle of equity is expressed as a concern to see that a plan of arrangement is fair and reasonable and represents an attempt to "balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights". (*Per* Farley J. in *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), at 173.) Elsewhere, it has been said that one measure of what is "fair and reasonable" is the "extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in a non-intrusive and as non-prejudicial a manner as possible." (*Per* Blair J. in *Olympia & York Developments Ltd.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.), at 513.) At the same time, fairness and reasonableness are not "abstract notions, but must be measured against the available commercial alternative." Thus in *Canadian Airlines Corp., Re*, [2000] A.J. No. 771, [2000] 10 W.W.R. 269 (Alta. Q.B.), the Court summarized the interaction between the objectives of a CCAA arrangement and the principles of fairness and reasonableness as follows:

> In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these

concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia and York Dev. Ltd. v. Royal Trust Co.*, *supra*, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, [1989] 2 W.W.R. 566 at 574 (Alta. Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).

The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

> a. The composition of the unsecured vote;
>
> b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
>
> c. Alternatives available to the Plan and bankruptcy;
>
> d. Oppression;
>
> e. Unfairness to Shareholders of [the debtor]; and
>
> f. The public interest. [paras. 94-96]

40 Of course, there are also statutory and constitutional limitations on the court's exercise of its authority under the CCAA. The Supreme Court of Canada's decision in *Baxter Student*

Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475 (S.C.C.) confirmed that it is beyond the authority of a CCAA court to provide for a priority that runs contrary to the express terms of a statute (in that case, the *Mechanics Lien Act* of Manitoba.) Thus in *Baxter*, the fact that the provincial legislation created a lien having priority over "all judgments, executions, assignments, attachments, garnishments and receiving orders", precluded an order granting CMHC priority for new advances over and above all prior registered liens. Dickson J. (as he then was) stated for the Court:

> . . . the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a Court simply cannot do. [at 480; emphasis added.]

41 *Baxter* continues to be applied today: see *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) and *Westar Mining Ltd., Re* (1992), 70 B.C.L.R. (2d) 6 (B.C. S.C.). However, the Court in *United Used Auto & Truck Parts Ltd.* distinguished *Baxter* on the basis that the former did not involve an express statutory priority that could not be overcome by the Court's equitable jurisdiction. Mackenzie J.A. noted that the receiver's jurisdiction originates in the "equitable jurisdiction of the Court of Chancery and [that] while that jurisdiction cannot be exercised contrary to a statute, nothing precludes its exercise to supplement a statute and effect a statutory object." (para. 18.)

42 It may be unnecessary to add that in cases of direct or express conflict between the CCAA itself and a provincial statute, the doctrine of paramountcy would apply and the federal statute would prevail. The only case brought to our attention which, on its face at least, applied the doctrine of paramountcy in the CCAA context was *Sulphur Corp. of Canada Ltd., Re*, [2002] A.J. No. 918 (Alta. Q.B.). In addressing the question of whether the Court had the authority to permit DIP financing ranking in priority to liens registered under the *Builders' Lien Act* of British Columbia, LoVecchio J. distinguished *Baxter* and *Royal Oak Mines Inc.*, *supra*, on the basis that the discretion to grant priority for DIP financing was grounded in s. 11 of the CCAA rather than purely in the court's inherent jurisdiction. (This, at least, is what I draw from the Court's comments at paras. 35-37.) Seeing the case before him as involving a conflict between a federal statute and a provincial statute, LoVecchio J. ruled that the former prevailed and that in exercising its jurisdiction under the CCAA, the Court could grant priority for DIP financing. (See also *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 10 B.C.L.R. (3d) 62 (B.C. C.A.).)

The Issues in this Case

43 Against this background, I turn at last to the substantive questions raised by the intervenor and the appellants respectively — did the Chambers judge have the jurisdiction

to include in the Come-back Order provisions which contemplated the termination of any replaceable logging contracts; and if so, did he err by failing to consider whether the appellants would be treated fairly in relation to Skeena's other replaceable contractors or by failing to consider whether the termination of the appellants' contracts was, in their words, "a necessary or justifiable part of [Skeena's] reorganization plan at all"?

