C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

SUPERIOR COURT
(Commercial Division)
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED,
QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUEBEC IRON MINING ULC, WABUSH IRON CO. LIMITED AND WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY AND WABUSH LAKE RAILWAY COMPANY, LIMITED

Mises-en-cause

-and-

HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS

THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RÉGIE DES RENTES DU QUÉBEC

MORNEAU SHEPELL LTD., IN ITS CAPACITY AS REPLACEMENT PENSION PLAN ADMINISTRATOR

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

BOOK OF AUTHORITIES AND REPORTS OF THE SUPERINTENDENT OF PENSIONS OF NEWFOUNDLAND & LABRADOR

Doctrine **TAB**

Barron's Canadian Law Dictionary 1

DOLKAR, K., "Re-Thinking Rescue: a Critical Examination of CCAA Liquidating Plans" (2011) 27 Banking & Finance Law Review 111 2

GARNER, B., *Black's Law Dictionary*, (7th ed.: 1999).. 3

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Jurisprudence

114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, 2001 SCC 40 13

Alberta (Attorney General) v. Moloney, 2015 SCC 51, [2015] 3 S.C.R. 327 14

Aveos Fleet Performance Inc. (Re), 2013 QCCS 5762 15

Bank of Montreal v. Marcotte, [2014] 2 SCR 725, 2014 SCC 55 16

Bloom Lake (Re), 2017 QCCS 284 17

Buschau v. Rogers Communications Inc., [2006] 1 S.C.R. 973, 2006 SCC 28 18

Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, 2007 SCC 22 19

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379 20

Construction Montcalm Inc. v. Min. Wage Com., [1979] 1 S.C.R. 754 21

Crystalline Investments Ltd. v. Domgroup Ltd., [2004] 1 SCR 60, 2004 SCC 3 22

Globe-X Management Ltd. (Proposition de), 2006 QCCA 290 23

Grant Forest Products Inc. (Re), 2013 ONSC 5933 24

Husky Oil Operations Ltd. v. Minister of National Revenue, [1995] 3 S.C.R. 453 25

Indalex Limited (Re), 2011 ONCA 265 26

Indalex Limited (Re), 2010 ONSC 1114 27

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 SCR 152, 2004 SCC 54 28

Puratone et al., 2013 MBQB 171 29

Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 S.C.R. 536 30

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 31

Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, 2005 SCC 13.. 32

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 S.C.R. 419 33

Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611 34

Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6, [2013] 1 S.C.R. 271.. 35

Target Canada Co. (Re), 2015 ONSC 303.. 36

Timminco Ltée (Arrangement relative à), 2014 QCCS 174 37

Monitor's Reports

Monitor's Report (17th).. 38

Monitor's Report (18th).. 39

Monitor's Report (19th).. 40

Monitor's Report (21st).. 41

Monitor's Report (22nd).. 42

Monitor's Report (23rd) 43

Monitor's Report (25th).. 44

Monitor's Report (26th).. 45

Monitor's Report (27th).. 46

Monitor's Report (28th).. 47

Monitor's Report (34th).. 48

MONTREAL, May 19, 2017

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WINDING UP

The process of **liquidating** a corporation. The **assets** of the enterprise are used to discharge liabilities, and the resulting net assets are distributed to the **shareholders** on a **pro rata** basis, according to preference.

The term *winding up* usually refers to the procedures carried out by a liquidator, but the courts have used it to describe discontinuance of a business as well. *Merritt v. M.N.R.,* [1940--41] C.T.C. 226 (Ex.Ct).; *Kennedy v. M.N.R.,* [1972] C.T.C. 429 (F.).

Liquidation procedures are usually prescribed and regulated by statute, e.g., the *Winding-up and Restructuring Act,* R.S.C. 1985, c. W--11.

27 B.F.L.R. 111

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Article

Re-Thinking Rescue: A Critical Examination of CCAA Liquidating Plans

Karma Dolkar [a1]

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1. INTRODUCTION

Trailing in the path of General Motors, [1] Chrysler, [2] Lehman Brothers [3] and Nortel, [4] the sale of Canadian media empire Canwest's television assets to Shaw Communications [5] is the latest high-profile example in the past year of a "liquidating plan" being approved of by a court under the *Companies' Creditors Arrangement Act* [6] (the "CCAA") in Canada or its equivalent Chapter 11 of the *U.S. Bankruptcy Code*. [7] In the Canadian context, the use of liquidating plans, which involves a situation where a debtor company sells its significant assets to a willing buyer on a going concern basis, tells an interesting tale. Whereas courts in Ontario have approved of liquidating plans under the CCAA, decisions from Alberta and British Columbia ("Western") courts have criticized this as a perversion of the statute's intended purpose of facilitating the continued survival of an insolvent company.

The recent credit crisis has produced an upsurge in the number and speed of companies commencing CCAA proceedings, thus providing a ripe setting for this paper to examine liquidating plans in the CCAA context. In tracing the case law, this paper ultimately contends that CCAA liquidating sales pose the fundamental question of asking what the aim is in "rescuing" an insolvent company. It argues ***112** that the divergence in judicial approaches to the approval of liquidating sales is reflective of a lack of judicial consensus as to the purpose of restructuring as well as the need to develop a normative theory with a stronger prescriptive force than the bankrupt rhetoric of "acting in the wider public interest."

2. RESTRUCTURING PLANS v. LIQUIDATING PLANS

(a) Introduction

The CCAA was born during the Great Depression in 1933 with the primary aim of facilitating the restructuring of large insolvent corporations so as to avoid liquidation. [8] At the time of its enactment, bankruptcy legislation and receiverships to effect a debtor corporation's liquidation were already in existence and the CCAA was designed as an alternative path to it. [9] In order to determine whether a liquidating plan properly falls within the jurisdiction of the CCAA, the initial question that must be answered is, "What is a restructuring plan?"

The foremost rule of statutory interpretation instructs us to turn to the words of the statute itself. This rule is not very helpful in this case as the CCAA does not provide definitions for either "restructuring" or its synonym "reorganization". While the objectives of the CCAA may be gleaned from its long title, "*An Act to facilitate compromises and arrangements between companies and their creditors*" as well as key provisions [10] which contemplate a debtor corporation proposing a "plan of arrangement" or a "compromise" with its creditors, none of these terms are actually defined in the statute. Thus, we find, inherent in its very constitution, a statute that is inevitably reliant on judicial interpretation to "put flesh on its bones." [11]

(b) Traditional Narrative of "Rescue": Preservation of the Debtor

In early decisions under the CCAA, the courts adopted the view that a CCAA restructuring plan was to exclusively focus on the continuation of a debtor corporation. ***113** [12] The main rationale for this position was based on the fact that the CCAA imposes a debtor-in-possession ("DIP") regime and authorizes a very wide stay of proceedings under section 11. The suspension of all creditors' rights along with the continuation of the debtor corporation in the hands of the same management fit with the notion of allowing the debtor "breathing space" to negotiate a compromise or arrangement with its creditors with the aim to continue its existence and operate its business. [13] In *Re Ursel Investments*, the Saskatchewan Queens Bench stated:

> The object and purpose of the Act is to *continue the Company through its period of difficulty* to become a viable company for the benefit of its creditors, shareholders, employees and public. The re-organization plans proposed falls far short of these objectives. [14] [Emphasis added.]

A similar pronouncement was made in *Hong Kong Bank of Canada v. Chef Ready Foods Ltd.* where the British Columbia Court of Appeal stated that the purpose of the CCAA is to facilitate an arrangement between a company and its creditors "to the end that the company is able to continue its business." [15]

At first blush, the above quotations seem to support the claim that a liquidating plan is inconsistent with the purpose of preserving a company. [16] However, it should be emphasized that the cases do not make a distinction between liquidating sales on a going concern basis and piecemeal liquidations. In *Re Ursel*, the court was faced with a reorganization plan wherein the petitioner tried to set-off its claim for unliquidated damages against the principal creditor and *Chef Ready* involved a bank trying to rely on the *Bank Act* to enforce its security whilst disregarding the CCAA stay. It is suggested that the references in these cases are actually to piecemeal liquidations. [17] This opinion is corroborated by the fact that in his judgment in *Re Ursel*, Osborn J. quotes from Stanley Edwards' article entitled, "Reorganizations Under the *Companies' Creditors Arrangement Act*" to state:

> 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 ... *In the case of a large company it is probable* ***114** *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 a sale of the property piecemeal* for an amount which would yield little satisfaction to the creditors and none at all to the shareholders. [18] [Emphasis added.]

The quotation above is seen as agreeing with a view that a reorganization plan is to avoid a fire sale scenario. In making the claim that a liquidating plan is functionally equivalent to a restructuring plan, a distinction ought to be made between "liquidation" and liquidating plans.

(c) Liquidation v. Liquidating Plan

The term "liquidation" is not a legal term of art and is used to capture a wide array of scenarios. [19] For example, take this statement: "Liquidation usually involves the sale of assets on a piece-meal or going concern basis to a third party" [20] --here, the same term is used with reference to two very different outcomes. This can obviously lead to confusion. Moreover, the "L" word itself bears a scarlet letter in insolvency proceedings such that many liquidating plan petitioners distance themselves from any connection with it choosing instead to use the more neutral term "asset sale". For example, Canwest in a news bulletin to its advertisers states,

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> The LP sale process is not liquidation. It is part of a *pre-packaged restructuring plan that is supported by secured lenders holding almost 50% of the senior secured debt*. [21] [Emphasis in original.]

Similarly, in *Indalex Limited*, the applicants' factum states,

> Contrary to the assertions of the Retired Executives, this is not a "liquidating CCAA", this is a complex cross-border restructuring involving the going concern sale of the assets of the Applicants ... A cross-border asset sale is the best way to preserve and maximize value for the Applicants' stakeholders. [22]

A more useful approach is one that distinguishes a "liquidating plan" from the related but distinct concept of "liquidation." While liquidation occurs when assets are sold on a piecemeal basis, a liquidating plan occurs when the assets of the debtor company are sold on a going concern basis to a willing buyer. [23] This means that that unlike liquidation, in a liquidating sale, the business is sold with the prospects ***115** for continuation of operations. Thus, it is asserted that a liquidating plan is functionally equivalent to a restructuring plan in that the business itself survives and the devastating socio-economic effects of liquidation (*e.g.*, termination of employees, harm to creditors, suppliers, customers and the community at large [24]) are avoided. The only distinction is that in a liquidating plan, the business itself continues in the hands of a company other than the debtor itself.

3. NORMATIVE THEORY OF RESTRUCTURING

(a) Introduction

Prior to a discussion of the case law, it is useful to set the theoretical foundations of restructuring as theory inevitably informs practice and vice versa. We need to ask the question "*Why* are we seeking to rescue the debtor-company?" because the only way to measure success of a restructuring plan is if we have defined policy objectives. At best, the theoretical approach towards restructuring undertaken in CCAA applications can be described as a fusion of two competing theories on the policy of bankruptcy and insolvency law developed in the United States. [25] At worst, it might be said, as Kent and Rostrom suggest, that Canadian insolvency law lacks any clear theoretical basis at all." [26]

(b) U.S. Theories: Creditors' Bargain v. Rehabilitation

The creditors' bargain theory, developed primarily by Douglas Baird and Thomas Jackson, contends that a decision on whether to undertake a restructuring or a liquidating plan or even liquidation should be determined on the basis of which strategy generates the greatest return on the assets for creditors. [27] The sole reason to choose a restructuring plan to preserve a debtor's business will be because this option generates a higher return to creditors than straight bankruptcy or receivership. Under this view, the benefits that come about with a successful restructuring plan (*e.g.*, employees keeping their jobs, suppliers maintaining their business relations, customers continuing their business, the preservation of the community) are simply by-products of the maximization of creditors' returns and not a reason in ***116** themselves to undertake restructuring a debtor company.

In contrast, rehabilitation theory, advocated by Elizabeth Warren, deems non-creditor stakeholders' interests (such as employees, suppliers, contractors, customers, the larger community) relevant when considering a choice between liquidating and restructuring plans. Under this view, while creditors' interests are acknowledged, it is implied that bankruptcy and insolvency policy should consider the effect on those least likely to spread the risk of default and who are unable to bear the cost of firm failure. It thus maintains that the interests of the community at large should be prioritized such as to favor restructuring, even if this may not be the best option in terms of creditors' return maximization. [28]

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The problem with this view is that it does not adequately account for the problems of deferred liquidations [29] --those that should occur but are delayed by a regime that accords too much value to the objective of rehabilitation. Douglas Baird, in his response to Warren, questions why we should only seek to protect these losses as a policy objective in bankruptcy and insolvency law if just as many firms shut down, relocate, restructure outside of bankruptcy/insolvency proceedings and the loss for the stakeholders are indistinguishable. [30]

(c) CCAA: An All-Purpose Approach

In adopting an approach where the CCAA is designed to serve a “broad constituency” which “requires a court considering applications brought under the Act to *also have regard to the wider public interes*t,” [31] Canadian courts have tried to blend the goals of creditor maximization with the wider public interest. [32] In considering whether to sanction a restructuring plan, a court has to determine its “fairness and reasonableness” which is assessed by considering how it balances the interests of the creditors, the company and the community. [33]

***117** This all-purpose approach went largely unchallenged prior to *GMAC Commercial Credit Corp of Canada v. TCT Logistics Inc.* [34] This is because liquidation (including liquidating plans) and reorganization were commonly conceived of as two separate proceedings with the former being administered under the auspices of the *Bankruptcy Insolvency Act* and receiverships; and the latter pursuant to the provisions of the CCAA. [35]

In *TCT Logistics Inc.*, the Supreme Court of Canada held that an interim receiver was not protected from successor employer claims advanced by a union. This had a chilling effect on receiverships and resulted in an accelerated growth of CCAA liquidating sales as a means to effect going concern sales without attracting third party liabilities. [36] This surge in CCAA liquidating plans has forced courts to confront the challenge of articulating the purpose of restructuring. In particular, courts have been faced with deciding which of the two goals--maximizing creditors' interests or taking account of the wider public interest--should take priority in determining whether to approve of a CCAA liquidating sale.

4. PRE-PLAN LIQUIDATING SALES

(a) Introduction

A “pre-plan” liquidating sale occurs when a court is asked to approve the sale of substantial assets belonging to the debtor company even before it submits a plan of compromise or arrangement to a creditors' vote. “Pre-plan” or “pre-pack” sales tend to occur in cases where time is of the essence-- situations where the debtor is forecasted to be unable to meet its operating expenses. [37] Given that the CCAA contemplates a requisite double majority approval by way of a creditors' vote on a compromise or arrangement prior to court approval, [38] pre-plan liquidating sales ***118** have raised questions as to the appropriateness of a court approving a liquidating sale in the absence of a creditors' vote for three main reasons.

First, secured creditors, stayed under s. 11 of the CCAA while awaiting a restructuring plan, maintain the ability to realize upon the assets if the plan is found to be unacceptable. A pre-plan liquidating sale necessarily compromises their realization rights. [39] Second, unsecured creditors such as unpaid suppliers who under bankruptcy/receivership have a right to repossess their goods within a 30 day period have no similar rights in the CCAA. [40] The use of restructuring proceedings to liquidate the business therefore has the effect of undercutting the priority ranking of some classes of creditors. [41] Similarly, third parties who have executory contracts with the debtor may find themselves in a worse position in a pre-plan liquidating sale because unlike bankruptcy/receivership, under the CCAA, courts have the ability to order assignments of these contracts contrary to their terms and over the objections of the counterparty. [42] Third, it is questionable why a debtor should retain control over the pre-plan liquidating sale when the parties with the real stake are the secured creditors. [43]

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A review of the case law shows that Ontario courts, in approving liquidating plans, focus on whether or not creditors are able to maximize recovery better than in bankruptcy proceedings. This approach seems consistent with Baird and Jackson's creditor maximization theory of restructuring. Meanwhile, the Western courts have adopted a narrower interpretation of "restructuring" such that liquidating plans are seen as outside the CCAA's scope. While this can partially be attributed to confusion over the term "liquidating plan", it nevertheless reveals a strong rehabilitative perspective which seeks to avoid liquidations-- regardless of whether or not this option best maximizes creditors' returns.

(b) The Ontario Approach

Ontario courts have long recognized their inherent jurisdiction [44] to facilitate liquidating sales. In *Lehndorff General Partner Ltd.*, Farley J. indicated the CCAA could involve a liquidating sale scenario when he stated,

> Re-organization may include partial liquidation where it is intended as part ***119** of the process to a return to a long term viability and profitability ... it appears to me that the process of the CCAA is also to protect the interest of creditors and to enable an orderly distribution of affairs. This may involve a winding up or liquidation of a company, or simply a substantial downsizing of its business operations, provided that the same is proposed in the best interest of the creditors generally. [45]

The fact that this statement preceded *TCT Logistics* by over a decade confirms Ontario as a jurisdiction, which applies the CCAA in a flexible manner to accommodate restructurings. [46]

In the aftermath of *Lehndorff*, numerous cases have shown that the proposal of a plan to creditors is not a necessary requirement of a CCAA restructuring plan. [47] For example, in *Canadian Red Cross Society*, [48] the Red Cross was facing $8 Billion in tort claims relating to a blood contamination. After obtaining CCAA protection, the Red Cross gained court approval of the sale and transfer of all its blood supply operations to a new authority before any restructuring plan was even put to the creditors for a vote. Similarly, in *Re Consumers Packaging Inc.*, [49] the court approved of a sale of substantially all of the debtor's assets under the CCAA prior to a creditor vote on the plan. On appeal, the Ontario Court of Appeal confirmed that a pre-plan sale on a going concern basis which results in new ownership of the debtor's assets was a legitimate purpose of the statute. [50] The commercially expedient approach taken by Ontario courts towards restructuring is seen in Ontario cases holding that a plan of compromise and arrangement can be made only to secured creditors where the unsecured creditors are not entitled to any recovery. [51]

***120 (c) Re Fracmaster**

The Alberta Court of Appeal decision in *Re Fracmaster* [52] was controversial as it was highly critical of Ontario's approach to allowing liquidating sales under the CCAA. In that case, the trial court disapproved of a proposed sale of the debtor's assets on the grounds that it did not comprise a going concern sale and was objected to by the secured creditors. The proposed sale was in effect a piecemeal liquidation. The Court of Appeal, in dismissing the appeal, held that while a liquidation of a company's assets under the CCAA had occasionally been allowed,

> [t]he proposed transaction must be in the best interests of the creditors generally and the sale of all or substantially all of the assets of a company to an entirely different entity, with no continued involvement by former creditors and shareholders, does not meet this requirement. [53]

Even while taking into account the fact that the actual case dealt with a piecemeal liquidation, there is no mistaking the statement by the court being anything other than a firm rejection of the general Ontario approach. As such, the case has had the effect of prohibiting liquidating plans under the CCAA in Alberta. [54] Outside of Alberta, the case has largely

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been overlooked. [55] This is likely due to the failure on the court's part to distinguish between the survival of a "company" and the survival of the "business." [56]

(d) Cliffs Over Maple Bay

In *Cliffs over Maple Bay*, [57] the British Columbia Court of Appeal overturned a lower court decision which had granted a stay and authorized DIP financing. In this case, there was no "active" business to "rescue" as the debtor company was a single purpose land developer of a golf course residential project. The debtor only commenced CCAA proceedings after the secured creditors appointed a receiver.

Unlike *Re Fracmaster*, the court in this case did not say that a liquidating plan ***121** under the CCAA was inappropriate or outside the contemplation of the statute. Instead, it held that as the debtor company was attempting to freeze the rights of creditors without any intentions of proposing a plan or compromise, a section 11 stay was inappropriate in the circumstances as a stay should only be granted in furtherance of the CCAA's fundamental purpose. The actual results in both *Re Fracmaster* and *Cliffs over Maple Bay* are not inconsistent with a court's ability to effect a liquidating sale under the CCAA and it has been recognized that an Ontario court would have likely come to a similar decision given these facts. [58]

The obiter in this case brings it into conflict with the Ontario authority and takes us back to the starting point of questioning the purpose of restructuring. Tysoe J.A. held that the fundamental purpose of the legislation is expressed in the long title of the statute [59] and implied that this meant that a debtor is to remain in operation and continue its business for the future benefit of both the company and its creditors. [60] Notwithstanding the fact that no distinction was made between going concern sales and liquidations, this view is still at odds with the prospect of using CCAA plans to effect liquidations, even if this option maximizes creditors' returns.

The court then went on to state:

> I need not decide the point on this appeal, but I query whether the Court should grant a stay under the CCAA to permit a sale, winding up or liquidation without requiring the matter be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose the net proceeds from the sale, winding up or liquidation to be distributed to its creditors. [61]

From a creditors' bargain viewpoint, the lack of a vote would be a cause for concern if this resulted in creditors not being able to realize the maximum amount in returns. However, given that courts in pre-plan liquidating sales are very reluctant to sanction a plan that is objected to by the debtor's secured creditors, [62] there is little cause for concern. Moreover, a creditor vote may be seen as an inefficient use of time and a waste of limited monetary resources. [63]

From a rehabilitation viewpoint, the point of restructuring is to maintain the *status quo* and to protect non-creditor stakeholders (including unsecured creditors), a requirement for a vote would be seen as a means of providing some level protection because should a vote fail to pass, then the liquidating plan would likely be continued under the BIA or a receivership where different priorities are built into ***122** the legislation.