Jurisdiction

44 On behalf of the Truck Loggers' Association, Mr. Maclean contended that the Chambers judge had strayed outside his jurisdiction because nothing in s. 11 of the CCAA (which permits the granting of a stay) extends to the termination of a contract. On this view, any authority to sanction a termination must originate not in the statute, but in the Court's inherent jurisdiction. Based on the authority of *Baxter*, *Royal Oak Mines Inc.* and *Westar Mining Ltd.*, the intervenor submits that the court's inherent jurisdiction cannot be used to override legislation such as the *Forest Act* and Regulation 22/96.

45 It is true that in "filling in the gaps" or "putting flesh on the bones" of the CCAA — for example, by approving arrangements which contemplate the termination of binding contracts or leases — courts have often purported to rely on their "inherent jurisdiction". Farley J. did so in *Dylex*, for example, at para. 8, and in *Royal Oak Mines Inc.*, *supra*, at para. 4, the latter in connection with the granting of a "superpriority"; and Macdonald J. did so in *Westar Mining Ltd.*, *supra*, at 8 and 13. The court's use of the term "inherent jurisdiction" is certainly understandable in connection with a statute that confers broad jurisdiction with few specific limitations. But if one examines the strict meaning of "inherent jurisdiction", it appears that in many of the cases discussed above, the courts have been exercising a discretion given by the CCAA rather than their inherent jurisdiction. In his seminal article, "The Inherent Jurisdiction of the Court", (1970) 23 *Current Legal Problems*, Sir J.H. Jacob, Q.C., writes that the inherent jurisdiction of a superior court of law is "that which enables it to fulfill itself as a court of law." The author explains:

> On what basis did the superior courts exercise their powers to punish for contempt and to prevent abuse of process by summary proceedings instead of by the ordinary course of trial and verdict? The answer is, that the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent." This description has been criticized as being "metaphysical," but I think nevertheless it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with the power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack

> substance. . . . The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner. [at 27-28; emphasis added]

The author also notes that unlike inherent jurisdiction, the source of statutory jurisdiction "is of course the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of inherent jurisdiction of the court is derived from its nature as a court of law, so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition." (at 24.)

46 Applying this distinction to the issue at hand, I think the preferable view is that when a court approves a plan of arrangement under the CCAA which contemplates that one or more binding contracts will be terminated by the debtor corporation, the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. (As to the meaning of "discretion" in this context, see S. Waddams, "Judicial Discretion", (2001) 1 *Cmnwth. L.J.* 59.) This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process.

47 In saying this, I leave to one side the jurisdiction of the court to make special provision for the payment of the fees and expenses of a monitor appointed under the CCAA. The monitor's functions are of course analogous to those of a receiver — traditionally a creature of Equity. I suspect that this particular power may be properly described as both an equitable jurisdiction and a statutory discretion. As this court said in *United Used Auto*, nothing precludes the exercise of the equitable jurisdiction of the Court of Chancery to "supplement a statute and effect a statutory object." (para. 18.) In any event, the distinction between these two sources of authority is one that, in my mind at least, 'eludes definition'.

48 Returning, then, to the intervenor's argument, the first question posed by it must in my view be revised to whether the Chief Justice erred in purporting to exercise the statutory discretion given by the CCAA in a manner that conflicts with the *Forest Act*. But the second branch of the question also incorporates an assumption that is problematic. Can it be said that the Come-back Order conflicts with the *Forest Act* or the scheme created thereby? It is true that the Act and Regulation contemplate a perpetual series of contracts (provided the contractor fulfils its obligations thereunder) and contemplate the termination of a replaceable contract only in the event of a reduction in AAC or the expiration or surrender of the licence. But nothing in the legislation to which we were referred purports to invalidate a termination of a replaceable logging contract by the licence holder or to require that a court make an

order for specific performance in the event of such a termination. (In a CCAA context, such an order would be very unlikely, as well as futile.) The licence holder will of course be liable in damages for breach of contract, giving rise to a "claim" against the debtor corporation under the CCAA. The licence holder may also be in breach of one or more of its obligations under the Act; but ultimately, a logging contract is still a "contract" at law, notwithstanding that many of its terms are dictated by the legislation for the protection and security of the contractor.

49 Thus I disagree with the intervenor's assertion that the effect of the Come-back Order was to "eliminate" the licence holder's "statutory obligation under the *Forest Act* to replace the contract and to eliminate the other conditions that are required by the Regulation to be included in the contract." In fact, the renewal of the appellants' contracts was not required by the Act *per se*; what the Act required was that each of their contracts contain a clause requiring renewal. It was those contractual terms which were breached. The licence holder's obligations, mandated by the scheme, were not "eliminated" by the Come-back Order or even by Skeena: having been breached, the obligations are recognized as giving rise to claims against the corporation either for specific performance or for damages.

50 It follows in my view that in approving an arrangement in which the debtor corporation terminates a replaceable logging contract, a CCAA court is not overriding "provincial legislation" as the intervenor contends. Nor is the court "overriding" the terms of the contract: it is merely exercising the discretion given to it by the statute to approve a plan of arrangement. The breach of contract is recognized as a matter of fact by the court, but is not "permitted" in the sense that the licence holder is somehow immunized from the usual consequences of its breach at law or in Equity. Finally, even if the *Forest Act* or Regulation did prohibit the termination of replaceable contracts, the federal government's powers with respect to bankruptcy and insolvency would become applicable once the CCAA was invoked and the doctrine of paramountcy would operate to resolve any direct conflict.

The Exercise of the Court's Discretion

51 The appellants and the intervenor argued that even if the Court did have the authority to grant the Come-back Order on the terms it did, the Chief Justice erred in failing to exercise his discretion so as to achieve "fairness" between the appellants and Skeena's three other logging contractors, whose contracts were, in theory at least, unaffected by the Reorganization Plan. As I mentioned earlier, both the appellants and the intervenor contend that contractors under replaceable contracts have "special status" as persons entitled to share in the benefits of a Crown resource (timber) and that the *Forest Act* scheme is predicated on fairness between them, and between them and the holders of Crown licences. They note that the Chief Justice referred in his "fairness" analysis only to the question of whether the Order differentiated inappropriately "between the applicants and other [Skeena] creditors" and made no reference

to fairness as between the appellants and the other three contractors or as between the appellants and Skeena itself. In Mr. Forstrom's submission, it is unfair that his clients should suffer the loss of their very significant income streams under the replaceable contracts when the other three contractors will suffer no such loss, and when the licence holder itself suffers only the loss of five percent of its AAC under the *Forest Act*. (In fact, it is possible the Minister may revoke that reduction upon application by Skeena under s. 56.1 of the Act.) In essence, the argument of the appellants is "Why us?"

52 It is trite law that the scope of review open to an appellate court in respect of the exercise of discretion of a CCAA court (or any other court) is narrow. In *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]), Macfarlane J.A. (in Chambers) observed that this court should exercise its powers "sparingly" when asked to intervene in this context. In his words:

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. . . . In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. [para. 32]

Macfarlane J.A.'s comments were echoed by the Alberta Court of Appeal in *Smoky River Coal, supra*, where Hunt J.A. noted at para. 61 that ". . . Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases."

53 Another principle informing the court's task flows from the fact that a plan of arrangement approved by the court is not the plan of the court. It is a compromise arrived at by the debtor company and the requisite number of its creditors. The court should not readily interfere with their business decision, especially where the plan has been approved by a high percentage of creditors. As observed by Blair J. in *Re Olympia & York, supra*, "[I]t is not my function to second guess the business people with respect to the 'business' aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas." (at 510.) (See also *Sammi Atlas Inc., Re, supra*, at para. 5, and *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), at 205, *per* McEachern C.J.B.C.)