(e) CCAA, Section 36

The newly enacted section 36 of the CCAA [64] provides a regime for a debtor corporation to apply to the court for approval of a sale of assets outside the ordinary course of business. [65] While the provision has resolved all questions of jurisdiction regarding asset sales, it has not resolved the conflicts raised in the case law about the purpose of restructuring or about procedural questions such as whether a plan must be voted on by creditors prior to any asset sale. What it does is basically codify the previous jurisprudence by providing a non-exhaustive list of factors for a court to consider. [66]

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In the recent case of *Re Nortel*, the Ontario court had to consider its jurisdiction to approve of a pre-plan liquidating sale under the CCAA in the absence of a creditor vote and a formal plan. [67] In making this determination, Morawetz J. held that the overarching policy of the CCAA is to facilitate arrangements that might avoid liquidation and preserve the benefit of a going concern business for the "whole economic community including the shareholders, [68] the creditors (both secured and unsecured) and the employees." [69] In dealing with *Cliffs over Maple Bay*, the court concluded that the B.C. Court of Appeal in that case focused on whether the court *should* grant the requested relief and not whether a court *can* grant such relief. [70]

5. CONCLUSION

This paper has argued that the divergence in judicial approaches towards CCAA liquidating plans is at its core a debate about the purpose behind restructuring and "rescue" itself. A review of the case law shows that Ontario has adopted a creditor maximization approach towards restructuring in the sense that the object of restructuring is creditors' recovery--and the preservation of jobs and communities are a *consequence* of this. In contrast, the Western courts reluctance to support "liquidating sales" (compounded by the confusion in the liquidation terminology itself) reveals a pro-restructuring bias where the motivating factor is the protection of ***123** non-creditor constituencies.

In closing, this paper turns to the latest development in the Canwest CCAA saga where leave to appeal has been sought by applicants seeking to challenge the approval of a pre-plan liquidating sale on the basis of a failed competitive bid. Once again, this case raises the issue of the goals of restructuring: do we prioritize the procedural fairness of bidding or do we say that the sole operating criterion is the maximization of creditor recovery. In the absence of a normative theory of insolvency, it will be up to the judiciary to resolve these competing values on a case by case basis.

Notes de bas de page

a1 J.D. University of Toronto, 2010; Student-at-Law, Bennett Jones, LLP. The author is grateful to Professor Anthony Duggan of the University of Toronto for his helpful comments and support. This paper was the winning entry in the 2010 Insolvency Institute of Canada Student Essay Competition.

1 *In re General Motors Corp.*, 407 B.R. 463, 51 Bankr. Ct. Dec. (CRR) 225 (Bankr. S.D. N.Y. 2009).

2 *In re Chrysler LLC*, 405 B.R. 84, 51 Bankr. Ct. Dec. (CRR) 181 (Bankr. S.D. N.Y. 2009); leave to appeal granted 2009 WL 1532960 (2d Cir. 2009) at 87 [B.R.]; affirmed 576 F.3d 108, 51 Bankr. Ct. Dec. (CRR) 254, 62 Collier Bankr. Cas. 2d (MB) 183, 47 Employee Benefits Cas. (BNA) 1513 (2d Cir. 2009); cert. dismissed 130 S. Ct. 41, 174 L. Ed. 2d 626 (2009); cert. granted, judgment vacated 130 S. Ct. 1015, 175 L. Ed. 2d 614, 48 Employee Benefits Cas. (BNA) 2952 (2009); judgment vacated 592 F.3d 370 (2d Cir. 2010); appeal dismissed 592 F.3d 370 (2d Cir. 2010).

3 *In re Lehman Bros. Holdings Inc.*, 2010 WL 4818173 (Bankr. S.D. N.Y. 2010).

4 *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467, [2009] O.J. No. 3169, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

5 *Canwest Global Communications Corp., Re*, 2010 ONSC 1176, 2010 CarswellOnt 1077, 64 C.B.R. (5th) 221 (Ont. S.C.J. [Commercial List]).

6 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA].

7 *U.S. Bankruptcy Code*, 11 U.S.C.

8 Anthony Duggan et al., *Canadian Bankruptcy and Insolvency Law: Cases, Text and Materials*, 2d ed. (Toronto: Emond Montgomery Publications, 2010) at 574.

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9 Janis Sarra, *Creditors Rights and the Public Interest* (Toronto: University of Toronto Press, 2003).

10 CCAA sections 4 and 5 along with the correspondent order of a stay on proceedings under section 11.02.

11 *Dylex Ltd., Re*, 1995 CarswellOnt 54, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]); *Royal Oak Mines Inc., Re*, 1999 CarswellOnt 792, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 2003 CarswellBC 1399, [2003] B.C.J. No. 1335, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.); *Stelco Inc., Re*, 2005 CarswellOnt 1188, [2005] O.J. No. 1171, 75 O.R. (3d) 5, 253 D.L.R. (4th) 109, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142 (Ont. C.A.) at para. 32.

12 Shelley C. Fitzpatrick, "Liquidating CCAAs--Are We Praying to False Gods?" in Janis Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Thomson Carswell, 2008) at 42.

13 *Ibid.*

14 *Ursel Investments Ltd., Re*, 1990 CarswellSask 34, 2 C.B.R. (3d) 260 (Sask. Q.B.); reversed 1992 CarswellSask 19, [1992] 3 W.W.R. 106, 89 D.L.R. (4th) 246, 10 C.B.R. (3d) 61, 97 Sask. R. 170, 12 W.A.C. 170 (Sask. C.A.).

15 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 1990 CarswellBC 394, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136 (B.C. C.A.) at para. 10.

16 These cases have been taken as authority for the position that the CCAA should not be used for liquidating the debtor's assets. For example, *Pope & Talbot Ltd., Re*, 2008 BCSC 1000, 2008 CarswellBC 1726, 46 C.B.R. (5th) 34 (B.C. S.C. [In Chambers]) at paras. 24-28.

17 Bill Kaplan, "Liquidating CCAA: Judicial Discretion Gone Awry?" in Janis Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Thomson Carswell, 2008) at 92.

18 Stanley Edwards, "Reorganizations Under the *Companies' Creditors Arrangement Act*" (1947) 25 Can. Bar Rev. 587 at 592.

19 *Supra*, n. 17 at 86.

20 *Supra*, n. 9 at 31.

21 Canwest, Advertiser Fact Sheet, online: <http:// www.canwestglobal.com/about/PDFs/CLP_Advertiser_Fact %20Sheet_FINAL.pdf>.

22 *In the Matter of a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C) Ltd., 6326765 Canada Inc. and Novar Inc.*, Ontario Court of Justice (Commercial List), Factum of the Applicants July 1, 2009, online: <http://65.200.149.14/indalex/docs/Factum.pdf>.

23 *Supra*, n. 17 at 86.

24 *Ivaco Inc., Re*, 2004 CarswellOnt 3563, [2004] O.J. No. 3625 (Ont. S.C.J. [Commercial List]); *Canwest Publishing Inc./ Publications Canwest Inc., Re*, 2010 ONSC 222, 2010 CarswellOnt 212, [2010] O.J. No. 188, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]).

25 In *Creditor Rights and the Public Interests*, Professor Sarra develops a conceptual model for Canadian restructuring law. Specifically, the "Enterprise Wealth Maximization" is predicated on the idea that every entity affected by bankruptcy should have a right to be heard in the proceeding even though these interests do not have a money investment at risk. Sarra's model draws from the U.S. theories and reflects a strong rehabilitation point of view.

26 Andrew Kent et al., "Canadian Business Restructuring Law: When Should a Court Say 'No"'? (2008) 24 B.F.L.R. 1 at 5.

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27 Douglas Baird, "Loss Distribution, Forum Shopping and Bankruptcy: A Reply to Professor Warren" (1987) 54 U. Chicago L. Rev. 815. Thomas Jackson, *The Logic and Limits of Bankruptcy* (Cambridge: Harvard University Press, 1986).

28 Elizabeth Warren, "Bankruptcy Policy" (1987) 54 U. Chicago L. Rev. 75.

29 Professor Edward Altman in his lecture "Current Conditions and Outlook in Global Credit Markets" spoke about the "Chapter 22, 33, etc." phenomenon where companies repeatedly underwent Chapter 11 restructuring plans. Edward Altman, "Global Credit Meltdown" (Public Lecture, Toronto, March 3, 2010).

30 "Arguably, creditors should not be burdened with the priority of workers in a bankruptcy when shareholders are not required to bear this burden outside of bankruptcy." *Supra*, n. 9 at 39.

31 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 2008 CarswellOnt 4811, [2008] O.J. No. 3164, 92 O.R. (3d) 513, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) at paras. 50-52; leave to appeal refused 2008 CarswellOnt 5432, 2008 CarswellOnt 5433, [2008] S.C.C.A. No. 337, 257 O.A.C. 400 (note), 390 N.R. 393 (note) (S.C.C.) [emphasis in the original].

32 *Air Canada, Re*, 2004 CarswellOnt 870, 47 C.B.R. (4th) 189 (Ont. S.C.J. [Commercial List]) at para. 27.

33 *Algoma Steel Corp. v. Royal Bank*, 1992 CarswellOnt 162, 11 C.B.R. (3d) 1 (Ont. S.C.J.); *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185, [1992] O.J. No. 1946, 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339 (Ont. Gen. Div.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 1990 CarswellBC 232, [1990] B.C.J. No. 2241, 50 B.C.L.R. (2d) 207, [1991] 1 W.W.R. 219 (B.C. C.A.); leave to appeal refused [1990] 2 S.C.R. x, 50 B.C.L.R. (2d) xxviii (S.C.C.).

34 *GMAC Commercial Credit Corp.--Canada v. TCT Logistics Inc.*, 2006 SCC 35, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, [2006] S.C.J. No. 36, [2006] 2 S.C.R. 123, 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, 215 O.A.C. 313, 351 N.R. 326, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, 271 D.L.R. (4th) 193 (S.C.C.) [*T.C.T. Logistics Inc.*].

35 *Supra*, n. 17.

36 Peter Farkas & John Sandrelli, "Liquidating CCAAs: Do They Have a Future?" (Fasken Martineau DuMoulin LLP, October 2009), online: <http:// www.fmclaw.com/upload/en/hidden%20files/sandrellijohn_liquidating_ccaas.pdf>. Note that BIA section 243 sets out a new "National" Receiver that can seize assets in all jurisdictions and also attempts to protect receivers from the type of liability that arose in the TCT case (s. 14.06(1.2)) but it remains to be seen how effective this amendment as receiverships have generally slowed down.

37 Stephanie Ben-Ishai & Stephen Lubben, "Sales or Plans: A Comparative Account of the 'New' Corporate Reorganization", online: (2010) Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=1541265>.

38 *Canadian Airlines Corp., Re*, 2000 CarswellAlta 622, [2000] A.J. No. 1692, 19 C.B.R. (4th) 1 (Alta. Q.B.).

39 *Supra*, n. 17.

40 Roderick Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009) at 315.

41 It is worth noting that even under the BIA section 81.1, suppliers' rights can largely be illusory as there are strict statutory criteria to realize on this right. See *T. Eaton Co., Re*, 1999 CarswellOnt 2747, [1999] O.J. No. 3277, 12 C.B.R. (4th) 130 (Ont. S.C.J. [Commercial List]).

42 *Supra*, n. 12 at 61.

43 Alan Brown, "Liquidating Under the CCAA: an Overview of Recent Developments in Cliffs Over Maple Bay and Pope and Talbot" (2008) 12 Cred. & B. Lit. 686.

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44 A discussion of inherent jurisdiction" and "statutory jurisdiction" is beyond the scope of this paper. Please see John Sandrelli, "Jurisdiction of the Court in CCAA Proceedings: Inherent Jurisdiction vs. Statutory Discretion" in *Canadian Bar Association Pan-Canadian Conference on Bankruptcy, Insolvency and Restructuring Law* (Fasken, Martineau DuMoulin LLP, 2005), online: <http:// www.fmc-law.com/upload/en/publications/20052006/2634262_Jursidiction_of_the_ Court_in_CCA.pdf>.

45 *Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

46 *Supra*, n. 17 at 97.

47 *Ibid.*, at 96; *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346, [1998] O.J. No. 3306, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]); additional reasons at 1998 CarswellOnt 3347, 5 C.B.R. (4th) 319 (Ont. Gen. Div. [Commercial List]); additional reasons at 1998 CarswellOnt 3345, 5 C.B.R. (4th) 321 (Ont. Gen. Div. [Commercial List]); leave to appeal refused 1998 CarswellOnt 5967, [1998] O.J. No. 6562, 32 C.B.R. (4th) 21 (Ont. C.A.); and *Re Pope & Talbot Ltd.*, BCSC Vancouver Registry, Action No. S077839.

48 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346, [1998] O.J. No. 3306, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]); additional reasons at 1998 CarswellOnt 3347, 5 C.B.R. (4th) 319 (Ont. Gen. Div. [Commercial List]); additional reasons at 1998 CarswellOnt 3345, 5 C.B.R. (4th) 321 (Ont. Gen. Div. [Commercial List]); leave to appeal refused 1998 CarswellOnt 5967, [1998] O.J. No. 6562, 32 C.B.R. (4th) 21 (Ont. C.A.).

49 *Consumers Packaging Inc., Re*, 2001 CarswellOnt 3482, [2001] O.J. No. 3908, 150 O.A.C. 384, 27 C.B.R. (4th) 197, 12 C.P.C. (5th) 208 (Ont. C.A.).

50 "The sale of Consumers Glass operations as a going concern pursuant to the Owens bid, allows the preservation of Consumers business (albeit new ownership) and is therefore consistent with the purpose of the CCAA." *Ibid.*

51 *1078385 Ontario Ltd., Re*, 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152, 206 O.A.C. 17 (Ont. C.A.); and *Anvil Range Mining Corp., Re*, 2001 CarswellOnt 1325, [2001] O.J. No. 1453, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]); affirmed 2002 CarswellOnt 2254, [2002] O.J. No. 2606, 34 C.B.R. (4th) 157 (Ont. C.A.); additional reasons at 2002 CarswellOnt 3687, 38 C.B.R. (4th) 5 (Ont. C.A.); leave to appeal refused 2003 CarswellOnt 730, 2003 CarswellOnt 731, 310 N.R. 200 (note), 180 O.A.C. 399 (note) (S.C.C.).

52 *Fracmaster Ltd., Re*, 1999 ABQB 379, 1999 CarswellAlta 461, [1999] A.J. No. 566, 245 A.R. 102, 11 C.B.R. (4th) 204 (Alta. Q.B.); affirmed 1999 ABCA 178, 1999 CarswellAlta 539, [1999] A.J. No. 675, 244 A.R. 93, 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.).

53 *Ibid.*, at para. 16.

54 Christa Nicholson, "Corporate Governance, Liquidation Sales and More; The Alberta CCAA Restructuring of Skyreach Equipment Ltd." in Janis Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Thomson Carswell, 2006).

55 It is useful to bear in mind that this case occurred prior to *TCT Logistics*.

56 *Supra*, n. 17 at 119.

57 *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 2008 CarswellBC 1758, [2008] B.C.J. No. 1587, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.).

58 Linc Rogers, "Latest Developments in CCAA Sales" in Law Society of Upper Canada, *The Six Minute Debtor- Creditor and Insolvency Lawyer* (2009), online: <http://www.blakes.com/english/publications/RI/pdf/Paper154.pdf>.

59 *E.g.*, "*An Act to Facilitate Compromises and arrangements between Companies and their Creditors*."

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60 *Cliffs Over*, *supra*, n. 58 at paras. 28-30.

61 *Ibid.*, at para. 32.

62 *Supra*, n. 51.

63 *Supra*, n. 17 at 123. Indeed, as Justice Peck noted in a 2010 lecture, “Time is the enemy in insolvency.” See Justice Peck, Bankruptcy Law Lecture (University of Toronto, May 2010).

64 The amendment came into force on September 18, 2009.

65 *Supra*, n. 12 at 44.

66 CCAA, *supra*, n. 6 at s. 36(c). Some of these factors include the reasonableness of the sale process, the monitor's report on the disposition, etc.

67 *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467, [2009] O.J. No. 3169, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

68 Despite ruling that the asset sale was in the best interests of “all stakeholders,” shareholders are effectively eliminated from this equation with the comment “the value of equity in an insolvent debtor is dubious, at best, and in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship.” *Ibid.*, at para. 40.

69 *Supra*, n. 67 at para. 33.

70 The court distinguished *Cliffs over Maple Bay* by confining it to its facts: no active business to recover.

27 BFLR-CAN 111

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linea transversa (**lin**-ee-ə trans-**vər**-sə), *n.* [Latin "transverse line"] *Roman law.* The relationship between persons in the collateral line of descent, such as uncle and nephew. — Also termed *linea obliqua.*

lineage (**lin**-ee-əj). Ancestry and progeny; family, ascending or descending.

lineal (**lin**-ee-əl), *adj.* Derived from or relating to common ancestors, esp. in a direct line; hereditary. Cf. COLLATERAL (1).

lineal, *n.* A lineal descendant; a direct blood relative.

lineal consanguinity. See CONSANGUINITY.

lineal descent. See DESCENT.

lineal heir. See HEIR.

lineal warranty. See WARRANTY (1).

linea obliqua. See *linea transversa* under LINEA.

linea reta. See LINEA.

linea transversalis. See LINEA.

line-item veto. See VETO.

line of credit. The maximum amount of borrowing power extended to a borrower by a given lender, to be drawn upon by the borrower as needed. — Also termed *credit line.*

line of demarcation. See DEMARCATION LINE.

line of title. CHAIN OF TITLE.

lines and corners. See METES AND BOUNDS.

lineup. A police identification procedure in which a criminal suspect and other physically similar persons are shown to the victim or a witness to determine whether the suspect can be identified as the perpetrator of the crime. — Also termed (in BrE) *identification parade.* Cf. SHOWUP.

***Lingle* test.** *Labor law.* The principle that a union member's state-law claim against the employer is not preempted by the Labor–Management Relations Act if resolution of the state-law claim does not require an interpretation of the collective-bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988). See MARCUS MODEL; WHITE MODEL.

link, *n.* **1.** A unit in a connected series; something that binds separate things <link in the chain of title>. **2.** A unit of land measurement <one link equals 7.92 inches>.

link financing. See FINANCING.

link-in-chain principle. *Criminal procedure.* The principle that a criminal defendant's Fifth Amendment privilege against self-incrimination protects the defendant from not only answering directly incriminating questions but also giving answers that might connect the defendant to criminal activity in the chain of evidence.

LIP. *abbr.* LEGALLY INCAPACITATED PERSON.

liquere (li-**kweer**-ee), *vb.* [Latin] *Roman law.* To be clear, evident, or apparent. • When a judex appointed to try a civil case swore under oath *sibi non liquere* ("that it was not clear to him"), he would be discharged from deciding the case. See NON LIQUET.

liquid, *adj.* **1.** (Of an asset) capable of being readily converted into cash. **2.** (Of a person or entity) possessing assets that can be readily converted into cash.

liquid asset. See *current asset* under ASSET.

liquidate, *vb.* **1.** To determine by litigation or agreement the amount of (damages or indebtedness). **2.** To settle (an obligation) by payment or other adjustment. **3.** To ascertain the liabilities and distribute the assets of (an entity), esp. in bankruptcy or dissolution. **4.** To convert (a nonliquid asset) into cash. **5.** To liquidate something, such as a debt or corporation. **6.** *Slang.* To get rid of (a person), esp. by killing.

liquidated, *adj.* **1.** (Of an amount or debt) settled or determined, esp. by agreement. **2.** (Of an asset or assets) converted into cash.

liquidated amount. A figure readily computed, based on an agreement's terms.

liquidated claim. See CLAIM (3).

liquidated damages. See DAMAGES.

liquidated-damages clause. A contractual provision that determines in advance the measure of damages if a party breaches the agreement. • Traditionally, courts have upheld such a clause unless the agreed-on sum is deemed a penalty for one of the following reasons: (1) the sum grossly exceeds the probable damages on breach, (2) the same sum is made payable for any variety of different breaches (some major, some minor), or (3) a mere delay in payment has been listed among the events of default. Cf. LIMITATION-OF-REMEDIES CLAUSE; PENALTY CLAUSE.

liquidated debt. See DEBT.

liquidated demand. See *liquidated claim* under CLAIM (2).

liquidating distribution. See DISTRIBUTION.

liquidating dividend. See *liquidation dividend* under DIVIDEND.

liquidating partner. See PARTNER.

liquidating price. See *redemption price* under PRICE.

liquidating trust. See TRUST.

liquidation, *n.* **1.** The act of determining by agreement or by litigation the exact amount of something (as a debt or damages) that before was uncertain. **2.** The act of settling a debt by payment or other satisfaction. **3.** The act or process of converting assets into cash, esp. to settle debts.

one-month liquidation. A special election, available to certain shareholders, that determines how the distributions received in liquidation by electing shareholders will be treated for federal income-tax purposes. • To qualify for the election, the corporation must be completely liquidated within one month. IRC § 333 (26 USCA § 333).

partial liquidation. A liquidation that does not completely dispose of a company's assets; esp., a liquidation occurring when some corporate assets are distributed to shareholders (usu. on a pro rata basis) and the corporation continues to operate in a restricted form.

twelve-month liquidation. A liquidation occurring within 12 months from adoption of the liquidation plan to complete liquidation, subject to a tax law prohibiting the company from recognizing any gains or losses on property sold within that time frame. • Generally, inventory will not be included unless a bulk sale occurs. IRC (26 USCA) § 337.