54 In this case, the chief executive officer of NWBC and Skeena provided the Chambers judge below with an explanation as to why they chose to reduce the volume of timber allocated to Skeena's evergreen contractors, and why they chose to terminate the contracts of the appellants rather than to terminate all five contracts or reduce the work allocated to all five. I have already mentioned Mr. Veniez's affidavit evidence (see para. 11 above) that the

cost to Skeena of logs produced by each of the appellants was greater than those produced by the other three contractors and that NWBC made it a "condition of going forward with the acquisition of Skeena, that Skeena take steps within the context of the CCAA proceedings to terminate the Clear Creek and Jasak contracts."

55 In this court, Mr. Forstrom asked us to discount Mr. Veniez's evidence, contending that since the appellants' objections to the Come-Back Order had been known to NWBC when it completed its purchase of the Skeena shares, NWBC must be taken to have effectively "waived" this condition. I am not persuaded that such an inference necessarily follows from NWBC's completion of the Plan. At that time, the Come-back Order clearly authorized the termination of replaceable logging contracts, and the validity of a similar order had been upheld by Thackray J. in 1997. It may be that in deciding to proceed, NWBC undertook a risk that the appellants would be successful either before the Chief Justice or on appeal, but we have no evidence as to what concessions NWBC may have obtained to protect against that risk.

56 As for the argument that the appellants' contracts were no less costly to Skeena than those of the other three contractors (since the rates chargeable under all five contracts were subject to arbitration), Mr. Veniez deposed:

> 13. I acknowledge that the Contract Regulation dictates that any rates determined according to this process must be determined according to what a licence-holder and a contractor acting reasonably in similar circumstances would agree is a rate that is competitive by industry standards. <u>However, this provides little comfort to licence-holders such as Skeena, because ultimately rates under the Contract Regulation are determined on a cost-plus reasonable profit for replaceable contractors basis which, in my view, acts as a significant disincentive for replaceable contractors to be cost effective on an ongoing basis.</u>
>
> 14. On the contrary, the Contract Regulation in my view <u>creates a legislated disincentive for evergreen contractors to control their cost structures, because volumes under these contracts are guaranteed. This results in high costs being passed on to Skeena</u>.
>
> 15. Prior to NWBC's acquisition of Skeena, and the termination of the replaceable contract that has given rise to this application, I <u>was advised that Skeena, on average, paid approximately 10% more for work done under replaceable contracts than work done pursuant to contracts issued after a competitive bid process</u>. Indeed, I am advised by Derrick Curtis, Skeena's Terrace Woodland's Manager, that in March 2001 Skeena put out to tender a harvesting contract (Setting S83303), consisting of roughly 20,000 m^3, and received tenders from both evergreen and non-evergreen contractors. The latter

offered significantly lower rates ($23.95/m^3$ vs. $27.85/m^3$, a difference of $3.90/m^3$), resulting in a 14% reduction in costs to Skeena. [Emphasis added.]

57 There was, then, a "business case" for the actions taken by Skeena and NWBC vis-à-vis the appellants. Clear Creek and Jasak did not apply to cross-examine Mr. Veniez on this evidence, and did not bring anything to our attention which would cast doubt on his statements. In these circumstances, the Chambers judge was entitled to take seriously the assertion that the termination of the appellants' contracts would save Skeena a considerable sum per year and that that fact was important to the only purchaser willing to make an offer acceptable to the requisite number of creditors. In the terminology used by Mr. Forstrom, there was a "causal link" between the terminations and the chances of success of the Reorganization Plan. For this reason, I do not agree with his submission that *Dylex* is different in principle from the case at bar: the appellants' contracts in particular were said to be too costly for Skeena to continue operating under them, in the same way the terminated leases were said to be too costly for Dylex to continue leasing under them. And, weighing Dylex's precarious financial position against that of the landlord (which was described as "less than robust"), the Court 'gave the nod' to the insolvent corporation, rejecting the proposition that Dylex should have to prove that without the three proposed closures (of leases), its proposal would not be viable. (*supra*, para. 10.)

58 In this case, the appellants deposed that the evergreen contracts were important to them, particularly for financing purposes. Mr. Rigsby, the controller of Clear Creek, for example, deposed:

> 26. Clear Creek requires its Replaceable Contract in order to obtain financing for capital costs. Lending institutions require that Clear Creek has a replaceable contract when considering lending money to, or financing equipment for, Clear Creek. Within the logging industry, it is very difficult to obtain financing without the security of a replaceable contract.
>
> . . . . .
>
> 30. Clear Creek remains capable of properly capitalising itself, and maintaining its own equipment and other capital investments in good working order, provided that it has a replaceable contract. If Clear Creek's replaceable contract remains in place, Clear Creek will be able to provide competitive, cost-effective, and efficient services and rates to [Skeena] . . . .

59 This evidence brings us squarely to the question of fairness. As already noted, for purposes of the CCAA, the court must be satisfied that the arrangement proposed is "fair, reasonable and equitable." Courts have made it clear that "equity" is not necessarily "equality"; in the words of Farley J. in *Sammi Atlas Inc., Re*:

> A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights . . . . [para. 4]

60 I have no difficulty in accepting the appellants' argument that fairness as between them and the other three evergreen contractors and as between the appellants and Skeena was a legitimate consideration in the analysis in this case. (Indeed, I believe the Chief Justice considered this aspect of fairness, even though he did not mention it specifically in this part of his Reasons.) The appellants are obviously part of the "broad constituency" served by the CCAA. But the key to the fairness analysis, in my view, lies in the very breadth of that constituency and wide range of interests that may be properly asserted by individuals, corporations, government entities and communities. Here, it seems to me, is where the flaw in the appellants' case lies: essentially, they wish to limit the scope of the inquiry to fairness as between five evergreen contractors or as between themselves and Skeena, whereas the case-law decided under the CCAA, and its general purposes discussed above, require that the views and interests of the "broad constituency" be considered. In the case at bar, the Court was concerned with the deferral and settlement of more than $400,000,000 in debt, failing which hundreds of Skeena's employees and hundreds of employees of logging and other contractors stood to lose their livelihoods. The only plan suggested at the end of the extended negotiation period to save Skeena from bankruptcy was NWBC's acquisition of its common shares for no consideration and the acceptance by its creditors of very little on the dollar for their claims. As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. Each of them might also ask "Why me?" However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only "upside" is the possibility that bankruptcy and even greater losses will be averted.

61 As has been seen, the purchaser required as a condition of proceeding with the Reorganization Plan that the appellants' contracts be terminated. In the absence of evidence that Skeena or the purchaser was motivated by anything other than a desire to improve the debtor corporation's financial prospects for survival post-arrangement, it cannot in my view be said that the Chambers judge erred in ruling that the termination of the appellants' replaceable contracts was a valid part of the Reorganization Plan in this case.

Procedural Question

62 The second ground of appeal advanced by the appellants was that since Skeena had failed to comply strictly with the requirements of the Come-back Order in relation to the

termination of their contracts, the terminations were null and void. In response to the Chief Justice's conclusion that the appellants had not been prejudiced by the failure to give timely notice, the appellants submitted that the terminations could not have been effective until 21 days after they received the Monitor's Eleventh Report. In the meantime, the creditors' meeting took place. The appellants contend that since there was uncertainty as to whether their contracts had been validly terminated or would be terminated, it was unclear whether they were entitled to vote at the meeting. Accordingly, they submit that they:

> . . . were effectively disenfranchised in the *CCAA* proceeding. The Come-Back Order contemplates that the effectiveness of any proposed termination of a replaceable logging contract will be determined in a timely way, before the Plan of reorganisation is submitted to the creditors for approval. By failing to give proper notice, [Skeena] created uncertainty about both when and if the Appellants' contracts would be terminated. The Appellants were only entitled to vote in relation to the Plan if they acknowledged that the termination of their contracts was effective when the initial (and clearly invalid) notice was given on March 1, 2002.
>
> This placed the Appellants on the horns of a dilemma. Had the Appellants exercised the right to vote on April 2,2002, based on the premise that their contracts had been terminated, they would be guilty of approbation and reprobation in relation to their position that no valid notice of termination had yet been given and that their contracts remains in force. [Skeena] structured the approval process in such a way that the Appellants would effectively be required to waive their right to proper notice of termination under the Come-Back Order in order to vote on the Plan.