4. *Bankruptcy.* The process — under Chapter 7 of the Bankruptcy Code — of collecting a debtor's nonexempt property, converting that property to cash, and distributing the cash to the various creditors. • Upon liquidation, the debtor hopes to obtain a discharge, which releases the debtor from any further personal liability for prebankruptcy debts. Cf. REHABILITATION (3).

liquidation dividend. See DIVIDEND.

liquidation preference. See PREFERENCE.

liquidation price. See PRICE.

liquidation value. See VALUE.

liquidator. A person appointed to wind up a business's affairs, esp. by selling off its assets. See LIQUIDATION (3), (4). Cf. RECEIVER.

liquid debt. See DEBT.

liquidity. 1. The quality or state of being readily convertible to cash. **2.** *Securities.* The characteristic of having enough units in the market that large transactions can occur without substantial price variations. • Most stocks traded on the New York Stock Exchange, for example, have liquidity.

liquidity ratio. The ratio between a person's or entity's assets that are held in cash or liquid form and the amount of the person's or entity's current liabilities, indicating the ability to pay current debts as they come due.

liquor offense. See OFFENSE (1).

lis (lis). [Latin] A piece of litigation; a controversy or dispute.

lis alibi pendens (lis **al**-ə-bɪ **pen**-dənz). [Latin] A lawsuit pending elsewhere.

lis mota (lis **moh**-tə), *n.* [Latin "a lawsuit moved"] *Hist.* A dispute that has begun and later forms the basis of a lawsuit.

lis pendens (lis **pen**-dənz). [Latin "a pending lawsuit"] **1.** A pending lawsuit. **2.** The jurisdiction, power, or control acquired by a court over property while a legal action is pending. **3.** A notice, recorded in the chain of title to real

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secured assets. She did not claim that the BIA excluded all provincial regulation of creditors' remedies in insolvency, but the Saskatchewan law placed such "important obstacles" in the way of secured creditors that the provincial law frustrated "the federal purpose of providing a timely, flexible and context-sensitive remedy for secured creditors."[37h]

16.4 Negative implication

(a) Covering the field

Cases where one law expressly contradicts another obviously call for the application of the paramountcy doctrine. We have seen that the courts have expanded the concept of express contradiction to include the case where a provincial law would frustrate the purpose of a federal law. The question to be examined in this section is whether they are the only cases that attract the doctrine or whether lesser kinds of incompatibility will also suffice. Where the federal Parliament has enacted a law on a particular topic, does this preclude a province from enacting a different law on the same topic? If the provincial law does not contradict the federal law, but adds to it or supplements it, is the provincial law rendered inoperative by the federal law? And what if the provincial law is exactly the same as the federal law? The short answer to these questions is that only express contradiction suffices to invoke the paramountcy doctrine. A provincial law that is supplementary or duplicative of a federal law is not deemed to be inconsistent with the federal law.

Canadian courts, by confining the doctrine of paramountcy to such a narrow compass, have rejected a "covering the field" (or negative implication) test of inconsistency, which is employed by the courts of the United States and Australia.[38] Under this test, a federal law may be interpreted as covering the field and precluding any provincial laws in that field, even if they are not contradictory of the federal law.[39] In other words, a federal law may be read as including not only its express provisions, but also a "negative implication" that those express provisions should not be supplemented or duplicated by any provincial law on the

37h *Id.*, paras. 119.

38 For an authoritative statement of the rule of "preemption" (as it is usually called) in the United States, see *Pennsylvania v. Nelson* (1956) 359 U.S. 497, 501-505; but compare *Wyeth v. Levine* (2009) 555 U.S. xxx (federal drug labelling requirements imposed by federal law do not pre-empt duty to warn imposed by the state's common law of negligence; both federal and state laws can be obeyed by giving the stronger warning called for by the stricter state law); and for the rule of "inconsistency" (as it is usually called) in Australia, *see Ex parte McLean* (1930) 43 C.L.R. 472, 483. These broad definitions of inconsistency are, of course, consistent with the more centralized interpretation of the federal distribution of powers in the United States and Australia. For a detailed comparison of the Australian and Canadian law, see Gilbert, *Australian and Canadian Federalism 1867-1984* (1986), chs. 8, 9.

39 This interpretation is not automatic, but turns on a judicial finding that the federal law was to be the sole and exclusive law in the field. This finding, and the definition of the "field" that has been covered, confer a degree of judicial discretion that makes the law quite unpredictable.

same subject. Under this test, the question is whether the provincial law is in the same "field", or is upon the same subject, as the federal law: if so, the provincial law is deemed to be inconsistent with the federal law.

The negative implication (or covering the field) test of inconsistency seems to have been applied on one occasion by the Privy Council. In the *Local Prohibition* case (1896),[40] the Privy Council held that federal local-option temperance legislation would render inoperative similar provincial legislation if both laws were ever adopted in the same district. Both laws prohibited the retail sale of liquor, the only differences residing in the definition of quantities which made a sale "wholesale" and therefore permitted. It was possible to comply with both laws by complying with the stricter of the two, that is, by selling liquor only in quantities which fitted the narrowest definition of wholesale sale. The direct contradiction test was therefore not satisfied,[41] and their lordships' finding of inconsistency, although not explained in the opinion, must have been premised on a negative implication or coverage of the field.[42]

A statement of the negative implication (or covering the field) test of inconsistency is to be found in the dissenting opinion of Cartwright J. in *O'Grady v. Sparling* (1960).[43] In that case, a federal law (the Criminal Code) made it an offence to drive a motor vehicle recklessly; a provincial law (Manitoba's Highway Traffic Act) made it an offence to drive carelessly ("without due care and attention"). The two laws did not expressly contradict each other because it was possible to obey both of them by adhering to the stricter provincial standard. Nonetheless, Cartwright J. (who had dissented in the *Saskatchewan Breathalyzer* case) would have held that the two laws were inconsistent. With the concurrence of Locke J., he said:[44]

> In my opinion when Parliament has expressed in an Act its decision that a certain kind or degree of negligence in the operation of a motor vehicle shall be punishable as a crime against the state it follows that it has decided that no less culpable kind or degree of negligence in such operation shall be so punishable. By necessary implication the Act says not only what kinds or degrees of negligence shall be punishable but also what kinds or degrees shall not.

The premise of this reasoning is the inference that Parliament covered the field of bad driving when it enacted the Criminal Code offence of reckless driving, and thereby preempted any provincial law in the same field. What Cartwright J. was willing to do was to add to the express terms of the federal statute an implication that there should be no provincial regulation of the same subject matter.

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40 *A.-G. Ont. v. A.G. Can.* (Local Prohibition) [1896] A.C. 348.

41 Contra, W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 McGill L.J. 185, 190-191; B. Laskin, "Occupying the Field: Paramountcy in Penal Legislation" (1963) 41 Can. Bar Rev. 234, 243.

42 This part of the decision was not obiter, because it formed part of their lordships' answer to one of the questions referred for decision; on the other hand, the existence of inconsistency was described as "obvious" and was not carefully considered.

43 [1960] S.C.R. 804.

44 *Id.*, 820-821.

In *O'Grady v. Sparling,* Cartwright J.'s opinion was a dissenting one. The majority of the Court, in an opinion written by Judson J., rejected the negative implication (or covering the field) test, holding that "both provisions can live together and operate concurrently".[45] The two laws were therefore not inconsistent and paramountcy did not apply. The negative implication test was also rejected in two other cases which the Court decided at the same time. In *Stephens v. The*

(Continued on page 16-11)

45 *Id.*, 811.

Queen (1960),[46] the question was whether there was inconsistency between a federal (Criminal Code) offence of failing to remain at the scene of an accident "with intent to escape civil or criminal liability", and a provincial (Highway Traffic Act) offence of failing to remain at the scene of an accident. In this case, as in *O'Grady*, it was possible to obey both laws by complying with the stricter of the two, which was the provincial one because it lacked the ingredient of intention to escape liability. Again the majority of the Court, in an opinion written this time by Kerwin C.J., held that there was no inconsistency; and again Cartwright J. (with Locke J.) dissented on the basis of a negative implication. In *Smith v. The Queen* (1960),[47] the two laws were virtually identical in their effect: the federal (Criminal Code) offence was making, circulating or publishing a false prospectus; the provincial (Securities Act) offence was furnishing false information in a prospectus. Again the Court held that the two laws were not inconsistent. Kerwin C.J., who wrote one of the two concurring opinions, said that the two laws could "co-exist";[48] Martland J., who wrote the other, made his already-quoted statement that there was "no conflict in the sense that compliance with one law involves breach of the other";[49] Cartwright J. again dissented, this time attracting the support of Ritchie J. as well as Locke J.

In *O'Grady*, *Stephens* and *Smith*, none of the majority or concurring opinions attempted to deal with Cartwright J.'s argument that inconsistency could arise by negative implication. In fact, with the exception of Martland J.'s "compliance" dictum in *Smith*, none of the opinions even offered a rival definition of inconsistency. These failures left in doubt the exact status of negative implication (or covering the field) as a test of inconsistency. It was not clear whether the majority judges had rejected negative implication in principle for all cases, or whether they had decided merely that no negative implication should be drawn from the particular federal laws in issue in *O'Grady*, *Stephens* and *Smith*. Since those cases were decided, the Supreme Court of Canada has made clear that the former view is correct. A series of cases has decided that the negative implication test no longer has any place in Canadian constitutional law.

The first case is *Mann v. The Queen* (1966).[50] This case concerned a new federal Criminal Code offence of driving a motor vehicle "in a manner that is dangerous to the public". This "dangerous driving" offence stipulated a stricter standard of care than the "reckless driving" offence which was the federal offence in issue in *O'Grady v. Sparling*. Did this new offence render inoperative the provincial "careless driving" offences? In *Mann*, the Court held unanimously that paramountcy did not apply. This case was a clearer one for Cartwright J.'s negative implication than *O'Grady v. Sparling*, because the federal standard was now so

46 [1960] S.C.R. 823.
47 [1960] S.C.R. 776.
48 *Id.*, 781.
49 *Id.*, 800, quoted at note 18, above.
50 [1966] S.C.R. 238.

close to the provincial one. But Cartwright J. wrote a concurring opinion in *Mann*, following *O'Grady v. Sparling* and not mentioning the negative implication test. Obviously, Cartwright J. was bowing to the doctrine of precedent, but it is significant that he did not consider that the clearer facts of *Mann* justified his persisting with the negative implication test.

In *Ross v. Registrar of Motor Vehicles* (1973)[51] and *Bell v. A.-G. P.E.I.* (1973),[52] the question arose whether there was inconsistency between a federal law conferring a judicial discretion to prohibit a convicted "drunk driver" from driving and a provincial law imposing an automatic suspension of a convicted drunk driver's driving licence. The question had first arisen in *Provincial Secretary of P.E.I. v. Egan* (1941),[53] when the Criminal Code included as a penalty for certain impaired driving offences the power to prohibit the convicted defendant from driving anywhere in Canada for up to three years. Egan was convicted of impaired driving, but the magistrate in imposing sentence exercised his discretion to make no order prohibiting Egan from driving. However, Egan's driving licence had been issued by Prince Edward Island, and that province's Highway Traffic Act automatically suspended for 12 months the licence of anyone who, like Egan, had been convicted of an impaired driving offence. Egan therefore lost his licence for a year and was effectively prohibited from driving his car for that period of time. The Supreme Court of Canada unanimously decided that Egan had indeed lost his licence: the provincial suspension was not inconsistent with the federal discretion. Cartwright J. was not on the Court in 1941, and no judge made the argument that a federal discretion to prohibit driving carried the negative implication that there should be no automatic suspension of the convicted driver's licence to drive. Although the reasoning of the judges confuses validity with inconsistency and does not clarify the ground for decision on the latter question, the reason for the result must have been that both enactments could be obeyed by Egan by not driving for a year!

The new point which had to be decided in *Ross* and *Bell* arose out of an amendment to the Criminal Code in 1972 which enlarged the discretion of the court in sentencing impaired drivers. Whereas before 1972 any court-imposed prohibition on driving had to be for a continuous period of time, the 1972 amendment authorized the sentencing court to prohibit driving on an intermittent basis "at such times and places as may be specified in the order". In *Ross*, the sentencing Court had prohibited the defendant "from driving for a period of six months, except Monday to Friday, 8 a.m. to 5:45 p.m., in the course of employment and going to and from work". The purpose of the 1972 amendment, as exemplified by the order in *Ross*, was to enable the sentencing court to tailor its prohibition order to the facts of the case; and, in particular, to impose a more lenient restraint on a defendant who was dependent upon driving for his livelihood. It was obvi-

51 [1975] 1 S.C.R. 5.
52 [1975] 1 S.C.R. 25.
53 [1941] S.C.R. 396.

ESSENTIALS OF
CANADIAN LAW

PENSION LAW

SECOND EDITION

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workforce, with employees relocating to jobs with the same employer in a number of different provinces during their careers. The question here is whether to adopt a "final location" approach to determining the employee's rights on plan wind up or whether to adopt a so-called "checkerboard" approach. Under the final location approach, the laws of the jurisdiction where the employee has terminated employment applies to all pension credits earned throughout the employee's career with the employer. Under the checkerboard approach, alternatively, each period of service in different jurisdictions is forever subject to that jurisdiction's laws so that on termination of employment, each period during which pension credits were earned is subject to different legislative requirements.

To illustrate, where an Ontario-registered plan is partially wound up, does the *PBA* apply to an employee's pension credits earned in Ontario if the employee is working in Alberta at the time of the wind up? Is that employee entitled to surplus in respect of the period of service he or she earned in Ontario (the checkerboard approach) or is he or she only entitled to immediate vesting, the principal right conferred in Alberta to employees affected by a partial wind up (the final location approach)?

Each approach has its advantages and disadvantages as far as the administrator, employer, and employees are concerned. It is thought that most Canadian pension regulators consider the final location approach as the better one.[210] However, as stated, this question is not entirely settled and will likely require a further judicial determination in the absence of legislative clarification.

4) Employer Funding Obligations

a) Introduction

As is the case in an ongoing pension plan, an employer responsible for a plan that is wound up has an obligation to make contributions to the pension plan to ensure that all benefit obligations payable under the plan are met.[211] It is in this respect that the *PBA*'s funding provisions on wind up reflect "the vested nature of pension plans."[212] An employer's

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210 The Canadian Association of Pension Supervisory Authorities [CAPSA] has proposed that the final location approach should govern, generally: see *Agreement Respecting Multi-Jurisdictional Pension Plans* (Toronto: Canadian Association of Pension Supervisory Authorities, 2011) s 7.

211 *Monsanto*, above note 64 at para 44.

212 *Dayco (Canada) Ltd v CAW-Canada* (1993), 102 DLR (4th) 609 at 646 (SCC) [*Dayco*].

failure to comply with its funding obligations on wind up is a "serious matter" that may engage regulatory prosecution.[213]

Sometimes, particularly in circumstances where the plan is wound up because of the employer's insolvency and there is no successor employer who has agreed to assume the pension obligations, there will be no one to fund the benefits. This section explains an employer's funding obligations on plan wind up and the rules that apply in the event the employer or the pension fund are insolvent at the time of wind up. Also discussed are the general principles relating to claims made under the Pension Benefits Guarantee Fund (PBGF) and the very different funding rules and exceptions that are applicable on the wind up of a MEPP or JSPP.

b) Payment of contributions due

On plan wind up, the employer is required to pay into the pension fund all contributions and amounts owing under the plan terms, the *PBA*, and regulations that are due and accrued and that have not yet been paid into the fund.[214] The employer must remit the contributions necessary to pay all accrued pension benefits.[215] This obligation exists in all jurisdictions.[216] This rule applies only to contributions that were due as at the wind-up date and does not apply to special payments owing by the employer and that have arisen as a result of the wind up, which are discussed below. Because accrued payment obligations are employer contributions that were already "due" upon wind up, the *PBA*'s deemed statutory trust extends to the quantum of these funds.[217]

Generally, an employer must fund its special payments over five annual payments commencing at the effective date of the wind up.[218] There are exceptions to this rule for certain MEPPs and JSPPs and also where temporary solvency funding relief measures have been implemented.

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213 *Corewall Inc v Ontario (Superintendent of Pensions)* (1995), 12 CCPB 103 (PCO).

214 *PBA*, s 75(1)(a). See also Chapter 7, Section B(4)(b). See also *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at paras 29–32 [*Indalex*]; *Toronto-Dominion Bank v Usarco Ltd* (1991), 42 ETR 235 (Ont Ct Gen Div).

215 *PBA*, s 75(1)(b); *Indalex, ibid.*

216 Federal (*PBSA*, s 29(6)); Alberta (*AEPPA*, s 73); British Columbia (*BCPBSA*, s 51); Manitoba (*MPBA*, s 26(3)); New Brunswick (*NBPBA*, s 65); Newfoundland and Labrador (*NLPBA*, s 61); Nova Scotia (*NSPBA*, s 80); Quebec (*QSPPA*, s 228); Saskatchewan (*SPBA*, s 54(1)).

217 See Chapter 7, Section B(7).

218 *PBA*, s 75; *PBA*, Reg, s 31.

If there is a surplus in the plan at the time of the wind up and if the plan permits it, the employer may be able to satisfy its contribution obligations under this provision by taking a contribution holiday.[219]

c) Pension plan has a wind-up surplus

If the wind-up report discloses a surplus in the pension fund after all benefits and wind-up liabilities are accounted for, then no special payments must made by the employer to the pension fund. This rule is the same whether the employer was solvent or insolvent upon the wind up.

Where the plan has a wind-up surplus, the administrator or employer has an obligation to deal with and distribute the surplus.[220] The employer may be a beneficiary of any surplus distributed upon the wind up.[221] If the employer is bankrupt and the plan is wound up with a surplus, the employer's secured or other creditors may be beneficiaries of the surplus.

d) Employer is solvent and plan has a wind-up deficiency

A wind-up report filed by the plan administrator may disclose a deficit in the pension fund.[222] Because of the statutory benefit enhancements and acceleration of pension entitlements, a wind up increases the aggregate liabilities of the pension fund. The wind up triggers benefits that would not ordinarily be paid to some employees, such as grow-in benefits. As a result, the employer becomes liable for the additional costs associated with funding so-called wind-up liabilities.

A wind-up deficiency arises where the assets in the pension fund are insufficient to pay all accrued benefits, including wind-up liabilities, owing to employees. Where a pension fund had a solvency deficiency prior to wind up, the solvency deficiency becomes a wind-up deficiency.

Where a wind-up report discloses a wind-up deficiency, the employer will be required to make special payments to fund the deficiency.[223]

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219 See Chapter 7, Section B(8).

220 See Sections C(2)(f) and C(3)(i), above in this chapter.

221 See Chapter 10, Section C.

222 *PBA*, Reg, s 30.

223 *PBA*, s 75(1)(b). Included here are amounts required to be paid by an employer to maintain the "50 percent cost-sharing" level required by *PBA*, s 39(3) (see Chapter 5, Section C(5)(d)) and all benefits guaranteed by the PBGF. The employer must pay the amount by which the Ontario wind up liability, exclusive of the unfunded portion of non-plan-vested benefits, exceeds the value of plan assets allocated for payment of pension benefits accrued with respect to employment in Ontario. The employer is not liable for the unfunded portion (based on the wind up funded ratio) of non-plan-vested benefits: FSCO Policy W100-102 (December 2004).

In determining who the employer is for the purpose of funding a wind-up liability, the relevant criterion is which person or organization pays remuneration to the employees accruing benefits in the pension plan.[224]

If an employer in a prior year has paid more than its minimum-required contributions, it may apply all or a portion of the so-called "prior year credit balance" against the normal cost or special payments due and not yet paid on the wind-up date.[225]

Generally, the employer may either fund the wind-up deficiency immediately or, failing which, the wind-up report must set out a proposal for the funding over a period of time. In the event the employer funds the wind-up deficiency immediately, the Superintendent may proceed with approving the wind-up report as if there was no deficiency arising on the wind up.[226] If the wind-up deficiency is not paid off immediately, the proposal in the wind-up report must generally provide for the employer to pay it off, at a minimum, by equal annual instalments over a five-year period.[227]

Until the wind-up liability is fully funded by the employer, the plan's funded status must be reviewed annually by an actuary and the administrator must file supplementary wind-up reports on the same basis.[228] Most other jurisdictions have similar rules.[229]

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224 *Victorian Order of Nurses for Canada v Ontario (Superintendent of Financial Services) et al* (2008), 78 CCPB 244 (Ont FST).

225 See *PBA*, Reg, ss 4(3), 5(13), and 5(16)–(16.2) and FSCO Policy W100-106 (September 2008).

226 Where the employer funds the deficit by a lump-sum payment and the actuary files a certification that all wind-up liabilities have been fully funded, the benefits can be paid: FSCO Policy W100-102 (December 2004).

227 *PBA*, s 75(2) and Reg, s 31(2). As a minimum, the deficit must be funded by annual special payments, payable annually in advance, over a maximum period of five years commencing at the effective date of wind up: FSCO Policy W100-102 (December 2004).

228 *PBA*, Reg, s 32. The annual supplementary actuarial report must be prepared by an actuary and must satisfy all standards normally applicable to a valuation report. The report should provide a gain and loss analysis for the period since the last report filed and specify the special payments required to liquidate the remaining wind up liability obligation. Where a report shows that no further amount is to be funded, any surplus may revert to the employer, subject to the surplus withdrawal procedures and requirements in the *PBA*: see FSCO Policy W100-102 (December 2004).

229 Federal (*PBSA*, s 29(6) and Reg, ss 8–9); Alberta (*AEPPA*, s 73 and Reg, ss 48, 55, and 63); British Columbia (*BCPBSA*, s 51 and Reg, ss 35(3.1)–(3.3)); Manitoba (*MPBA*, s 26(3) and Reg, ss 4.5, 4.6, 4.7, and 7.11); New Brunswick (*NBPBA*, s 65(4) and Reg, s 49(12)); Newfoundland and Labrador (*NLPBA*, s 61 and Reg, s 25); Nova Scotia (*NSPBA*, s 80 and Reg, s 38); Quebec (*QSPPA*, ss 228 & 229);

During the period that an employer is making special payment to fund a wind-up deficiency, the *PBA* permits certain pension benefits to be reduced to an amount proportionate to the extent that the benefits had been funded.[230]

e) Employer is insolvent and plan has a wind-up deficiency

A wind-up report may disclose a wind-up deficiency, yet the employer is unable to fund it because the employer is insolvent or bankrupt. In fact, this may have been the reason for the plan being wound up in the first place.[231] Such a scenario is disastrous for both the employer and the employees and is the worst possible scenario that can arise on a plan wind up.