63 In response, Skeena emphasizes that the appellants did file proofs of claim with the Monitor prior to the creditors' meeting. Skeena says the Chief Justice was correct in concluding that the appellants were not prejudiced in fact, since if it is ultimately determined that the replaceable logging contracts were not validly terminated, the appellants will be free to withdraw their proofs of claim; and if the contracts were validly terminated, the appellants will share *pro rata* under the Plan with Skeena's other unsecured creditors once the amounts of all claims have been finally determined.

64 As for the proposition that the appellants could not both reprobate and approbate, Skeena notes that "conditional voting" was permitted by the Monitor in light of the time pressures attendant upon the approval of the Plan. These led the Monitor to allow voting even by those claimants whose claims it had disallowed. The Monitor noted their particular ballots as "objected to" in case the votes cast by them ultimately had an impact on the outcome of the vote for the applicable class. Mr. Zuk, the chair and claims officer for the meeting, deposed that even if all of the disallowed claims were reversed and the appellants'

votes were counted, the result would not have been affected. This statement was not challenged by the appellants.

65 In these circumstances, I cannot agree with the appellants that the delay in their receipt of notice of the terminations of their contracts and the delay in the processing of their proofs of claim were prejudicial to them. It is certainly unfortunate that these delays occurred, but there is no evidence (as opposed to speculation) that the delays were the result of bad faith or deliberate omission. On the other hand, the appellants could have had little doubt that they faced major difficulties once the initial CCAA order was granted (September 5, 2001) and once the "replacement" deadline of September 30 passed. Ultimately, the effect of the delay in their receipt of formal notice made no difference to the appellants' position and did not influence the approval of the Reorganization Plan one way or the other, especially given the small amount allowed by the Monitor in respect of the appellants' claims in relation to Skeena's indebtedness. The appellants chose not to attend the meeting and not to vote, even on a conditional basis. In these circumstances, the Chief Justice correctly recognized that, as stated by Rowles J.A. for the Court in *Cam-Net Communications v. Vancouver Telephone Co.* (1999), 71 B.C.L.R. (3d) 226 (B.C. C.A.), a supervising court under the CCAA must be alert to the incentive for creditors to "avoid the reorganization compromise" and must "scrutinize carefully any action by a creditor which would have the effect of giving it an advantage over the general body of creditors." (para. 20.)

66 Moreover, the arguments which the appellants would have made at the show cause hearing have now been made in the Supreme Court and in this court. If my analysis is correct, they would have failed even if the Court's approval of the Reorganization Plan had been delayed in accordance with the apparent intent of the Come-back Order.

67 I cannot say the Chief Justice was wrong in concluding that Skeena's failure to give timely notice was anything other than a procedural error without prejudicial consequences. I would dismiss this ground of appeal, as well as the substantive grounds, for the reasons I have given.

***Hall J.A.*:**

I agree.

***Levine J.A.*:**

I agree.

Appeal dismissed.

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TAB 3

2010 SKQB 429
Saskatchewan Court of Queen's Bench

Clayton Construction Co., Re

2010 CarswellSask 750, 2010 SKQB 429, 203 A.C.W.S. (3d) 466, 365 Sask. R. 301, 74 C.B.R. (5th) 130

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

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE CREDITORS OF CLAYTON CONSTRUCTION CO. LTD. and CLAYTON CONSTRUCTION GROUP INC.

A.R. Rothery J.