As a result, employees will face potential reductions in their benefits. It is in this sense, where employees face potential reductions in their benefits, that employees bear significant risks by participating in defined benefit pension plans.

The general rule in the *PBA* is that where the money in a pension fund is not sufficient to pay all the pension benefits and other benefits on the wind up of the pension plan, the benefits must be reduced.[232] Ontario has unique rules regarding the manner of reductions because of the PBGF, which offers some benefit protection in the event of fund insolvency.[233] Subject to the application of the PBGF, employee benefits must be reduced by first refunding employee contributions to the employees, following which, remaining accrued pension benefits are reduced *pro rata* to the remaining wind-up deficiency.[234] Similar rules apply in other jurisdictions.[235] In the case of a wind up of a multi-juris-

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Saskatchewan (*SPBA*, s 54(1)). In Nova Scotia, the employer does not have to fund any wind up deficiency related to grow-in benefits: (*NSPBA*, Reg, s 37(8))

230 *PBA*, Reg, s 29(9). See also *NSPBA*, Reg, s 37(7).

231 The employer's bankruptcy is an enumerated ground for the Superintendent to wind up a pension plan. See *PBA*, s 69(1)(c). See also Chapter 7, Section B(8).

232 *PBA*, s 77. See also British Columbia (*BCPBSA*, s 45(1)); Manitoba (*MPBA*, s 21(23)); New Brunswick (*NBPBA*, s 66); Newfoundland and Labrador (*NLPBA*, s 66); Nova Scotia (*NSPBA*, s 82); Quebec (*QSPPA*, s 216).

233 See Section C(5), below in this chapter, on the application of the PBGF.

234 *PBA*, Reg, ss 29(7)–(9), 30(2), and 33–34. See also FSCO Policy W100-441 (November 2011).

235 See Manitoba (*MPBA*, Reg, s 7.13); Nova Scotia (*NSPBA*, Reg, ss 37(6)–(8)). Some jurisdictions permit the prioritization of accrued benefits that do not have an unfunded liability ahead of accrued benefits that do have an unfunded liability, or otherwise permit benefits to be reduced in a manner approved by the Superintendent: Alberta (*AEPPA*, Reg, s 55(5) and Policy Bulletin #6), British Columbia (*BCPBSA*, Reg, s 39), New Brunswick (*NBPBA*, Reg, ss 49(6) and (8)(a), and 50), Newfoundland and Labrador (*NLPBA*, Reg, s 24), Saskatchewan

dictional pension plan in which there are insufficient assets to cover all benefits and wind-up liabilities, the method for allocating assets and reducing benefits among the employees in the jurisdictions other than where the plan is registered is dealt with in accordance with the requirements of each applicable jurisdiction.[236]

Where the employer is insolvent and the plan is being wound up in a deficit, employees become creditors of the insolvent company. Under the provincial law, the *PBA*'s "deemed trust" provisions are available to the employees to recover employer contributions that have accrued up to the date of the wind up, but have not yet become due,[237] although the extent to which the deemed trust will be operational in an insolvency proceeding depends on the nature of the proceeding. Where the insolvency leads to a proceeding under the *Bankruptcy and Insolvency Act* (*BIA*), the deemed trust is not available as the Supreme Court, in a series of cases, has held that a province cannot alter priorities under the *BIA* by creating a deemed trust.[238] Where an insolvent company attempts to restructure under the *Companies' Creditors Arrangement Act*, the deemed trust may still be operational.[239] However, the application of the deemed trust can be limited by the doctrine of paramountcy by a court making an order under the *Companies' Creditors Arrangement Act*.[240]

The Superintendent may approve agreements made by the relevant parties in restructuring proceedings under the *CCAA* and *BIA*.[241] The Superintendent may order the preparation of specified reports in these circumstances.[242]

f) MEPP and JSPP exceptions

The trade-offs of joint governance, whether it be in the form of a MEPP or a JSPP where an employer's contribution obligations to the pension plan are fixed in a collective agreement, are most pronounced on pen-

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(*SPBA*, s 40). In Quebec, the benefit reduction formula is based on a scheme that depends on how recently amendments were made to the plan conferring those benefits. Generally, the more recent the amendment the larger the proportional reduction in the benefit: *QSPPA*, s 216.

236 *PBA*, Reg, s 30 and FSCO Policy W100-102 (December 2004).

237 See Chapter 7, Section B(6). See also, *Indalex*, above note 214.

238 See, for example, *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24.

239 *Indalex*, above note 214 at para 52.

240 *Ibid* at para 60. See also *Re Timminco Ltd*, 2012 ONSC 948.

241 *PBA*, s 81.1. As of the date of publication, s 81.1 had not been proclaimed and regulations had not yet been released.

242 *PBA*, ss 87–88.

sion plan wind up.[243] Because of the unique nature of bargained contribution rates in MEPPs and JSPPs, the funding rules are different for such plans while they are ongoing.[244] They are also different when such a plan is wound up.

There are two significant differences that exist on a plan wind up between a MEPP or JSPP and a single-employer plan. First, when the administrator winds up a MEPP and the wind-up report discloses a wind-up deficiency, there is no obligation in the *PBA* for any one employer to fund the deficiency, even if the employers participating in the plan are solvent. In short, the *PBA*'s rules that require an employer to fund a plan's wind-up deficiency do not apply with respect to JSPPs.[245] Instead, an employer under a JSPP is only required fund benefits on wind up to the extent that the plan documentation requires it.[246] Moreover, employees participating in a JSPP are also required to fund benefits on wind up in accordance with the plan documentation.[247] Employees are made aware of these risks annually in their annual pension statements.[248]

Second, where a MEPP or JSPP is wound up with a wind-up deficiency, employees' benefits must be reduced, as they must be reduced in an employer-sponsored plan. However, the PBGF does not cover MEPPs and JSPPs. Employees are also advised of this risk annually in their annual pension statements.[249]

These two differences between MEPPs and JSPPs on the one hand, and employer-sponsored plans, on the other, is reflective of the fact that employers participating in the former need not pay premium assessments to the PBGF while the plan is ongoing; but it is also in further recognition, from a public policy perspective, that, absent any bargain to the contrary, employees who participate in the governance of their plans should bear as much risk in the plan as do the employers that jointly govern and contribute to it.

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243 On joint governance and plan design generally, see Chapter 6, Section A(1)(d), and Chapter 3, Sections B(1)(c) & (d).

244 See Chapter 7, Sections B(2)(b) and C(4)(f).

245 *PBA*, s 75(3).

246 *PBA*, s 75.1(1).

247 *PBA*, s 75.1(2).

248 *PBA*, Reg, s 40(1)(t)(ii) provides that the annual statement must state that "if, on wind up of the plan, the assets of the plan are not sufficient to meet the liabilities of the plan, pension benefits may be reduced."

249 *PBA*, Reg, s 40(1)(t)(i) provides that the annual statement must state that "the pension benefits established under the pension plan are not guaranteed by the Guarantee Fund."

g) Multi-Jurisdictional Pension Plans

Where a pension plan being wound up includes employees in more than one jurisdiction, the assets and liabilities must be identified and allocated by jurisdiction of employment. Each allocated portion of the pension fund is wound up in accordance with the legislation of that jurisdiction.[250] Any remaining assets are allocated among the different categories of employment in proportion to the allocation of the liabilities.[251]

5) Pension Benefits Guarantee Fund

a) Introduction

The Pension Benefits Guarantee Fund (PBGF) is unique to Ontario. The PBGF is an insurance fund established by the Ontario government in 1980 to protect employees participating in employer-sponsored defined benefit plans in cases of employer insolvency. The PBGF is designed to ensure that a specified level of pension benefits will be paid to employees in the event that a pension plan is wound up in a deficit position and the employer is insolvent and, therefore, unable to fund the wind-up deficiency. With the exception of certain types of designated, prescribed, and "qualifying" pension plans, all employers who sponsor a pension plan and who employ persons in Ontario are required to contribute annual premiums to the PBGF. The amount of employer premiums is based on a sliding scale "assessment" and employers who operate plans with the largest solvency deficiencies are required to contribute the largest premiums. The rationale behind this premium formula model is that employers with the largest solvency deficiencies presumably have the greatest cash flow concerns and, therefore, their employees are the most vulnerable.

Ontario is (and always has been) the only Canadian jurisdiction with a PBGF, although other jurisdictions have at times considered implementing one.[252] The United States has, since 1974, sponsored its own comparable insurance fund for private employment pension plans.[253] From a policy perspective, employees and trade unions are, not surprisingly, in favour of the PBGF since it increases the security of employee pension benefits. With the continued increase in employer insolven-

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250 FSCO Policy W100-108 (April 2008).

251 *PBA*, Reg, s 30(2)(d). See *PBA*, s 70; *PBA*, Reg, ss 30 and 35.

252 See, for example, the consultation paper by the Department of Finance Canada, *Strengthening the Legislative and Regulatory Framework for Defined Benefit Pension Plans* (Ottawa: Department of Finance, 2005).

253 Pension Benefits Guarantee Corporation, being Title IV to the *Employee Retirement Income Security Act, 1974*, 29 USC Chapter 18.

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ASSET SALES UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT AND THE FAILURE OF SECTION 36

*Alfonso Nocilla**

I. INTRODUCTION

This paper examines the process for court approval of asset sales under the Companies' Creditors Arrangement Act[1] (CCAA), which has become the restructuring statute of choice in Canada for large corporations. Under the CCAA, debtor companies are permitted to dispose of assets outside the ordinary course of business only with court approval.[2] Consequently, the asset sale approval regime is an important part of the restructuring process.

An examination of the sale process under the CCAA is particularly appropriate at this time for two reasons. Firstly, amendments to the statute in 2009 have created s. 36, which codifies the rules for court approval of asset sales.[3] Two years after these amendments were introduced, there is now a body of case law to review in analyzing how the introduction of s. 36 has affected the common law rules on asset sales. Secondly, the asset sale process is especially important in light of the ongoing controversy, both in the courts and in the academic literature, over the issue of "liquidating CCAAS" — that is, the use of CCAA proceedings to effect the sale of substantially all the assets of a debtor company, often where no restructuring plan is presented to creditors and where there is no intention of continuing the debtor company as a going concern.

This paper begins by considering the key cases on asset sales prior to the 2009 amendments. Next, it examines the amendments and subsequent cases and commentaries, analyzing the impact of the 2009 amendments on the sale approval process. This analysis leads to a surprising conclusion: in major asset sale cases thus far, courts have largely ignored s. 36 as a substantive test for whether to approve asset sales. In some cases, courts have said that s. 36 is

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1. R.S.C. 1985, c. C-36.
2. *Ibid.*, s. 36.
3. An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36.

not a definitive test at all. This is surprising because both the Joint Task Force on Business and Insolvency Law Reform and the Standing Senate Committee on Banking, Trade and Finance recommended enacting s. 36 to provide "substantive direction" to courts in deciding whether to approve asset sales.[4] Despite this recommendation, recent cases suggest that s. 36 is only one of many considerations in the approval of asset sales, and is not a substantive test. This will be discussed below in Part IV of this paper.

A second conclusion is that s. 36 has done nothing to resolve the ongoing disagreement among judges and academics over liquidating CCAAS. This is unfortunate because the Senate Committee intended that s. 36 provide "some guidance regarding *minimum requirements to be met during the sale process.*"[5] However, s. 36 cannot fully resolve the dispute over liquidating CCAAS because it makes no mention of them. Although s. 36 has answered the procedural question of whether courts have the authority to approve asset sales, it has not answered the substantive question that has divided courts and commentators: under what circumstances, if any, are liquidating CCAAS appropriate? Although this question is beyond the scope of this paper, it is an important question given the different approaches to liquidating CCAAS in the courts. It is unfortunate that s. 36 provides no guidance on this issue.

II. COMMON LAW ON ASSET SALES PRIOR TO 2009 AMENDMENTS

1. Ontario

In the 1998 decision of *Re Canadian Red Cross Society*,[6] Blair J., as he then was, approved a CCAA sale of substantially all of the assets of the Red Cross. In doing so, Blair J. held that the supervising judge in a CCAA proceeding had the authority to approve asset sale plans, even before a creditor vote:[7]

4. Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003, Chair: Richard H. Kroft) ("Senate Report"), at p. 146.
5. *Ibid.*, at pp. 147-148 (emphasis added).
6. (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)).
7. *Supra*, at para. 43.

> The source of the authority is twofold: it is to be found in the power of the Court to impose terms and conditions on the granting of a stay under section 11; and it may be grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to "fill in the gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan."

In approving the transaction, Blair J. applied two tests. Firstly, he found that the purchase price was "fair and reasonable" based on the reports of the Monitor, financial advisors, and other independent experts involved.[8] Next, he considered the four "duties" of the court in approving an asset sale, as established by the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*:[9]

(i) to consider whether the debtor has made a sufficient effort to obtain the best price and has not acted improvidently;
(ii) to consider the interests of the parties;
(iii) to consider the efficacy and integrity of the process by which offers have been obtained; and
(v) to consider whether there has been unfairness in the working out of the process.

Notably, Blair J. applied this test by analogy, since *Soundair* dealt with the requirements for approval of a sale by a court-appointed receiver, not for CCAA sales. Nonetheless, as will be discussed below, *Soundair* has become an important test for CCAA sales since the *Red Cross* decision.

In *Re Tiger Brand Knitting Co.*,[10] the Ontario Superior Court considered an application by the debtor company for an extension of time to negotiate with a prospective purchaser. The offering process for the going concern sale of the company's assets had ended and the Monitor was expected to finalize negotiations with a prospective purchaser shortly.[11] C. Campbell J. applied the four factors from *Soundair* and found that they had been satisfied.[12] In doing so, C. Campbell J. stated that the *Soundair* factors "are implicit in a marketing and sale process pursuant to Court Order under the CCAA."[13]

8. *Ibid.*, at para. 49.
9. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.); *Red Cross*, *supra*, footnote 6, at paras. 47-48. The *Soundair* factors were laid out originally in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (H.C.J.).
10. (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), leave to appeal to C.A. refused 19 C.B.R. (5th) 53.
11. *Ibid.*, at paras. 15-16.
12. *Ibid.*, at paras. 34-37.
13. *Ibid.*, at paras. 35.

More recently, in *Re Nortel Networks Corp.*,[14] the same court approved a CCAA sale process according to the following factors:[15]

(a) is a sale transaction warranted at this time?
(b) will the sale benefit the whole "economic community"?
(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
(d) is there a better viable alternative?

These factors have become known as the *Nortel* criteria. As will be discussed below in Part IV of this paper, these criteria apply to the approval of a CCAA sale process — such as an auction — in the absence of a restructuring plan. These criteria do not apply to the approval of the final sale transaction at the conclusion of the auction. However, in approving the sale process in *Nortel Networks Corp. (Re)*, the court noted that the debtor would "aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair*."[16] In a subsequent hearing at the conclusion of the auction process, the court applied the *Soundair* factors, found that they had been satisfied, and approved the final sale. In doing so, Morawetz J. stated:[17]

> Although the *Soundair* and *Crown Trust* tests were established for the sale of assets by a receiver, the principles have been considered to be appropriate for sale of assets as part of a court supervised sales process in a CCAA proceeding.

2. Québec

Courts in Québec have not applied *Soundair* directly in all CCAA asset sale cases, but their decisions often reference *Soundair* and consider the factors from that case indirectly when determining whether to approve sales.

In *Boutiques San Francisco Inc. v. Les Ailes de la Mode Inc.*,[18] the Québec Superior Court approved a CCAA sale where the bank syndicate and Monitor supported it, the sale price was the best possible price at the end of the sale process and was greater than the liquidation value of the company, and the sale would allow most employees to keep their jobs.[19] These factors appear to

14. (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. (Comm. List)).
15. *Ibid.*, at para. 49.
16. *Ibid.*, at para. 53.
17. *Nortel Networks Corp. (Re)* (2009), 56 C.B.R. (5th) 224 (Ont. S.C.J. (Comm. List)), at paras. 34-36.
18. (2004), 5 C.B.R. (5th) 197 (Que. S.C.).
19. *Ibid.*, at para. 3.

overlap with the *Soundair* factors, though *Soundair* was not cited in the decision.

In *Re Mecachrome Canada Inc.*,[20] the same court refused to approve a proposed sale in which interim (debtor-in-possession or DIP) lenders would acquire all the shares of the debtor company where the debtor had failed to properly canvass the market for bidders.[21] The court cited *Soundair* and *Tiger Brand Knitting* but did not apply the *Soundair* test directly:[22]

> As stated, albeit in a different but still similar context, by the Ontario Court of Appeal in *Soundair*, by the Ontario Superior Court of Justice in *Tiger Brand Knitting*, by the Alberta Court of Queen's Bench in *Calpine Canada Energy Ltd., Re*, and by this Court . . . in a process such as this one, there has to be some demonstration by the Canadian Debtors that reasonable attempts have been made to properly canvass the market before approving a PFA that is, in essence, presented to the affected creditors as the best available deal under the circumstances.

In *Re Rail Power Technologies Corp. (Arrangement relatif à)*,[23] the court applied the *Soundair* test in approving the sale of substantially all of the debtor company's assets.[24] In doing so, the court emphasized that the Monitor had recommended the sale:[25]

> The issue of unfairness in the process identified in *Soundair*, concerns actions of the receiver typically towards a potential purchaser. *As long as the receiver has acted reasonably prudently, fairly and not arbitrarily, its recommendation should be accepted.*

3. Alberta

In *Fracmaster Ltd. (Re)*,[26] the Alberta Court of Appeal upheld the lower court's decision to appoint a receiver instead of using the CCAA to sell substantially all the assets of the debtor company. The Court of Appeal held that a sale of assets under the CCAA should only occur where the proposed transaction is "in the best interests of the creditors generally" and that this requirement was not met by the sale of substantially all of the debtor's assets with no continued involvement by creditors and shareholders.[27] In contrast

20. (2009), 58 C.B.R. (5th) 49 (Que. S.C.).
21. *Ibid.*, at para. 45.
22. *Ibid.*
23. 2009 QCCS 2885.
24. *Ibid.*, at para. 51.
25. *Ibid.*, at para. 93 (emphasis in original), citing *Re Winnipeg Motor Express Inc.*, 2008 MBQB 297, at para. 24.
26. *Fracmaster Ltd. (Re)* (1999), 11 C.B.R. (4th) 230 (Alta. C.A.).

to the Ontario and Québec approaches to CCAA sales, the court also distinguished between CCAA and receivership proceedings, stating that a CCAA judge must wait for creditor approval before sanctioning a plan:[28]

> Under the CCAA the court has no discretion to sanction a plan unless it has been approved by a vote of 2/3 majority in value of each class of creditors (section 6). To that extent, each class of creditors has a veto. This procedure is quite different from a court-appointed receivership. In a receivership the desires of the creditors are a significant factor, but the approval by a specific majority of creditors is not a pre-condition to court sanction, and creditors do not have an absolute veto. The difference in the procedures gives rise to different tests and considerations to be applied in each type of proceeding. While in this case the lending syndicate's desires in the CCAA and receivership proceedings were consistent, the chambers judge was not required to give the same weight to their wishes in each proceeding.

The Court of Appeal held that the chambers judge correctly concluded the CCAA plan had no reasonable chance of success because the creditors' syndicate opposed the plan. Therefore, the court had no authority to sanction the plan and there was no point in calling a meeting of creditors to vote, which would have resulted in further delays and jeopardized the value of the assets. In reaching its decision, the court applied the *Soundair* test to the receiver's proposed sale.[29]

In *Re 843504 Alberta Ltd.*,[30] the Alberta Court of Queen's Bench refused to approve a sale of substantially all of the debtor company's assets before the Monitor had presented a formal plan to the creditors. The court did not apply the *Soundair* test to the proposed sale. Instead, the court cited *Fracmaster* and distinguished the Ontario Superior Court decision in *Red Cross*, stating:[31]

> Simply put, in this province the corporate entity is expected to continue in some form or another unless there are exceptional circumstances. Liquidation proceedings are typically reserved for receiverships, windings up or bankruptcy. . . .
>
> This is quite different than in Ontario where apparently debtors can use the benefits of the legislation when there is no prospect of corporate survival or no plan of arrangement is proposed.

27. *Ibid.*, at para. 16.
28. *Ibid.*, at para. 14.
29. *Ibid.*, at para. 32.
30. (2003), 4 C.B.R. (5th) 306 (Alta. Q.B.).
31. *Ibid.*, at paras. 14-15.

Despite the above cases, in *Re Calpine Canada Energy Ltd.*,[32] Romaine J. of the Alberta Court of Queen's Bench applied the *Soundair* test in a DIP financing sale under the CCAA and even though *Soundair* was a case dealing with a receivership:[33]

> While the *Soundair* case involved a receivership and this is a situation of a debtor-in-possession under the CCAA overseen by a Monitor, these duties remain relevant to the issues before me, with some adaptation for the differences in the form of proceedings.

The court in *Calpine* gave final approval to the plan following the satisfaction of previously imposed conditions intended to ensure fairness and transparency in the sale negotiation process.[34] The court emphasized that the Monitor supported the sale and that this was an important factor in determining whether to approve it, as expressed in *Crown Trust Co.*:[35]

> If the court were to reject the recommendations of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

4. British Columbia

Courts in British Columbia generally have refused to approve CCAA sales involving substantially all the assets of the debtor company where a plan has not been presented to the creditors. In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*,[36] the British Columbia Court of Appeal reversed the CCAA supervising judge's decision granting a stay of proceedings under s. 11 that would have allowed the debtor company to restructure and obtain DIP financing without presenting a plan to its creditors. Tysoe J.A. stated that, while the filing of a draft plan of arrangement was not a prerequisite for obtaining a stay under

32. 2007 ABQB 49.
33. *Ibid.*, at para. 29.
34. *Ibid.*, at paras. 31-34.
35. *Supra*, footnote 9, at p. 112, cited in *Calpine*, *supra*, footnote 32, at para. 52. This statement was adopted by the Ontario Court of Appeal in *Soundair*, *supra*, footnote 9, at para. 21.
36. 2008 BCCA 327.

s. 11, a stay should not be granted where the debtor company has no intention to present a plan to its creditors.[37] Notably, the Court of Appeal made its decision despite the Monitor's support for the plan.[38] In *obiter*, Tysoe J.A. stated:[39]

> I need not decide the point on this appeal, but I query whether the court should grant a stay under the CCAA to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

While Tysoe J.A. made no reference to a specific case, this *obiter* clearly questions the Ontario approach of allowing a CCAA sale of substantially all of the debtor company's assets before a plan is presented to the creditors.

5. Conclusions on Common Law on Asset Sales Prior to 2009 Amendments

The above cases demonstrate that there is a divergence in judicial approaches to the approval of CCAA asset sales between courts in Ontario and Québec, on the one hand, and courts in Alberta and British Columbia, on the other. With some exceptions, Western courts are less likely to approve sales in which the debtor company will not present a plan to its creditors and will not continue as a going concern after restructuring. Their rationale is that these sorts of sales are liquidations without the involvement of the company's creditors, and it is generally inappropriate to use the CCAA in such cases when the same sales can be completed through a receivership.

The application of the *Soundair* factors in CCAA sales, factors that were intended to apply to sales by receivers, is less than ideal from a theoretical perspective because the CCAA is a restructuring statute. The distinction between restructuring and liquidation is important. Significantly, in *Cliffs Over Maple Bay*, the British Columbia Court of Appeal stated that courts should not grant CCAA protection to a debtor company that "does not intend to propose a compromise or arrangement to its creditors."[40] Likewise, the Alberta Court of Appeal in *Fracmaster* expressed the view

37. *Supra*, at para. 31.
38. *Ibid.*, at paras. 14-15.
39. *Ibid.*, at para. 32.
40. *Ibid.*, at para. 31.

that liquidations should not occur under the CCAA in most circumstances:[41]

> There must be an ongoing business entity that will survive the asset sale.... A sale of all or substantially all the assets of a company to an entirely different entity, with no continued involvement by former creditors and shareholders, does not meet this requirement. While we do not intend to limit the flexibility of the CCAA, we are concerned about its use to liquidate assets of insolvent companies which are not part of a plan or compromise among creditors and shareholders, resulting in some continuation of a company as a going concern. Generally, such liquidations are inconsistent with the intent of the CCAA and should not be carried out under its protective umbrella.

It is unsurprising that the above cases make no mention of *Soundair* in the context of CCAA sales because *Soundair* applies to liquidations by receivers. If wholesale liquidations without creditor involvement should not occur under the CCAA — as *Cliffs* and *Fracmaster* suggest — then *Soundair* is not particularly relevant in the context of CCAA sales.

It makes sense that courts considering CCAA liquidations would turn to the *Soundair* factors, since, until recently, *Soundair* provided the only guidance. However, with Parliament adding s. 36, courts are granted the express authority to approve asset sales under the CCAA and are instructed to consider specific factors. In light of this, one might think that courts would come to favour the s. 36 factors over those of *Soundair*. As will be discussed below, this has not come to pass, and the result has been a series of muddled analyses in Ontario and Québec in which courts have applied *Soundair*, s. 36 and other factors. It remains to be seen whether Western courts will do the same, or whether they will simply focus on s. 36 when asked to approve asset sales under the CCAA.

III. THE 2009 AMENDMENTS: SECTION 36

1. Provisions

Coming into force on September 18, 2009, s. 36 is a new section granting the CCAA court express jurisdiction to authorize asset sales in restructuring proceedings. Subsection (1) requires that a debtor company obtain court authorization before selling assets outside the ordinary course of its business. Additionally, subsection (2) requires that the debtor company notify all secured creditors who are "likely to be affected by the proposed sale." Subsection (3) lists

41. *Fracmaster*, *supra*, footnote 26, at para. 16.

several factors that the court must consider in deciding whether to authorize a sale:

> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> (d) the extent to which the creditors were consulted;
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Importantly, this is a non-exclusive list, as subsection (3) provides that the court is to consider these factors "among other things." These additional factors will be examined in Part IV. It is also noteworthy that the Monitor is not formally required to file a report in respect of a proposed sale, despite subsections (3)(b) and (c) asking the court to consider the Monitor's opinion.[42]

Subsection (4) provides that, where the proposed sale is to a "related party,"[43] the court must first consider the factors in subsection (3) and then be satisfied that:

> (*a*) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
> (*b*) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

42. The Canadian Bar Association recommended that monitors be required to make "full, true and plain disclosure whenever they communicate with creditors or file information with the Court" in its written submission on Bill C-55 to the House Committee, "Submission on Bill C-55 – Bankruptcy Reform" (Ottawa, National Bankruptcy and Insolvency Law Section, November 2005), at pp. 27-28. Available online: <http://www.cba.org/cba/submissions/pdf/05-52-eng.pdf>. See also E. Patrick Shea, *Bankruptcy & Insolvency Act, Companies' Creditors Arrangement Act, Bill C-55 & Commentary* (Markham, Ontario, LexisNexis Butterworths, 2006).
43. A "related party" is defined in subsection (5) as: (*a*) a director or officer of the company; (*b*) a person who has or has had, directly or indirectly, control in fact of the company; and (*c*) a person who is related to a person described in paragraph (*a*) or (*b*).

2. Purpose

In its report, *Debtors and Creditors Sharing the Burden*, the Standing Senate Committee on Banking, Trade and Commerce suggested that the s. 36 amendments were intended to provide courts with "substantive direction" on factors to consider when deciding whether to approve asset sales.[44] In discussing the purpose of s. 36 with regard to the sale process, the Committee stated:[45]

> [T]here are circumstances where all stakeholders would benefit from the opportunity for an insolvent company involved in a reorganization to divest itself of all or part of its assets, whether to raise capital, eliminate further loss for creditors or focus on the solvent operations of the business. We feel, however, that the Court must be involved in approving such sales and that it should be provided with some guidance regarding *minimum requirements to be met during the sale process.*

The Committee did not mention *Soundair* in its brief discussion of asset sales and there is no suggestion that s. 36 was intended to replace the common law approach of applying the *Soundair* criteria. However, the Committee seems to have expected that the s. 36 factors would constitute "minimum requirements" that debtor companies would have to meet when asking for court approval of asset sales. In other words, while the amendments should not be read to preclude *Soundair*, s. 36 was intended to be substantive. The recent treatment of s. 36 in Ontario and Québec does not reflect this intention. This is discussed below.

IV. IMPACT OF THE 2009 AMENDMENTS ON JUDICIAL APPROACHES TO ASSET SALES

1. When Will Courts Apply Section 36?

Despite the Senate Committee's intention that s. 36 would provide substantive direction to courts in approving asset sales, the interpretations of s. 36 by courts so far suggest that s. 36 is not substantive. This has created uncertainty in the judicial analysis of asset sales.

In *Re Canwest Global Communications Corp.*,[46] the first in a series of proceedings dealing with s. 36, Pepall J. of the Ontario

44. Senate Report, *supra*, footnote 4, at p. 146.
45. *Ibid.*, at pp. 147-148 (Emphasis added).
46. 2009 CarswellOnt 7169 (S.C.J. (Comm. List)).

Superior Court considered the circumstances in which the s. 36 criteria would apply to a proposed sale of assets. Firstly, in order for s. 36 to be engaged, the threshold requirements must be met:[47]

Court approval is required under section 36 if:

(a) a debtor company under CCAA protection
(b) proposes to sell or dispose of assets outside the ordinary course of business.

Pepall J. made two important holdings with respect to these threshold requirements. Firstly, she held that while partnerships are not expressly included in the definitions of "debtor company" and "company" in s. 2(1) of the CCAA, s. 36 nonetheless applied to the partnerships that were under CCAA protection in *Canwest*.[48] This holding should be viewed within the fact-specific context of the *Canwest* proceedings. The limited partnerships in *Canwest* were highly integrated with those of the debtor companies under CCAA protection. Therefore, Pepall J. reasoned that even though the partnerships were not "debtor companies" under the CCAA, the court had inherent jurisdiction to extend CCAA protection to the partnerships. This analysis is less than ideal because it provides no clear rule for when a partnership will enjoy CCAA protection, but it is nonetheless in line with previous Ontario decisions in which courts have extended CCAA protection to entities that do not fall within the definition of a CCAA "debtor company" where those entities are highly integrated with a debtor company or companies undergoing restructuring.[49]

Secondly, Pepall J. held that when determining whether a proposed sale was in the "ordinary course of business" within the meaning of s. 36, a court should conduct a fact-specific inquiry:[50]

> [A] court should in each case examine the circumstances of the subject transaction within the context of the business carried on by the debtor.

In her decision, Pepall J. held that s. 36 did not apply to the transfer of shared assets and services in an "internal reorganization transaction" within the same corporate family.[51] In Pepall J.'s view, it would have been "commercially unreasonable" to expect the debtor companies to satisfy the requirements of s. 36(4) for

47. *Supra*, at para. 26.
48. *Ibid.*, at para. 30.
49. See especially *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Ct. (Gen. Div.)).
50. *Canwest*, *supra*, footnote 46, at para. 35.
51. *Ibid.*, at para. 36.

sales to these third parties because of the "highly integrated and interdependent" businesses of the parties.[52] The Canwest family of entities had previously adopted a complex business structure for tax reasons that no longer applied, and the proposed transactions would merely "realign the shared services arrangements" between these entities.[53] As such, Pepall J. stated that not all internal reorganizations would fall outside the purview of s. 36.[54]

The above analysis of when s. 36(4) should apply makes sense based on the specific facts of *Canwest*, but the implications for s. 36 are troubling. The 2003 Senate report states that sales to related parties should be not be permitted other than in "exceptional circumstances."[55] Perhaps transfers between highly integrated entities involved in a restructuring should be exempt because such circumstances are exceptional, but this requires further inquiry. Instead, Pepall J. relied simply on a statement by Industry Canada that s. 36(4) was intended to address the problem of "phoenix corporations", *i.e.*, companies whose owners engage in serial bankruptcies in order to purchase assets of the bankrupt business through a new entity and leave creditors unpaid.[56] This ignores the fact that related parties may have other interests in asset sales beyond "phoenix corporation" schemes — for example, incumbent management simply might be trying to entrench itself by reorganizing the assets of the related companies.

Pepall J. went on to say that even where a proposed sale is outside the ambit of s. 36 because it is in the ordinary course of business, s. 36 "may be considered in assessing fairness" where the sale is to a related party.[57] On this account, courts in such cases should consider, at a minimum, whether the proposed sale is fair and facilitates the restructuring. On this basis, Pepall J. then applied the provisions of s. 36 to the proposed sale and found that they had been satisfied.[58] As a consequence of this analysis, it now appears that courts have the discretion to decide when to apply s. 36 to proposed related party sales. In effect, Pepall J. substituted a test of whether the proposed transaction is "fair and facilitates the restructuring" in place of the clear wording of s. 36(4):

52. *Ibid.*
53. *Ibid.*
54. *Ibid.*, at para. 35.
55. Senate Report, *supra*, footnote 4, at p. 148.
56. *Canwest, supra*, footnote 46, at para. 34.
57. *Ibid.*, at para. 37.
58. *Ibid.*, at para. 38.

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

In the third *Canwest* proceeding,[59] Pepall J. held that s. 36 did not apply to transfers contemplated by a restructuring plan because the plan as a whole was subject to court approval. In that case, the asset transfers contemplated had been approved by a vote of the affected creditors.[60] This holding is problematic in light of the view expressed by Western Canadian courts that the CCAA should not be used to effect liquidations in the absence of a formal plan.[61] While it remains to be seen how Western courts will apply s. 36, it seems unlikely that they will interpret it in the same manner as the court in *Canwest*.

In *Re Brainhunter Inc.*,[62] a recent decision of the Ontario Superior Court, Morawetz J. approved a "stalking horse"[63] bid process where the purchaser was a related party and an insider of the company, without applying s. 36 of the CCAA. Morawetz J. held that s. 36 applies only where the court has been asked to approve an "actual sale" of assets. Approval of an "actual sale" is to be distinguished from approval of a "sale process" such as an auction.[64] Accordingly, Morawetz J. did not apply a. 36 to determine if the proposed sale process was appropriate, relying instead on the common law test established in *Nortel*.[65]

59. (2010), 70 C.B.R. (5th) 1 (Ont. S.C.J. (Comm. List)).
60. *Supra*, at para. 27.
61. *Cliffs Over Maple Bay*, *supra*, footnote 36, at para. 32.
62. (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. (Comm. List)).
63. A common arrangement in U.S. bankruptcy law and prevalent in cross-border proceedings, this involves an auction in which the seller designates a "stalking horse" buyer who has the right to bid first in the auction, setting a minimum price that precludes low-ball offers. If the stalking horse is out-bid by subsequent bidders, it typically receives a previously agreed-upon break-fee from the seller for its expenses. It is not a legal term of art as such, but stalking horses have been used in several recent cases. See *Re Nortel Networks Corp.*, *supra*, footnote 17, as an example of a proceeding involving a stalking horse auction.
64. *Brainhunter*, *supra*, footnote 62, at paras. 16-17.
65. *Nortel*, *supra*, footnote 14. The court's authority to approve a sale process is derived from its general statutory discretion. As discussed above in Part II, the *Nortel* criteria require the court to ask:
    (a) Is a sale transaction warranted at this time?
    (b) Will the sale benefit the whole "economic community"?
    (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the

There are three main problems with the above analysis in *Brainhunter Inc.* Firstly, despite holding that s. 36 is not engaged in the approval of a sale process, Morawetz J. stated that s. 36 "should also be considered indirectly when applying the Nortel Criteria."[66] Unfortunately, the court did not expand on this point. Presumably, s. 36 should be considered indirectly at the process approval stage because it will apply eventually when the court must decide whether to approve the final sale. In *Nortel*, for example, Morawetz J. considered it important that the debtor would "aim to satisfy" the *Soundair* factors for approval of the final sale in its conduct during the sale process.[67] Moreover, in the earlier decision of *Tiger Brand Knitting*, discussed above, C. Campbell J. of the Ontario Superior Court stated that the *Soundair* factors "are implicit in a marketing and sale process pursuant to Court Order under the CCAA."[68] This suggests that both *Soundair* and s. 36 are "implicit" in the approval of a sale process under the *Nortel* criteria. However, exactly what this means for the judicial analysis is unclear. Is it sufficient for approval of the sale process, as it was in *Nortel*, that the debtor merely "aim[s] to satisfy" the criteria for court approval of the final sale?

The second problem is that the s. 36 criteria are interconnected with the asset sale process and the *Nortel* criteria. Specifically, s. 36(3) asks (a) whether the process leading up to the proposed sale was reasonable, and (b) whether the Monitor approved the process. These questions are also fundamental to the court's analysis in deciding whether to approve the sale process. Under the *Nortel* criteria, the court must ask whether the sale transaction is warranted. Often, this analysis includes a consideration of the Monitor's recommendation with respect to the proposed process and whether the process is fair and reasonable. Therefore, by the time the court directly applies s. 36 to the final sale transaction, it has already decided its answers to questions (a) and (b) at the process approval stage. This is problematic because the Senate Committee stated that s. 36 was meant to provide "substantive direction" to the courts. Since some of the main questions asked by s. 36 will be answered

business?
(d) Is there a better viable alternative?

66. *Ibid.*, at para. 16.
67. *Nortel, supra*, footnote 14.
68. *Tiger Brand Knitting, supra*, footnote 10, at para. 35.

already under the *Nortel* criteria, it is difficult to see how s. 36 can provide substantive direction.

The third, related problem is that it is difficult to imagine many cases where a court would hold that s. 36 has not been satisfied at the conclusion of a sale process approved under the *Nortel* criteria. Where the participants have followed the process as sanctioned by the court and the Monitor recommends the final sale, it is impractical for the court to refuse its approval. In short, once the court sanctions and sets in motion the sale process, the most important test has been met already. Since s. 36 is only considered indirectly at this initial stage, if at all, s. 36 can provide neither the substantive direction nor the minimum requirements that the Senate Committee intended.

2. What Additional Factors Will Courts Consider?

Since s. 36 provides a non-exhaustive list of factors to consider, courts have considered other factors in determining the appropriateness of sale proposals. In the second *Canwest* decision,[69] Pepall J. approved the sale of substantially all of the financial and operating assets of the Canwest limited partnership entities. Pepall J. applied both s. 36 and the *Soundair* criteria to the proposed sale because s. 36 had not yet come into force. However, the court took the approach that s. 36 had not changed the analysis very much and that it was quite similar to *Soundair*, stating "[i]ndeed, to a large degree, the criteria overlap."[70] Consequently, it is unclear exactly which factors must be satisfied in order to obtain court approval of a sale. Section 36 has not replaced the *Soundair* factors and evidently, courts may still give serious consideration to the *Soundair* factors when asked to approve asset sales. As discussed below, this is problematic.

In *Re White Birch Paper*,[71] the Québec Superior Court approved the sale of substantially all the assets of a debtor company in a "stalking horse" bid process where all of the preliminary steps of the process had been approved without objection from the interested stakeholders.[72] In his reasons, Mongeon J. applied the criteria for court approval of asset sales

69. *Canwest Publishing Inc. (Re)* (2010), 68 C.B.R. (5th) 233 (Ont. S.CJ. (Comm. List)).
70. *Supra*, at para. 13.
71. *White Birch Paper Holding Co. (Proposition de) (Re)*, 2010 QCCS 4915, leave to appeal to C.A. refused, 2010 QCCA 1950.
72. *Ibid.*, at para. 25. The only objections came from two construction lien holders,

in s. 36 and found that they had been satisfied. In doing so, Mongeon J. stated:[73]

> The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.
>
> The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. *In other words, the Court could grant the process for reasons other . . . than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.*

Citing the second *Canwest* decision,[74] the court went on to say that it was not necessary for approval of a sale plan that all classes of creditors will benefit, and that the court "must rely" on the Monitor's recommendation of whether to support the sale plan.[75] Mongeon J. then applied the *Nortel* criteria to the sale process and found that they had been satisfied.[76] In effect, the court determined that s. 36 was not the substantive test for approving the asset sales and substituted its own test, asking whether "the sale is appropriate, fair and reasonable."[77]

Based on the above cases, the exact role of s. 36 remains unclear. There is overlap between the s. 36 and *Soundair* criteria, but they are not the same. Additionally, it is unclear what should happen if a court finds that the *Soundair* criteria have been satisfied, but the s. 36 criteria have not. If s. 36 is intended to be substantive, then the analysis in an asset sale approval proceeding should focus on s. 36. It may be acceptable to consider the *Soundair* criteria or other factors in these proceedings, but the s. 36 criteria are the minimum requirements that must be met. However, the above cases suggest that the opposite is true. Section 36 will be read narrowly so as not to apply in many cases, or so that only some of its criteria apply. Meanwhile, the *Soundair* criteria, a "fairness and reasonableness" test, or some other criteria might apply instead.

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whose objections became moot by the time of the final order approving the sale, as separate agreements had been made to honour those claims.

73. *Ibid.*, at paras. 48-49 (Emphasis added).
74. *Canwest, supra*, footnote 69, at para. 13.
75. *White Birch, supra*, footnote 71, at paras. 51-52.
76. *Ibid.*, at paras. 53-54.
77. *Ibid.*, at para. 49.

V. PROBLEMS WITH SECTION 36

1. CCAA Sales

While courts in other provinces have not yet had the opportunity to comment, Ontario and Québec courts have recognized at least three different sets of criteria for determining the appropriateness of CCAA sales. As discussed above, this is problematic.

The current approach to asset sales in these provinces suggests that s. 36 is not providing the substantive direction to courts that the Senate Committee and the Joint Task Force intended when they recommended the new section in 2003.[78] Nor is the holding in *White Birch* that the s. 36 factors "need not be all fulfilled" to approve a sale consistent with the intention — again expressed in the Senate Report — that s. 36 provide some minimum requirements that must be met before a court can approve an asset sale.[79]

It is particularly troubling that the courts are not applying s. 36 as a substantive test for asset sales that are made in the absence of formal CCAA plans. Where creditors are permitted to vote on a plan, it is understood that they are deciding whether the proposed plan is in their best interests. In the case of pre-plan sales, the creditors have no formal vote. Instead, the court decides what is best for the creditors based on the statements of the Monitor and, often, incumbent management of the debtor company. In such cases, it is especially important to have clear rules to protect creditors' rights and maximize returns from sales. Creditors should be aware that the current system for court approval of asset sales offers no guarantees that their rights will be protected because no clear rule governs.