Judgment: November 18, 2010
Docket: Saskatoon Q.B. 880/09

Counsel: I.A. Sutherland for Applicants
J.M. Lee for Monitor, Ernst & Young Inc.
D.P. Kwochka for Redhead Equipment Ltd.

Subject: Insolvency

Headnote

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

Terms of arrangements, meetings regarding arrangements — Debtor construction company entered protection under Companies' Creditors Arrangement Act — Debtor reached agreement with secured creditors — Debtor's plan for unsecured creditors was for payment of 15 per cent of amount owing, with creditors for less than $3,334 having election for lesser amount of $500 or payment of entire claim — Debtor brought application to order meeting of unsecured creditors and extend time of stay — Application granted — Administrative benefit to dealing with smaller claims did not defeat s. 6(1) of Act, as right to vote against plan was preserved — Dissenting creditors still protected by court's discretionary powers — Monitor had undertaken to make appraisal available to all creditors.

Table of Authorities

Cases considered by *A.R. Rothery J.*:

Big Sky Farms Inc., Re (2010), 70 C.B.R. (5th) 88, 2010 CarswellSask 448, 2010 SKQB 255 (Sask. Q.B.) — considered

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

229531 B.C. Ltd., Re (1989), 72 C.B.R. (N.S.) 310, 1989 CarswellBC 330 (B.C. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 4 — referred to

s. 6 — referred to

s. 6(1) — considered

s. 6(1)(a) — considered

APPLICATION by debtor company to approve meeting and to extend stay under *Companies' Creditors Arrangement Act*.

***A.R. Rothery J.*:**

1 The applicants, Clayton Construction Co. Ltd. and Clayton Construction Group Inc., applied pursuant to s. 4 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 (the "CCAA") for the court to order a meeting of the applicants' unsecured creditors to consider its plan of compromise. The stay of proceedings was granted July 10, 2009, and the applicants now have a proposal.

2 I granted the order calling for a meeting of the unsecured creditors on December 15, 2010 and for a further extension of the stay of proceedings until January 14, 2011. This extension will allow for both the meeting and an application to determine whether the plan of compromise would be sanctioned by the court as provided by s. 6 of the CCAA. Counsel for Redhead Equipment Ltd. ("Redhead") raised concerns about certain aspects of the proposed plan. These are the reasons for granting the order as proposed by counsel for the applicants.

3 The two applicants propose a consolidated plan of compromise; for all intents and purposes, they operate as one business. Theirs is a construction business, providing construction services to the oil field industry and building roads throughout Saskatchewan and Alberta. Following certain construction accidents at Ft. McMurray, Alberta and the subsequent loss of contracts, along with the global recession in 2008 and the dramatic drop

in oil prices, the applicants suffered a sharp drop in revenues. This all led to the initial order under the CCAA.

4 The applicants have been successful in renegotiating payments with all their secured creditors. This has solved in excess of $11 million of the debt. They now have sufficient ability to propose a plan of compromise to their unsecured creditors, who hold about $2.94 million of the debt.

5 The plan of compromise proposed is to pay the unsecured creditors a distribution of money equivalent to 15% of each unsecured creditor's claim, with 7.5% paid initially and 7.5% paid six months later. The monitor anticipates that this distribution is about twice the amount the unsecured creditors would receive if the applicants' businesses were liquidated in bankruptcy.

6 While the unsecured creditors are one class of creditors under the CCAA, this plan of compromise provides for an election for any unsecured creditor owed less than $3334. Those claimants may elect to receive a fixed distribution equal to $500 or the maximum amount of the claim, whichever is less. Otherwise, those claimants may elect to receive a distribution equal to 15% of the claim. Thus, anyone owed less than $3334 would receive a greater benefit if the fixed distribution option were selected. Indeed, some unsecured creditors may see their debt paid in full. The plan of compromise provides that members of this subgroup of unsecured creditors owed $3344 or less and entitled to the fixed distribution are deemed to have elected this fixed distribution and to have voted in favour of the plan of compromise, unless that unsecured creditor votes to the contrary at the meeting of the creditors.

7 It is this deeming provision in the plan of compromise that counsel for Redhead objected to. Counsel argued that the deeming provision was contrary to the intent of s. 6(1) of the CCAA. It provided the unsecured creditors owed less than $3344 a disproportionate voice in the outcome of the vote. These are the creditors who would least likely attend the creditors' meeting at all. The deeming provision could make a substantial difference in the result of the vote.

8 Counsel for the monitor argued that the deeming provision would reduce certain administrative costs for dealing with the less significant claims. Counsel for the monitor also submitted that such plans have been approved by this court in prior CCAA proceedings, citing as an example the deeming provision for creditors owed $4,000 or less to have voted in favour of the plan of compromise in *Big Sky Farms Inc., Re* [2010 CarswellSask 448 (Sask. Q.B.)] Q.B.G. No. 1461 of 2009 J.C.S., (unreported). In that case, there was no provision for those creditors to vote, should they elect to do so. Counsel for the monitor conceded that issue was not addressed by any party in *Big Sky*. So, it may not be of great precedent value in this case.

9 The monitor's fifth report shows that about forty-five of the ninety-seven claimants in the class of unsecured creditors fall into the category of claims less than $3334. The sum of $21,557 will be set aside for the fixed distribution pool.

10 Counsel for Redhead noted that the fixed distribution pool catches about $63,000 of the unsecured debt. That is about 2.1% of the total value of the claims. Redhead itself is owed $412,000, about 14% of the total value of the claims. Counsel for Redhead did not object to the sub-group owed less that $3334 receiving more than 15% of the claim if the plan were to be approved. Counsel argued that the 2.1% of fixed pool distribution could affect whether the two-thirds majority is met at the creditors' meeting.

11 Section 6(1)(a) of the CCAA states:

> 6.(1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding
>
> > (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company;

. . . . .

12 The power of the court to sanction the plan of compromise under s. 6 of the CCAA is a discretionary power. The court must be satisfied that the plan is fair and reasonable. This concept has been described in *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) where McEachern C.J.S.C. referred to numerous authorities on pp. 200-201and summarized the principles as follows:

> The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:
>
> > (1) There must be strict compliance with all statutory requirements (it was not suggested in this case that the statutory requirements had not been satisfied);

(2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.;

(3) The plan must be fair and reasonable.

13 There is no doubt that the deeming provisions provided for the fixed distribution claimants may make a difference if the vote is close. However, the requisite two-thirds majority does not, in and of itself, mean that the court will sanction the plan of compromise. Approval is discretionary. (See: *229531 B.C. Ltd., Re* (1989), 72 C.B.R. (N.S.) 310 (B.C. S.C.)).

14 If the requisite majority supports the plan, it does not bar a creditor from objecting to the plan and providing cogent reasons for so doing. Thus, the administrative benefit of dealing with over half the creditors who represent 2.1% of the value of the claims in the efficient manner proposed by the monitor does not defeat the intent of s. 6(1) of the CCAA. Their right to vote against the plan of compromise has been preserved by the plan of compromise itself. Should their collective vote, to a maximum of 2.1%, make a difference to the majority, dissenting creditors are protected by the discretionary powers given to the court at the sanction application. It is for these reasons that the applicants have been permitted to propose its plan of compromise to the unsecured creditors in the form encompassed in the order granted November 4, 2010.

15 On a related matter, counsel for Redhead expressed concern about the appraisal provided to the monitor, upon which reliance was placed by the monitor to conclude that liquidation of the applicants' businesses would only realize about 7.5% of the total debt. The monitor has undertaken to make that appraisal available to all unsecured creditors prior to the meeting of creditors. It is important that the unsecured creditors be convinced of the monitor's recommendations. In this case, the comparison of the liquidation value to the plan's proposal is crucial. It will be a factor not only for the creditors to consider, but also a factor in the court's exercise of its discretion.

Application granted.

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Court File No. CV-17-589016-00CL

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 COMRPROMISE OR ARRANGEMENT OF BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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