Courts and commentators often praise the flexibility of the CCAA regime. Flexibility is a useful feature of a restructuring regime involving large, complex companies. However, where Parliament has provided clear, substantive direction on asset sales, courts should pay heed. Unfortunately, it seems that the addition of s. 36 has served only to make an already complex legal analysis less clear. If the current situation persists, Parliament will need to introduce further amendments to resolve the confusion. For example, the sale approval process could be streamlined by amending s. 36 to include a modified set of the *Soundair* factors,

78. Senate Report, *supra*, footnote 4, at p. 146.

79. *Ibid.*, at p. 148; *White Birch*, *supra*, footnote 71, at para. 48.

with changes where necessary to reflect the different circumstances of restructuring and receivership sales. Parliament also might specify in the Act that s. 36 is a substantive test that lays out minimum requirements for CCAA sales. Until this is done, both sets of criteria — and perhaps other factors — will remain applicable, and no clear rule will govern.

2. Chapter 11 Sales

Given the growing number of U.S. and Canadian cross-border proceedings under the CCAA, it is helpful to consider how sales outside the ordinary course of business are treated under Chapter 11 of the U.S. Bankruptcy Code.[80] Although Chapter 11 began as a reorganization mechanism, the trend for some time in large cases has been toward going concern sales of substantially all of a debtor's assets, with no prospect of the debtor company surviving. Baird and Rasmussen, for example, have argued that wholesale liquidations under Chapter 11 are now the norm in large cases.[81] In their view, there is no longer any question that such sales are appropriate:[82]

> The debate over speedy sales of all the assets of the business as a going concern is over. Sales are the norm in large reorganizations that are anything other than a confirmation of a debt restructuring reached outside of bankruptcy. The debate now centers on how sales should be conducted.

This trend toward liquidation directly challenges the traditional reorganization model of Chapter 11, which is premised on the assumption that reorganization, by preserving going-concern value, usually results in better returns for creditors than liquidation. David Skeel has called this traditional account the "Debtor in Control" narrative:[83]

> According to this narrative, bankruptcy is designed to preserve "going concern value" when a large company stumbles. To achieve this objective, bankruptcy prevents creditors from making grabs for the company's assets,

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80. 11 U.S.C. § 101 *et seq.* (Bankruptcy), §1101.
81. Douglas G. Baird and Robert K. Rasmussen, "Chapter 11 at Twilight" (2003), 56 Stan. L. Rev. 673. See also Douglas G. Baird, "The New Face of Chapter 11" (2004), 12 Am. Bankr. Inst. L. Rev. 69, at pp. 80-82.
82. Douglas G. Baird, "Car Trouble" (2001), John M. Olin Law & Economics Working Paper No. 551 (2d Series), at p. 2, online: <http://ssrn.com/abstract=1833731>.
83. David A Skeel, Jr., "Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time To Spare" (2009), Mich. St. L. Rev. 1187, at p. 1198.

and it gives the debtor's managers an opportunity to negotiate with its creditors over the terms of a reorganization plan.

. . . . .

The Debtor in Control narrative suggested that the company and its team of professionals should be given plenty of time to determine what went wrong and work with its creditors to develop a plan for a healthier future. The narrative included an appeal to patience and for sympathy for the distressed company.

Skeel suggests that the "Debtor in Control" narrative has been replaced by the "No Time to Spare" narrative, which insists on the bankruptcy court's immediate approval of new financing and the sale of substantially all the company's assets as quickly as possible because "the company's assets are a melting ice cube and will . . . evaporate unless the court springs immediately into action."[84]

Variations of the "melting ice cube" argument figured prominently in the recent *Chrysler*[85] and *General Motors*[86] proceedings. In both decisions, the U.S. bankruptcy court approved rapid sales of substantially all the assets of the debtor companies in a restricted bid process, where the buyers assumed specified liabilities to unsecured creditors as part of the purchase, despite the claims of secured creditors. Barry Adler has criticized these decisions because the court approved the sales without first testing the value of the assets.[87] In his view, had the price paid been properly determined by a market test, the creditors should have been content to receive a ratable share of the proceeds from the sale. Instead, the buyers paid too little relative to the value of the assets, and in exchange assumed the specified liabilities relating to the unsecured creditors, all at the expense of secured creditors who otherwise would have received higher returns. Adler has further argued that this sort of result could be avoided in the future by amending the Code to set out minimum requirements for court approval of asset sales according to Delaware common law:[88]

Congress would do well to establish as a minimum procedural safeguard state law requirements for section 363 sales of all or substantially all of a

84. *Ibid.*, at p. 1199.
85. *Chrysler LLC (In re)*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), affd 576 F.3d 108 (2d Cir. 2009), vacated 130 S.Ct. 1510 (2009), remanded to 592 F.3d 370 (2d Cir. 2010).
86. *General Motors Corp. (In re)*, 409 B.R. 24 (Bankr. S.D.N.Y. 2009).
87. Barry E. Adler, "A Reassessment of Bankruptcy Reorganization After Chrysler and General Motors" (2010), 18 Am. Bankr. Inst. L. Rev. 305, at p. 315.
88. *Ibid.*, at p. 316.

debtor's assets, at least where the debtor is large enough to justify the administrative expense of such a process.

In sum, broadly similar concerns seem to arise in both Chapter 11 and CCAA sales. These concerns focus on the potential detriment to creditors when sales of substantially all the assets of a debtor are conducted under the auspices of a broad and flexible reorganization mechanism rather than the traditional liquidation procedures and, specifically, where the requirements for approving the sales are poorly defined. Many of the concerns expressed in this article, therefore, extend beyond the technicalities of s. 36 of the CCAA. They are concerns with how asset sales are conducted in large insolvencies, as well as the rationale for judicial approval. Put another way, the question asked here is not whether liquidations are appropriate under a restructuring statute (although this remains a live issue in the Canadian jurisprudence) but what requirements must be met before a court approves a given sale. The current approaches to this question in the jurisprudence are troubling, and the consequences for creditors' rights are significant.

3. The Liquidation vs. Reorganization Debate: Still Alive and Well

The advent of s. 36 has not resolved the controversy over "liquidating CCAAS" — the use of CCAA proceedings to effect a sale of assets by the debtor company with no intention of continuing the debtor company as a going concern. Section 36 makes no mention of liquidating CCAAS. However, as the above cases illustrate, courts in Ontario and Québec have continued to approve liquidating CCAAS. Meanwhile, courts in Alberta and British Columbia have expressed skepticism over liquidating CCAAS, especially where no plan is presented to the creditors and where the business operations of the debtor company will not continue following liquidation.

Prior to the 2009 amendments introducing s. 36, one commentator — now a judge of the British Columbia Supreme Court — noted:[89]

> The amendment will no doubt resolve the question of jurisdiction regarding asset sales, but will not resolve how the court ought to exercise its discretion. . . . Further, the amendment does not address procedural questions such as

89. Shelley C. Fitzpatrick, "Liquidating CCAAS – Are We Praying to False Gods?" in J. Sarra, *Annual Review of Insolvency Law 2008* (Toronto, Carswell, 2009), at pp. 44-45.

> whether a Plan of Arrangement approving the sale must be voted upon by its creditors before any sale takes place. This issue was raised by Tysoe J.A. in *Cliffs Over Maple Bay*, and again goes to the fundamental issue of whether the creditors and the court must endorse a substantive course of action proposed by the debtor company under the *CCAA* instead of the asset liquidations being presented to the creditors as a *fait accompli*.

As these remarks suggest, the debate over liquidating CCAAS raises fundamental questions about the underlying policy goals of Canada's restructuring regime. Section 36 does not solve the problem, because while the provision recognizes that going concern sales may be appropriate in some cases, it does not specify when courts should approve these sales or whether other types of liquidating CCAAS are appropriate. This is a question about the limits of judicial discretion under the CCAA, and it can only be answered by considering the purposes of the statute as a whole.

VI. CONCLUSION

While s. 36 was intended to provide substantive direction and guidance on minimum requirements for approving CCAA asset sales, courts have continued to apply other common law tests such as *Soundair*. Consequently, s. 36 has had the opposite effect than that intended: it further complicates the judicial analysis in asset sale scenarios. Moreover, s. 36 has not resolved the dispute over whether liquidating CCAAS are appropriate, and under what circumstances. This question has divided the courts of the different provinces. It is a fundamental question because it depends on the interpretation of the underlying purposes of the CCAA. These problems will remain unresolved until Parliament or the Supreme Court of Canada lays down a clear rule to streamline the sale approval process.

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IS "CORPORATE RESCUE" WORKING IN CANADA?

Alfonso Nocilla*

This paper examines the outcomes of proceedings under the federal Companies' Creditors Arrangement Act (CCAA) between 2002 and 2012. The CCAA is Canada's restructuring statute of choice for large, insolvent corporations. Its basic purpose is "corporate rescue" – that is, the CCAA is designed to facilitate the rehabilitation of insolvent companies so that they can return to solvency and continue in business. Significantly, the results of this study show that many recent CCAA proceedings have not, in fact, resulted in the survival of the debtor companies. Rather, many recent cases involved liquidations of substantially all of the assets of the debtor companies, after which the debtor companies ceased to operate. This paper considers the growing trend toward liquidating CCAAs in light of the Act's corporate rescue purpose. It examines some of the key problems presented by liquidating CCAAS and proposes some approaches for resolving the present uncertainty in this area of insolvency law.

I. INTRODUCTION

In *Century Services*,[1] the Supreme Court of Canada stated that the purpose of the Companies' Creditors Arrangement Act[2] (CCAA) "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[3] This paper asks whether the CCAA is fulfilling this "corporate rescue" purpose. Specifically, this paper examines filings under the CCAA between January 1, 2002 and December 1, 2012 in order to determine how many CCAA companies: (a) were reorganized by way of a formal plan of arrangement; (b) were liquidated under the CCAA (with or without presenting a plan to their creditors); or (c) left the CCAA process and entered receivership or bankruptcy.

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* Associate, Hoffer Adler LLP. This paper and the comment by Professor Wood were first delivered at the 42nd Annual Workshop on Commercial and Consumer Law held at the Schulich School of Law, Dalhousie University, on October 12-13, 2012 (ed.).

1. *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, 2010 SCC 60 (S.C.C.).
2. R.S.C. 1985, c. C-36.
3. *Century Services*, *supra*, footnote 1, at para. 15.

This inquiry is particularly relevant now given the Supreme Court of Canada's recent decisions in *Indalex*[4] and *Abitibi*.[5] These decisions are quite significant historically, as it is rare for the Supreme Court to hear CCAA cases.[6] These appeals resulted, in part, from a flurry of relatively recent lower court decisions that have caused a rapid evolution of Canadian restructuring law.[7] This evolution has given rise to controversies over the fundamental purposes of the CCAA. For example, the courts of the different provinces continue to disagree over whether the CCAA is the appropriate legal mechanism for effecting the sale of substantially all of the assets of an insolvent debtor company (also known as a "liquidating CCAA"), without any prospect of the debtor continuing in business or presenting a formal plan of arrangement to its creditors.[8] In *Abitibi*, the Supreme Court of Canada considered the CCAA's impact on provincial environmental protection legislation.[9] However, while the *Abitibi* decision has provided a measure of clarity on the status of environmental regulatory orders in CCAA proceedings, the Supreme Court's analysis did not consider some of the more pressing questions regarding the broad authority that the CCAA confers on the supervising judge in a restructuring.

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4. *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.).
5. *AbitibiBowater Inc., Re*, 2012 SCC 67 (S.C.C.).
6. The Supreme Court's only decisions on the CCAA prior to *Century Services* were *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), which was heard just one year after the Act was adopted, and the very brief appeal in *Westar Mining Ltd., Re*, [1993] 2 S.C.R. 448 (S.C.C.), which dealt with appeals of interlocutory orders.
7. See Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto, Irwin Law, 2009), at p. 307: "Restructuring law continues to be in a state of rapid evolution, and its proper role as well as its relationship with other commercial insolvency regimes continues to be controversial."
8. See *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C. C.A.), at para. 32:

   > I query whether the court should grant a stay under the CCAA to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

   See also, generally: Shelley C. Fitzpatrick, "Liquidating CCAAS — Are We Praying to False Gods?" in J. Sarra, *Annual Review of Insolvency Law 2008* (Toronto, Carswell, 2009), at p. 33; Bill Kaplan, "Liquidating CCAAS: Discretion Gone Awry?," *ibid.*, at p. 79; Robert Blair, "The CCAA Over 30 Years: From Chrysalis to Butterfly or Chrysalis to Gadfly? Some Thoughts from an Appellate Perspective" in J. Sarra, *Annual Review of Insolvency Law 2010* (Toronto, Carswell, 2010), at p. 557.
9. Specifically, the Supreme Court clarified the test for determining whether provincial regulatory orders issued for environmental remediation are provable claims and therefore subject to the CCAA process.

Meanwhile, in *Indalex*, a case involving a liquidating CCAA, the Supreme Court examined the CCAA's impact on provincial pension legislation. However, the Supreme Court in *Indalex* did not consider the controversy over liquidating CCAAS.

It would have been helpful if, in deciding *Indalex*, the Supreme Court had considered, in greater detail, the lower courts' interpretation and application of the CCAA in modern proceedings in light of the CCAA's history and purposes. Significantly, the results of this study point to a growing trend toward liquidating CCAAS in Canada. On its face, this result seems inconsistent with the CCAA's corporate rescue purpose, and therefore invites Parliament or the Supreme Court to provide some much needed clarity on this issue.

Part II below provides a brief overview of the CCAA process and the different possible outcomes when a debtor company applies for CCAA protection. Parts III and IV below discuss the method and results of this study. Parts V and VI discuss some of the implications of these results, particularly in light of the ongoing controversy over liquidating CCAAS, and suggest some approaches for resolving these problems.

II. THE CCAA PROCESS

The CCAA is remedial legislation designed to facilitate compromises and arrangements between insolvent companies and their creditors.[10] In order to apply for CCAA protection, the applicant must be an insolvent company or affiliated companies with more than $5 million in debt. Upon the debtor's initial application for protection, s. 11.02 empowers the CCAA court to order a general stay of proceedings against the debtor. Following this initial order, several different outcomes are possible:

(a) *Reorganization*: Traditionally, the debtor would prepare a plan of arrangement designed to rehabilitate the debtor corporation so that it could continue in business and avoid bankruptcy.[11]

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10. This purpose is expressed in the CCAA's long title, "An Act to facilitate compromises and arrangements between companies and their creditors." See *Cliffs*, *supra*, footnote 8, at para. 27. See also *Century Services*, *supra*, footnote 1, at para. 17:

> Parliament understood when adopting the CCAA that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal.

11. See *Century Services*, *supra*, at para. 60. See also Stanley E. Edwards,

The debtor would present this plan at a meeting of its creditors for their approval. If a majority of each class of creditors representing two-thirds of the value of the debt held vote in favour of the plan, the court may sanction the plan and the debtor may proceed to implement it.[12]

(b) *Failed Plan (Bankruptcy or Receivership)*: In contrast to reorganization proceedings under the Bankruptcy and Insolvency Act[13] (BIA), if the creditors in a CCAA proceeding do not approve the debtor's plan, the debtor is not automatically assigned into bankruptcy. Rather, the debtor may amend the plan and try again to obtain its creditors' approval, so long as the court continues to extend the protective stay under s. 11. If, however, the debtor ultimately fails to present a plan that receives the creditors' approval, the court will likely terminate the CCAA proceedings and lift the protective stay against the debtor company. In practice, this will result in the debtor being petitioned or assigning itself into bankruptcy, or placed into receivership by one of its secured creditors, and subsequently liquidated.

(c) *Liquidating CCAA*: As discussed above, this is a relatively new type of proceeding in which the debtor's assets are sold either piecemeal or on a going concern basis under the CCAA court's supervision. The sales may occur pursuant to a plan that has been approved by the creditors, or they may occur in the absence of a plan. Notably, many recent CCAA proceedings have been liquidating CCAAs from the outset. That is, the debtor never intended to present a reorganization plan to its creditors, and merely applied for CCAA protection so that it could begin a marketing process to sell substantially all of its assets. In such cases, the debtor might present a post-sale plan to its creditors that is essentially a plan of distribution of the sale proceeds, or the debtor may simply enter bankruptcy proceedings. For reasons that will be discussed further below, liquidating CCAAs are controversial and may not be consistent with the corporate rescue purpose of the CCAA.

In addition to the above scenarios, it is also possible that an insolvent debtor corporation could return to solvency and exit CCAA proceedings without being reorganized.[14]

"Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587.

12. CCAA s. 6.

13. R.S.C. 1985, c. B-3.

III. METHOD

Data was collected from three main sources: (i) the Office of the Superintendent of Bankruptcy Canada (OSB), which has recorded all CCAA filings since September 18, 2009;[15] (ii) Janis Sarra's report "Development of a Model to Track Filings and Collect Data for Proceedings Under the CCAA," which recorded filings between 2001 and 2005;[16] and (iii) the online databases Westlaw, Quicklaw, and CanLII. For certain recent proceedings that have not been reported, relevant information was obtained from the websites of monitors, trustees and receivers.

The results of each reported CCAA proceeding were recorded and categorized based on the different possible outcomes outlined in Part II above. That is, a reorganization was recorded whenever a company received approval from its creditors and the court for a formal plan of reorganization (including the court's sanctioning of a reorganization plan approved in proceedings in a foreign jurisdiction). On the other hand, where the CCAA process was terminated in favour of a receivership or bankruptcy proceedings, the outcome was recorded as a bankruptcy or receivership. Lastly, where the debtor completed a sale of substantially all of its assets while remaining under CCAA protection, this was recorded as a liquidating CCAA. In addition, this study asked several ancillary questions, such as how many liquidating CCAAs were carried out in the absence of a plan of arrangement, and how many reorganized companies remained in operation as of December 1, 2012. Outcomes were also compared with available data on commercial proposal proceedings under Part III of the BIA.

It is important to note that reported decisions rarely present the full picture either of the legal process as a whole, or of a given proceeding. Where certain information was unavailable, such as the date of filing or the outcome of the proceedings, information could sometimes be obtained from reported decisions outside of CCAA proceedings, or in news reports. For a number of cases, no records were found that provided the required information. In

14. *Century Services*, *supra*, footnote 1, at para. 14: "The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed."

15. Available online: <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02281.html>.

16. "Final Report to the OSB" (March, 2006), available online: <http://strategis.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Sarra-2006-ENG.pdf/$FILE/Sarra-2006-ENG.pdf>.

addition, several proceedings are ongoing, and their outcomes remain to be seen.

IV. RESULTS

Table 1 below shows the total number of CCAA filings by year and province of filing. Notably, this study revealed some additional filings beyond those recorded by the OSB for filings prior to 2009.[17]

Table 2 shows the number of reorganizations and liquidations carried out under the CCAA, as well as the number of receiverships or bankruptcies resulting from failed CCAA proceedings. As noted above, the outcomes of some cases are not known because either the proceedings are ongoing or the records are incomplete. Consequently, Table 2 contains fewer total cases than Table 1.

Table 3 shows, for comparison, the number of successful and failed reorganizations under the commercial proposal provisions of the BIA. These data are drawn from the OSB's records and Janis Sarra's 2009 study.[18]

Table 4 shows the total number of liquidating CCAAs that were carried out before the debtor presented a plan of arrangement to its creditors. The results show that in most cases, the court approved a liquidating CCAA before the debtor presented a plan to its creditors. In other words, the creditors did not formally vote on whether the proposed liquidation should proceed. In such cases, as discussed above in Part II, the debtor might present a plan after completing the liquidation (if at all), in order to determine how the sale proceeds should be distributed to the creditors. At the same time, or alternatively, the debtor might exit the CCAA process and enter bankruptcy proceedings.

Table 5 shows how many companies that reorganized under the CCAA still operate today.

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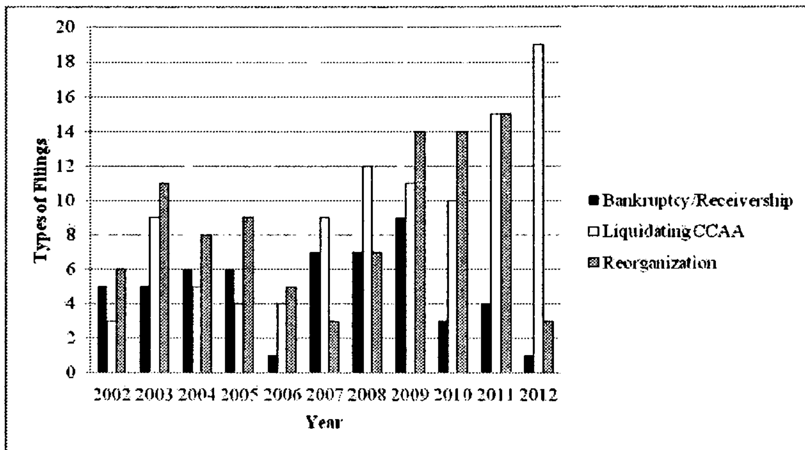
17. For example, Janis Sarra's study identified 16 filings in 2004, while this study identified 22 in that year.
18. Janis Sarra, "Failure to Capture the Brass Ring: An Empirical Study of Business Bankruptcies and Proposals under the Canadian *Bankruptcy and Insolvency Act*" (Toronto, Canadian Association of Insolvency and Restructuring Professionals, April 22, 2009), at p. 74. Available online: <http://www.cairp.ca/_files/file.php?fileid=filerQHowYPYwP&filename=file_2_FINAL_Sarra_Janis__Failure_to_Capture_the_Brass_Ring_April.pdf>.

Table 1 – CCAA Filings By Year and Province, January 1, 2002 to December 1, 2012

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	TOTAL
ALTA.	3	4	2	3	0	2	1	5	7	5	10	42
B.C.	2	3	2	2	3	4	6	2	3	13	11	51
MAN.	1	0	0	0	0	0	1	0	0	0	3	5
N.B.	1	1	0	0	0	2	1	0	1	1	2	9
NFLD.	1	0	0	0	0	0	1	0	0	0	0	2
N.S.	0	0	0	0	0	1	1	0	0	2	1	5
ONT.	5	10	11	12	4	7	12	22	12	10	19	124
P.E.I.	0	0	0	0	0	0	0	0	1	0	0	1
QUE.	2	7	6	3	2	4	6	7	8	11	5	61
SASK.	0	2	1	2	1	0	1	1	0	0	0	8
TOTAL *	15*	27*	22*	22*	10*	20*	30*	37*	32*	42*	51	308

Table 2 – CCAA Outcomes 2002-2012: Reorganizations, Liquidating CCAAS and Bankruptcies/Receiverships

	TYPE OF FILING	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	TOTAL
ALTA.	Liquidating CCAA	1	2	0	0	0	0	0	1	4	1	[illegible]	10
	Bankruptcy/Receivership	0	0	0	1	0	2	0	2	1	0	[illegible]	4
	Reorganization	2	1	2	1	0	0	1	1	2	3	[illegible]	13
B.C.	Liquidating CCAA	1	0	0	0	0	1	1	0	0	4	3	10
	Bankruptcy/Receivership	0	2	2	0	0	3	3	2	0	1	[illegible]	13
	Reorganization	0	1	0	2	3	0	0	0	2	6	1	15
MAN	Liquidating CCAA	0	0	0	0	0	0	1	0	0	0	2	3
	Bankruptcy/Receivership	1	0	0	0	0	0	0	0	0	0	0	1
	Reorganization	0	0	0	0	0	0	0	0	0	0	[illegible]	0
N.B.	Liquidating CCAA	0	1	0	0	0	1	0	0	0	0	1	3
	Bankruptcy/Receivership	1	0	0	0	0	0	1	0	0	0	[illegible]	2
	Reorganization	0	0	0	1	0	1	0	0	0	1	0	[illegible]
NFLD	Liquidating CCAA	0	0	0	0	0	0	1	0	0	0	[illegible]	1
	Bankruptcy/Receivership	1	0	0	0	0	0	0	0	0	0	[illegible]	1
	Reorganization	0	0	0	0	0	0	0	0	0	0	[illegible]	0
N.S.	Liquidating CCAA	0	0	0	0	0	0	1	0	0	1	[illegible]	2
	Bankruptcy/Receivership	0	0	0	0	0	0	0	0	0	1	[illegible]	1
	Reorganization	0	0	0	0	0	1	0	0	0	0	0	1
ONT	Liquidating CCAA	1	3	3	4	3	5	5	6	4	7	11	54
	Bankruptcy/Receivership	2	2	1	3	0	1	0	4	1	0	1	17
	Reorganization	2	5	3	2	1	0	5	8	6	1	1	34
P.E.I.	Liquidating CCAA	0	0	0	0	0	0	0	0	0	0	0	0
	Bankruptcy/Receivership	0	0	0	0	0	0	0	0	1	0	[illegible]	1
	Reorganization	0	0	0	0	0	0	0	0	0	0	0	0
QUE.	Liquidating CCAA	0	2	2	0	0	2	3	2	2	2	1	16
	Bankruptcy/Receivership	0	1	0	2	1	1	1	1	0	2	6	9
	Reorganization	2	3	3	2	1	1	1	4	4	4	1	26
SASK	Liquidating CCAA	0	1	0	0	1	0	0	0	0	0	0	2
	Bankruptcy/Receivership	0	0	1	0	0	0	2	0	0	0	0	3
	Reorganization	0	1	0	1	0	0	0	1	0	0	0	3
TOTAL		14	25	19	19	10	19	26	34	27	34	23	250


20
18
16
14
12
10
8
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0
Types of Filings
2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012
Year
Bankruptcy/Receivership
Liquidating CCAA
Reorganization

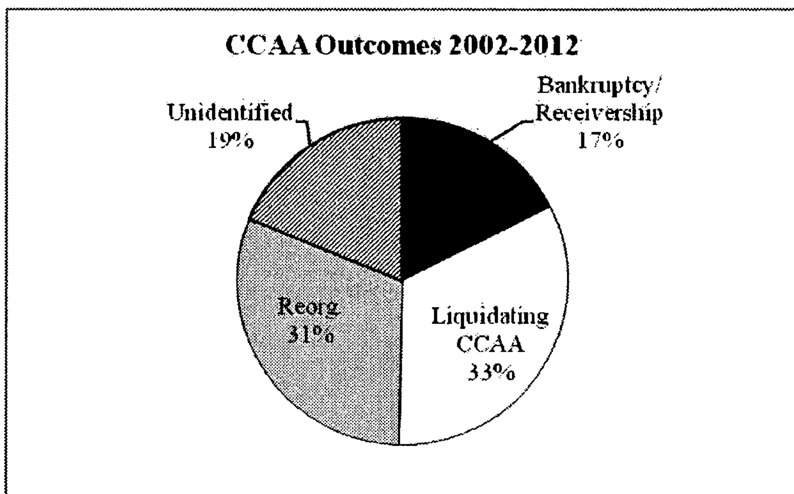
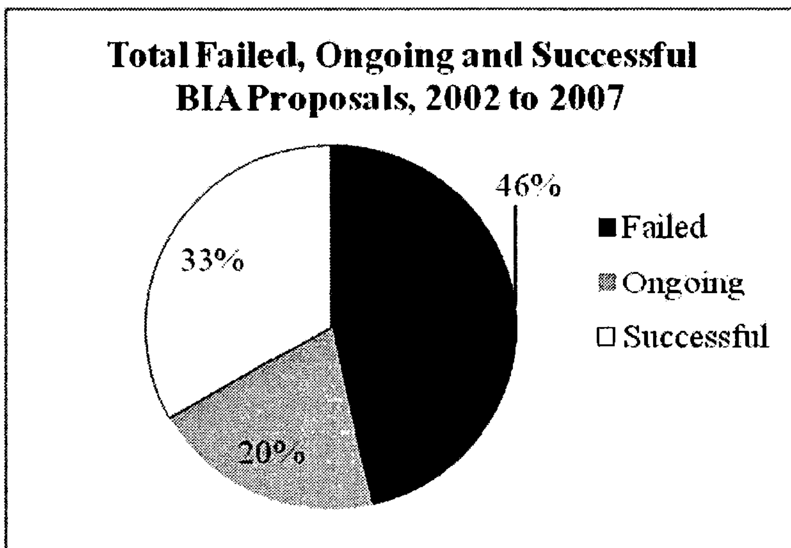

CCAA Outcomes 2002-2012
Bankruptcy/ Receivership 17%
Unidentified 19%
Reorg 31%
Liquidating CCAA 33%

Table 3 – Outcomes of BIA Commercial Proposal Proceedings, 2002 to 2007[19]

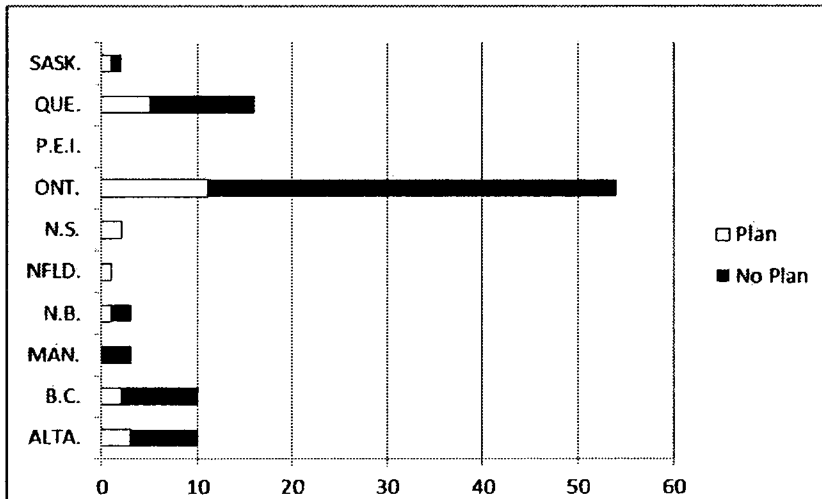
Year				Total
	Failed	Ongoing	Successfully Completed	
2002	963 (50%)	83 (4%)	879 (46%)	1925
2003	887 (48%)	142 (8%)	814 (44%)	1843
2004	807 (47%)	233 (13%)	684 (40%)	1724
2005	789 (48%)	401 (24%)	466 (28%)	1656
2006	601 (42%)	514 (36%)	316 (22%)	1431
2007	548 (42%)	630 (48%)	133 (10%)	1311
Total	**4595**	**2003**	**3292**	**9890**



19. *Ibid.*

Table 4 – Liquidating CCAAs With and Without (or Before) a Plan of Arrangement, 2002-2012

	Plan	No Plan
ALTA.	3	7
B.C.	2	8
MAN.	0	3
N.B.	1	2
NFLD.	1	0
N.S.	2	0
ONT.	11	43
P.E.I.	0	0
QUE.	5	11
SASK.	1	1
TOTAL	**26**	**75**



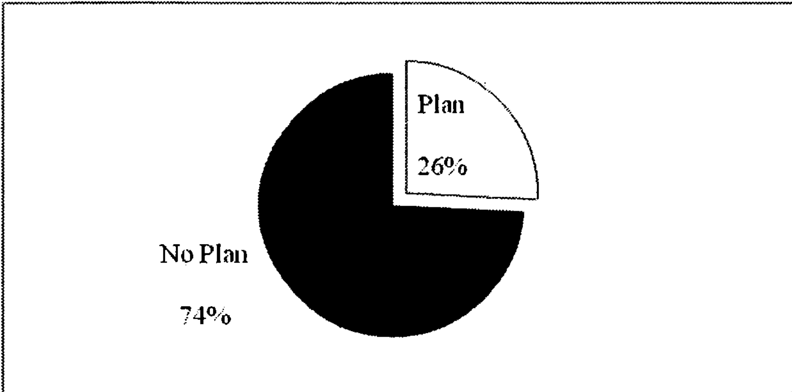
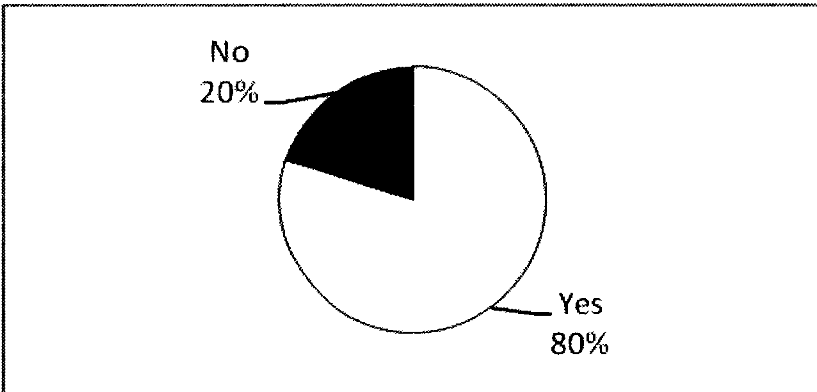


Table 5 – CCAA Reorganized Companies Still Operating in 2012

Yes	No
76	19



V. REFLECTIONS ON RECENT RESTRUCTURING OUTCOMES AND THE FUTURE OF THE CCAA

1. Rise in Liquidating CCAAs

While CCAA filings increased significantly between 2002 and 2012, many recent proceedings have been liquidating CCAAS from the outset, with no prospect of the debtor presenting a plan to its creditors or continuing in business following the conclusion of the CCAA process. Of the CCAA companies identified in this study, a significant number did not present plans to their creditors, while in other cases the creditors or the courts rejected the plans. As Table 2 shows, at least one third of all filings were liquidations carried out under the CCAA. These liquidations either resulted from failed reorganizations or, more commonly, were carried out in the absence of any reorganization efforts, as an alternative to receivership or bankruptcy sales.

The above results are problematic in light of the Supreme Court of Canada's statement in *Century Services* that the purpose of the CCAA is "to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[20] In *Century Services*, the Supreme Court clearly distinguished between the BIA, which contains provisions for both reorganization and liquidation, and the CCAA, which is designed for reorganization:[21]

> Unlike the BIA, the CCAA contains no provisions for liquidation of a debtor's assets if the reorganization fails. There are three ways of exiting CCAA proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the CCAA proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the BIA or to place the debtor into receivership.

It is unfortunate that the Supreme Court in *Century Services* did not address the issue of liquidating CCAAS. There has been considerable controversy over the use of liquidating CCAAS, even as they are becoming increasingly common alternatives to

20. *Century Services*, *supra*, footnote 1, at para. 15.
21. *Century Services*, *supra*, at para. 14.

receivership or bankruptcy sales. In particular, while courts in Ontario have often approved liquidating CCAAs, courts in British Columbia and Alberta have expressed skepticism.[22] Courts in Québec, meanwhile, have given mixed signals, approving liquidating CCAAs in some cases, while denouncing them in others.[23] These differing judicial interpretations of the CCAA will continue to cause uncertainty in Canadian restructuring law until Parliament or the Supreme Court sets out clear criteria for the approval of liquidating CCAAs and, more importantly, clarifies the underlying purposes of the CCAA. These issues are discussed immediately below.

2. Corporate Rescue and Liquidating CCAAs

In Ontario, the court's jurisdiction to approve liquidating CCAAs was established as early as 1998.[24] In recent years, courts in most other provinces have followed suit, though not without some conflicting judicial opinions. Perhaps as a consequence, most liquidating CCAAs are still carried out in Ontario. The jurisdiction of a supervising CCAA judge to approve sales was codified in s. 36, which was adopted in the 2009 amendments to the Act.[25]

While liquidating CCAAs appear to be inconsistent with the corporate rescue purpose of the Act, courts that favour them have justified them in two ways. Firstly, they have pointed to the broad discretion of the CCAA court to grant a wide range of orders, and to the remedial nature of the Act that requires a large and liberal interpretation of its provisions.[26] Secondly, they have suggested

22. See, respectively, *Cliffs*, *supra*, footnote 8, and *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93, 1999 ABCA 178 (Alta. C.A.).

23. For example, compare *White Birch Paper Holding Co., Re* (2010), 72 C.B.R. (5th) 49, 2010 QCCS 4915 (Que. S.C.), leave to appeal refused 2010 QCCA 1950 (Que. C.A.), approving the sale of substantially all the assets of the debtor in the absence of a formal plan, with *Medical Intelligence Technologies inc., Re*, 2009 QCCS 2725 (Que. S.C.), in which the court refused to extend the stay of proceedings in order to permit the debtor to sell substantially all of its assets. The court in *Medical Intelligence* cited *Cliffs*, *supra*, footnote 8, stating at para. 39: "La liquidation des actifs, *en l'absence de plan d'arrangement*, ne respecte ni la lettre ni l'esprit de la *LACC*" (emphasis in original).

24. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), additional reasons (1998), 5 C.B.R. (4th) 319, leave to appeal refused (1998), 32 C.B.R. (4th) 21 (Ont. C.A.).

25. S.C. 2007, c. 36. Notably, however, these provisions do not address liquidating CCAAS.

26. *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), at para. 47: "The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which

that sales in the absence of plans are appropriate where the underlying business of the debtor is preserved, or where the sale of the debtor's assets will maximize returns for the creditors.[27]

These flexible interpretations of the CCAA have facilitated many creative restructurings, and have helped to transform the CCAA from a bare-bones statute into a highly sophisticated restructuring tool. However, these interpretations also pose risks to the integrity of Canada's insolvency regime and to the rule of law generally. One commentator has explained this problem as follows:[28]

> Unfortunately, processes originating in extraordinary circumstances can too easily become accepted practices. The fact that successful results have been achieved both justifies the steps taken and validates them for future application. It is intrinsic to restructuring that, once a restructuring is completed, all other possible outcomes are consigned to the realm of the hypothetical. The process can easily become more akin to that of an administrative body performing an executive function of government rather than to a judicial process adjudicating on a principled basis between contending private parties. Once any stakeholders perceive rightly or wrongly that the court and the monitor are adverse parties, accepted standards of legal process are brought into some question. Under those circumstances, it might not be perceived by all parties that they have received due process from the courts; they may have, in fact, participated in a different, and perhaps non-court, process.

Part of the difficulty in resolving the problems posed by liquidating CCAAs is that the Act lacks clearly defined policy goals. As other commentators have pointed out, statements about the CCAA's corporate rescue purpose are "superficially attractive but vague . . . they lack a fundamental theoretical basis upon which we can formulate concrete objectives."[29] Consequently, the question of whether the CCAA's corporate rescue purpose requires the debtor to attempt a reorganization in every case, or whether it permits liquidation where the debtor's underlying business survives, will

preserves its business as a going concern is, in my view, consistent with those objectives."

27. *Nortel Networks Corp., supra*. See also *Winnipeg Motor Express Inc., Re*, 2008 MBQB 297 (Man. Q.B.). Consider, however, Morawetz J.'s statement in *Nortel* at para. 47 that a liquidating CCAA is appropriate, even in the absence of a plan, where the debtor's business is preserved as a going concern. It is unclear whether the court, in approving the *Nortel* sale, relied on a value-maximization principle, a corporate rescue principle, or some combination of the two.

28. Richard B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law" in J. Sarra, *Annual Review of Insolvency Law 2005* (Toronto, Carswell, 2006), p. 481.

29. Andrew J.F. Kent *et al.*, "Canadian Business Restructuring Law: When Should a Court Say 'No'?" (2009), 24 B.F.L.R. 1.

remain unsettled until Parliament or the Supreme Court addresses this issue. In my view, a liquidating CCAA that preserves the debtor's underlying business, is carried out pursuant to a plan approved by the debtor's creditors, and results in greater recoveries for the creditors, is certainly more defensible than one in which the debtor's assets are sold piecemeal before a plan is ever presented to the creditors. However, it is premature to suggest that courts should approve such proceedings on the basis that they are efficient and advance the Act's purposes, since the language of the CCAA does not expressly grant courts the authority to approve them, nor does it provide substantive guidelines for courts to follow in doing so.

In short, further analysis is needed to reconcile liquidating CCAAS conceptually with the corporate rescue purpose of the Act and to define their role in Canada's insolvency regime. At the very least, the notion of corporate rescue requires the continuation of the debtor's business, in order to preserve jobs or otherwise limit the negative social and economic impact of corporate failures.[30] However, not all liquidating CCAAS result in the continuation of the debtor's business by the purchaser.[31] Furthermore, even if we grant that a liquidating CCAA may be appropriate where it provides greater returns for the debtor company's creditors than would a receivership or bankruptcy, it is presumably up to the creditors to decide whether to proceed under the CCAA, and what form the restructuring should take. But most liquidating CCAAS no longer proceed by way of formal plans, so it would appear that creditors, in general, are not always given much choice over whether a debtor will liquidate under the CCAA, through a receivership or in bankruptcy proceedings. Only the senior secured creditors are likely to be in a position to make these decisions, as they typically have access to various tools with which to exercise control over the insolvent debtor. For example, only a secured creditor holding a

30. See, for example, Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge, U.K., Cambridge University Press, 2002) at p. 188:

> A distinction can be made between the company and the business. Thus, even where a company is liquidated, successful steps may be taken to retain aspects of the business as operational enterprises, to sustain the employment of groups of workers and to ensure the survival of some economic activity. Similarly, successful results may be obtained where the company is taken over and loses its individual identity accordingly.

31. Although it was beyond the scope of this study to consider, the question of what happens to the assets that are sold in a liquidating CCAA should be examined. Many liquidating CCAAS seem to result in the continuation of the debtor's business by the purchaser, but it is certainly possible for a purchaser to sell the assets piecemeal over time.

general security interest in the debtor's assets will be entitled to exercise the receivership remedy. Consequently, unsecured creditors may be left with few options but to follow the secured creditors' lead, even if the end result is that the secured creditors' choice yields lower overall returns than the alternatives.[32]

3. The High Costs of CCAA Proceedings

In light of the issues discussed above, some consideration should be given to the professional fees incurred by the debtor and its stakeholders in CCAA proceedings. These expenses are often considerable, partly due to the flexible nature of the CCAA process.[33] In contrast to the BIA's strict, rules-based commercial proposal regime, the CCAA is quite open-ended, as it is designed to deal with the largest and most complex corporate insolvencies. Consequently, CCAA proceedings are often less predictable than those under the BIA. Counsel for the monitor and the debtor company typically will prepare materials on an urgent basis and appear in court frequently, especially at the early stages of proceedings. Unsurprisingly, this "real-time" litigation tends to be very expensive.

In some cases, restructuring professionals' fees have threatened the success of the reorganization. For example, in *Community Pork Ventures*, Kyle J. of the Saskatchewan Court of Queen's Bench stated:[34]

> The issue of expense is of concern to the court. While senior lenders with $35,700,000 on the table are quite prepared to absorb the not inconsiderable costs in the long run, the companies foresee the presently budgeted $650,000 of professional fees ballooning to $1,000,000 or more for only a three month period. The consolidated cash flow statements before the courts show only $215,000 of positive cash flows and a pro forma accrual statement for the same period would, I am told, show a deficiency. Any further expense would

32. For a further discussion of the ways in which a senior secured creditor could potentially control the insolvent debtor's fate, possibly to the detriment of the other creditors, see Roderick J. Wood, "Rescue and Liquidation in Restructuring Law" (2013), 53 C.B.L.J. 407.
33. See Jacob S. Ziegel and Rajvinder S. Sahni, "An Empirical Investigation of Corporated Division I Proposals in the Toronto Bankruptcy Region" (2003), 41 Osgoode Hall L.J. 665, at p. 670: "[The CCAA] continues to be . . . relatively expensive to use due to its skeletal character, lack of procedural rules, and heavy judicial orientation."
34. *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 65, 2005 SKQB 245 (Sask. Q.B.), additional reasons 2005 SKQB 252 (Sask. Q.B.), leave to appeal refused 2005 SKCA 78 (Sask. C.A. [In Chambers]), at para. 10.

render the cash flow negative and accruals would show an even worse result. *These numbers will affect the survival potential of the business and the court must be on guard against any course of action which would render the process futile.* [emphasis added]

Despite Kyle J.'s cautions, the monitor submitted another bill four months later for over $376,000, much to the judge's dismay.[35] The CCAA proceedings ultimately ended when it became clear that the company would not be able to put forward a viable restructuring plan, and the court allowed the stay period to expire.[36]

Similarly, in *Triton Tubular Components*,[37] Mesbur J. of the Ontario Superior Court of Justice refused to grant the debtor's counsel's request for payment of a premium in addition to its fee. Mesbur J. stated that counsel had already charged "an enormously high fee" and noted that if the requested premium were granted, counsel would collect a total fee of just over $715,000 for its efforts in securing a recovery of roughly $1 million for the debtor.[38]

In the more recent case of *Tepper Holdings*,[39] LaVigne J. of the New Brunswick Court of Queen's Bench reduced the fees charged by the debtor company's counsel from over $500,000 to $150,000, stating:[40]

> The parties think that they may now arrive at a plan of arrangement that could have the general agreement of the major secured creditors; however, the large legal fees may be the straw that breaks the camel's back. The Corporations have no capacity to pay the Legal Accounts. They cannot afford these. If these fees are made payable in their entirety they may sink the debtor corporations. They definitely threaten the viability of any proposal.

Admittedly, the above cases represent only a small number of total CCAA proceedings, and there is otherwise little judicial commentary on fees in CCAA decisions.[41] Nonetheless, these cases

35. *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 68, 2005 SKQB 252, 2005 CarswellSask 410 (Sask. Q.B.), at para. 3.
36. *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 75, 2005 SKQB 294, 2005 CarswellSask 442 (Sask. Q.B.). The receiver subsequently sold the debtor's assets to Big Sky Farms Inc.
37. *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]), additional reasons 2006 CarswellOnt 2968, at paras. 92 and 100.
38. *Triton Tubular Components*, *supra*, at para. 92.
39. *Tepper Holdings Inc., Re* (2011), 984 A.P.R. 1, 2011 NBQB 311 (N.B. T.D.); see also *Tepper Holdings Inc., Re* (2011), 999 A.P.R. 86, 2011 NBQB 336 (N.B. Q.B.).
40. *Tepper Holdings*, *supra*, at para. 88.
41. In fact, there is very little data or commentary on the question of fees in CCAA proceedings. See Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost'-Benefit

are important for two reasons. Firstly, they are cautionary tales for restructuring professionals. Courts are now carefully scrutinizing professional fees in CCAA proceedings to determine whether they are "fair and reasonable," and are increasingly willing to reduce fees significantly where they are found to be excessive.[42] At the same time, counsel seeking to challenge each other's fees are now more likely to find support for their arguments in the jurisprudence and to receive a sympathetic ear from the supervising judge. Secondly, and perhaps more importantly, given that the costs of the CCAA process have actually threatened the viability of some reorganizations, it bears asking whether the CCAA is in fact the best option for many debtor companies that file for CCAA protection. Many companies that qualify for CCAA protection due to their high debt load may lack the cash flow or financing for a long, drawn out restructuring.[43] It is also questionable whether incumbent management of the debtor, which may be responsible for the company's distress, is best placed to determine whether a CCAA process is preferable to a receivership or proceedings under the BIA, or to implement a restructuring plan at all.[44]

4. Other Purposes of the CCAA

The above discussion raises the question of why distressed companies and their restructuring advisors choose the CCAA to liquidate rather than a receivership or bankruptcy proceedings. It is easy to see why the CCAA is preferable to the BIA for large,

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Analysis: Examining Professional Fees in CCAA Proceedings" in J. Sarra, *Annual Review of Insolvency Law 2009* (Toronto, Carswell, 2010). However, professional fees in restructurings have attracted significant criticism in the United States, see Lynn M. Lopucki and Joseph W. Doherty, "Routine Illegality Redux" (2011), 85 Am. Bankr. L.J. 35; "Routine Illegality in Bankruptcy Court, Big-Case Fee Practices" (2009), 83 Am. Bankr. L.J. 423; "Professional Overcharging in Large Bankruptcy Reorganization Cases" (2008), 5 J. Emp. Legal Stud. 983.

42. See *Winalta Inc., Re* (2011), 521 A.R. 1, 2011 ABQB 399 (Alta. Q.B.), at para. 125.
43. This is especially true for small- and medium-size enterprises (SMEs) that might qualify, as these enterprises are particularly sensitive to the costs of restructuring. See Paul Goodman and Anna Lund, "Concerns of Insolvency Professionals – Small and Medium Size Enterprises" in J. Sarra, ed., *Annual Review of Insolvency Law 2011* (Toronto, Carswell, 2012): "When a SME attempts to restructure, the process is very cost sensitive. . . It is difficult, and unfortunately sometimes impossible, to absorb the expenses associated with restructuring," referring to restructuring proceedings under both the BIA and the CCAA.
44. See John I. McLean and David P. Bowra, "Conflicts and the Modern CCAA Monitor" in Sarra, *ibid.*: "Monitor's reports rarely comment on management and its ability to implement a turnaround. This aspect of reports should be improved."

complex reorganizations because the BIA's commercial proposal process is far more rigid than the CCAA process. For example, the BIA does not permit stay extensions beyond a period of six months after the debtor has filed its notice of intention to make a proposal, and the debtor is deemed bankrupt if its creditors reject the proposal.[45] By contrast, there is no prescribed limit on stay extensions under the CCAA, and the stay remains in effect even if the creditors reject the plan, permitting the debtor time to negotiate and file an amended plan. Accordingly, the CCAA is the better choice where more time and flexibility are required to develop a viable plan.

It is less clear why the CCAA is preferable to a receivership or bankruptcy proceedings in cases where the debtor's only intention is to sell substantially all of its assets.[46] One important reason for using the CCAA in such circumstances is that receivers are wary of becoming "successor employers" under provincial labour and employment laws in light of the Supreme Court of Canada's decision in *TCT Logistics*.[47] In that case, applying Ontario labour law, the Supreme Court held that provincial labour boards have the exclusive jurisdiction to determine whether a receiver is a successor employer, and that no authority exists under the BIA to immunize a receiver from liability in this regard.[48] Insolvency professionals have strongly criticized this decision:[49]

> The Supreme Court of Canada's decision, by leaving the responsibility of reconciling the rights of a trustee in bankruptcy and the obligations imposed on a successor employer to the provincial labour relations tribunals, will create serious problems. The provincial labour relations statutes have not been drafted with that responsibility in mind. Most provincial statutes provide that decisions of the labour relations tribunals are not subject to review by the courts. Also, the members of these tribunals very seldom have a background or expertise in insolvency matters.

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45. Section 50.4(9) and (10) and s. 57.
46. A debtor might liquidate under the CCAA in several ways. For example, many courts will allow the debtor to liquidate either (i) pursuant to a creditor-approved and court-sanctioned plan, (ii) prior to presenting a plan, or (iii) in the absence of a plan. As noted above, however, these approaches are controversial in varying degrees.
47. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.* (2006), 271 D.L.R. (4th) 193, 2006 SCC 35 (S.C.C.).
48. *Supra*, at paras. 49-52.
49. David E. Baird and Ronald B. Davis, "Labour Issues" in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy & Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (Markham, Lexis Nexis, 2007). Note that the co-authors disagreed on this issue, and I cite Baird's view here.

Given that monitors are largely immunized from employee-related liabilities in CCAA liquidations because the debtor is deemed to remain in control of the enterprise,[50] this will be a strong incentive for restructuring professionals and creditors to continue to favour CCAA proceedings.[51]

The Supreme Court probably did not anticipate that its decision in *TCT Logistics* would cause a "flight away from receiverships resulting from the potential liability of receivers" in favour of CCAA liquidations.[52] In the aftermath of the Supreme Court's decision, some commentators did, however, suggest that receivers would turn to the CCAA to carry out liquidations, even if doing so would be more expensive than a receivership:[53]

> Without limitation, perhaps secured creditors will be more willing to support sales of a business and/or a liquidation that occur under the protection of the Companies' Creditors Arrangement Act . . .
>
> . . . . .
>
> However, even where the CCAA can be used, the cost of that approach will likely be much higher than was the case under the old receivership approach. Once again, it seems that the employees and other smaller creditors will lose in relative terms.

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50. Notably, while the 2009 amendments to the BIA have reduced the potential liabilities of receivers and trustees in respect of employees, these amendments do not provide a blanket protection against all liabilities. In addition, these new protections do not extend to the ultimate purchaser of the business from the trustee or receiver. See Susan Grundy and Katherine McEachern, "Are We There Yet? Personal Liability of Insolvency Practitioners for Employee and Pension Claims After the 2009 Insolvency Law Amendments" (2010), 26 B.F.L.R. 35, at pp. 57-60.
51. Alternatively, a receiver could simply require an indemnity from a creditor seeking to implement a receivership, but this is obviously unpalatable in cases where employee liabilities are potentially quite significant. See Peter Farkas, John Sandrelli and Jordan Schultz, "The Role of Liquidating CCAAs" (2010), 9 *Rebuilding Success* 43, at p. 43. Available online: <http://www.cairp.ca/_files/file.php?fileid=fileGQVixdTsKY&filename=file_2_PDF_of_March_2010_issue.pdf>.
52. See *Winnipeg Motor Express*, *supra*, footnote 27, at para. 41. Nonetheless, this trend may have been emerging already in the wake of the Ontario Court of Appeal's decision in *TCT Statistics*: see Jacob Ziegel, "The Personal Liabilities of Insolvency Practitioners Under Insolvency Legislation: A Comparative Analysis of Canadian, English and American Positions" in J. Sarra, ed. *Annual Review of Insolvency Law 2006* (Toronto, Carswell, 2007), in which the author states that "[t]he bloom has now gone off the ss. 47 and 47.1 interim receiverships," even if secured creditors would continue to value them.
53. Jeffrey C. Carhart, "The Decision of the Supreme Court of Canada in *TCT Logistics* and the Future of Receiverships in Canada" (2007), 44 C.B.L.J. 376, at pp. 396-397.

The shift to liquidating CCAAs from receiverships has had unfortunate consequences for Canadian restructuring law. Paradoxically, the decision in *TCT Logistics* exposing receivers and trustees to potential successor employer liabilities — which was done in order to protect employees — may simply have forced all stakeholders, including employees, to pay higher costs in connection with liquidations, because the CCAA process is often more expensive than a receivership. In addition, the CCAA was never designed to effect liquidations, and the ongoing controversy over the use of liquidating CCAAs has created considerable uncertainty with respect to the outcomes of such proceedings. As discussed above, *Indalex* is a good illustration of this problem.

5. Returns for Creditors in Sales vs. Liquidations – Chapter 11 and the CCAA

In the United States, there is ongoing debate over whether sales of substantially all of a debtor's assets under Chapter 11 of the Bankruptcy Code[54] yield higher returns for creditors than reorganizations. Baird and Rasmussen have argued that "[t]he days when reorganization law promised substantial benefits are gone," and that the rapid sale of a distressed company could yield equal or greater returns for creditors than a reorganization.[55] LoPucki and Doherty have countered this argument with empirical evidence that suggests sales of large public companies under Chapter 11 returned less than half the value for their creditors than they would have in reorganizations.[56] More recently, Jeremy Murphy has challenged LoPucki and Doherty's model on the basis that it does not adequately account for the poor health of firms that were sold compared to those that were reorganized. Using a different model to determine the pre-bankruptcy value of firms that were reorganized or sold, Murphy concluded that the differences in values that LoPucki and Doherty calculated are statistically insignificant.[57]

54. U.S.C. § 101 (2009), § 1101.
55. Douglas G. Baird and Robert K. Rasmussen, "The End of Bankruptcy" (2002), 55 Stan. L. Rev. 751, at p. 789.
56. Lynn M. LoPucki and Joseph W. Doherty, "Bankruptcy Fire Sales" (2007), 106 Mich. L. Rev. 1; "Bankruptcy Vérité" (2008), 106 Mich. L. Rev. 721.
57. Jeremy Murphy, "Bankruptcy Avant-Garde" (2011), 19 Am. Bankr. Inst. L. Rev. 113, at p. 145:

> When bankruptcy recoveries are measured as proportions of the pre-bankruptcy market value implied by an options model, the difference in average recovery ratios narrows and its statistical significance falls into doubt. The remaining difference in

At the present time, the debate over whether Chapter 11 sales or reorganizations provide greater returns for creditors appears to be at a standstill. However, an important related question is how unsecured creditors have fared under Chapter 11 compared to secured creditors. In a recent study, Andrew Wood found that returns for unsecured creditors in large, public company bankruptcies declined significantly in the period 2009-2010 compared to 1991-1996.[58] He suggests that the most likely cause of this decline was the significant increase in the overall amount of secured debt in these companies in 2009-2010 from 1997-1999 levels (the nearest possible period for comparison).[59] If these findings are correct, then recoveries for unsecured creditors will continue to decline as secured debt levels increase.[60]

What are the implications of the above studies for proceedings under the CCAA? In the absence of hard data on returns for creditors or the levels of secured debt in CCAA companies, it is difficult to draw firm conclusions. However, if secured debt is in fact more widely available and has increased significantly as a percentage of firm assets in recent years, it is possible that the CCAA will become increasingly a mechanism for secured creditors to quickly recover their investments through liquidating CCAAs. As Roderick Wood has suggested, secured creditors may have "a strong incentive to steer the insolvency towards a liquidation" where possible in order to avoid the risk that they will not realize full returns in a longer, traditional restructuring.[61] Although this question is beyond the scope of this paper, the possibility that secured creditors may now exercise more control over insolvent companies than in the past, and the effect this may have on both

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average recovery ratios appears to result in large part from asymmetries in the measurement of bankruptcy recoveries.

58. Andrew A. Wood, "The Decline of Unsecured Creditor and Shareholder Recoveries in Large Public Company Bankruptcies" (2011), 85 Am. Bankr. L.J. 429. Wood concedes that his calculations of recoveries may have been distorted by the depressed value of companies in the recession during 2009-2010. If so, one would expect to see improved recoveries over the next few years. However, Wood points out that there was also a recession during the 1991-1996 period, so the bad economy might not explain the decline in recoveries. Notably, Wood did not have access to sufficient data to determine whether the increasing use of sales in Chapter 11 contributed to the lower recoveries.
59. *Ibid.*, at p. 446.
60. There is evidence to suggest that corporate secured debt levels in general have increased significantly since 2002. See Harvey R. Miller, "Chapter 11 in Transition – From Boom and Bust and Into the Future" (2007) 81 Am. Bankr. L.J. 375, at pp. 378-383.
61. See Wood, *supra*, footnote 32, at p. 410.

the selection of proceedings (liquidations vs. reorganization) and the returns for unsecured creditors, are issues that should be investigated further. At a minimum, the absence of data to support the claim that sales generally yield better returns than reorganizations should encourage closer scrutiny of a process that the CCAA does not expressly authorize, *i.e.*, the sale of substantially all of the debtor's assets in the absence of a plan.

6. Conclusions on the Purposes of the CCAA

In order to resolve the present asymmetry between liquidations under the CCAA and those in receiverships or under the BIA, the Supreme Court should not be expected to second-guess its decision in *TCT Logistics*, nor seek to extend employee-related liabilities to monitors under the CCAA. Instead, Parliament should set out clear and substantive guidelines to be followed when a CCAA judge is asked to approve a sale of substantially all the assets of a corporation. These criteria should prevent CCAA liquidations that are undertaken purely to avoid the impact of adverse provincial legislation, or otherwise to alter the rights and entitlements of stakeholders that would ensue in a receivership or in a reorganization under the BIA. This approach would be in keeping with the Supreme Court's statement in *Century Services* that "the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization ultimately is unsuccessful," and with the goal of harmonizing the common goals of the BIA and CCAA.[62] In addition, this approach would add some needed substance to the current criteria for court approval of sales that are contained in s. 36. Significantly, in its present form, s. 36 is not substantive in its effect because it applies only to court approval of a sale, not to approval of the process by which the sale is conducted.[63]

62. *Century Services*, *supra*, footnote 1, at paras. 23 and 24. See also the Supreme Court's statement at para. 78 that the CCAA and BIA form part of "an integrated body of insolvency law."
63. See *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), at paras. 15-17. In my view, s. 36 cannot provide substantive direction if, once a sale process is accepted and carried out according to the court's order, the court is committed to approving the result of that process. See *Eddie Bauer of Canada Inc., Re* (2009), 57 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]), at para. 22:

   The concern in *Tiger Brand*, as in this case, is that once a sales process is put forward, the Court should to the extent possible uphold the business judgment of the Court officer and the parties supporting it. Absent a violation of the *Soundair* principles, the

In addition to the above consideration, and most importantly, Parliament should clarify that the fundamental purpose of the CCAA is to facilitate the reorganization of the debtor company so that it can continue in business, not to liquidate the company. The clear intention to meet this purpose should be a substantive requirement of obtaining CCAA protection — it should not be enough, as one court has suggested, for the debtor company merely to "utter some magic incantation that it intends to propose a plan of arrangement," in order to obtain CCAA protection.[64] Rather, the debtor's intentions should be scrutinized and the prospects of a viable plan emerging should be considered carefully both upon the debtor's initial application for CCAA protection, and over the course of the process.[65] Only then should other approaches, such as liquidating CCAAs, be considered. This, again, would be consistent with the Supreme Court's reasoning in *Century Services*:[66]

> Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, *preserving the status quo while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it*

result of that process should as well be upheld.

For further discussion, see Alfonso Nocilla, "Assets Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012), 52 C.B.L.J. 226.

64. See *Winnipeg Motor Express*, *supra*, footnote 27, at para. 42. Note that the court in *Winnipeg Motor Express* was critical of Tysoe J.A.'s statement in *Cliffs*, *supra*, footnote 8, that a stay should not be granted or continued under the CCAA if the debtor company does not intend to propose a plan to its creditors. However, it clear that Tysoe J.A. had in mind a more substantive requirement than the court in *Winnipeg Motor Express* seemed to think — see *Cliffs* at para. 31:

    > If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a *true arrangement or compromise*, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. [emphasis added]

65. This is of particular concern for creditors in liquidating CCAAs, where a more efficient liquidation could potentially be effected through a receivership, provided that a secured creditor is in a position to pursue this option. See McLean and Bowra, *supra*, footnote 44:

    > *CCAA* proceedings are more contentious now than ever before. Debtors are using *CCAA* proceedings to undertake self-liquidations in circumstances in which secured creditors would prefer to simply appoint a receiver. The costs of a *CCAA* proceeding make stakeholders wary if the perception is that there is no equity remaining, and management is "betting the farm" on a high cost/low probability strategy. Stakeholders understand that administrative charges, directors' charges and DIP charges are fairly common, and that once the *CCAA* train leaves the station it gains significant momentum.

66. *Century Services*, *supra*, footnote 1, at para. 60.

> *can be determined whether it will succeed* . . . In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company. [emphasis added]

VI. CONCLUSION

This paper began by considering the Supreme Court of Canada's statement in *Century Services* that the purpose of the CCAA is to permit debtor companies to continue in business and avoid liquidation. It then examined reported CCAA filings between 2002 and 2012 and found that, despite the stated corporate rescue purpose of the CCAA, many recent filings have resulted in liquidations without any prospect of the debtor's survival. It then discussed some of the possible reasons for this development, as well as the problems resulting from the fact that the CCAA "contains no provisions for liquidation of a debtor's assets if reorganization fails."[67] I have also suggested that, in the absence of further action by Parliament to amend the CCAA, the Supreme Court of Canada had the opportunity to address these issues in *Indalex* and *Abitibi*. It would have been helpful if the Supreme Court had done so by establishing clear guidelines for the court approval of asset sales under the CCAA and by elaborating on the corporate rescue purpose of the CCAA. This approach would have been consistent with the Supreme Court's reasoning in *Century Services*. Furthermore, it would have done much to resolve the uncertainty surrounding liquidating CCAAs and, more generally, the CCAA's place in Canada's insolvency framework. However, the Supreme Court did not take this approach, and in all likelihood this task will now fall to Parliament.

67. *Century Services*, *supra*, at para. 14.

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73 — THE HISTORY OF THE COMPANIES' CREDITORS ARRANGEMENT ACT AND THE FUTURE OF RE- STRUCTURING LAW IN CANADA

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THE HISTORY OF THE COMPANIES' CREDITORS ARRANGEMENT ACT AND THE FUTURE OF RE-STRUCTURING LAW IN CANADA

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This article examines the legislative history of the Companies' Creditors Arrangement Act (CCAA) in light of recent developments. The CCAA is Canada's statute of choice for resolving large, complex corporate insolvencies. The Act was designed to facilitate the reorganization of insolvent companies, with a view to their continued survival. More recently, however, courts have approved the use of the CCAA as a liquidation mechanism. Specifically, the Act is now commonly used to sell substantially all of the assets of insolvent companies on a going-concern basis, with no possibility of those companies surviving after the CCAA process is concluded — these proceedings are known as "liquidating CCAAs". Liquidating CCAAs represent a significant change in CCAA law which has passed largely unexamined in the jurisprudence. This change raises fundamental questions about the role and purposes of the CCAA, and it has important implications for the future of restructuring law in Canada. Is the CCAA truly a "rescue" statute, or has it morphed into a mechanism for creditors to realize upon their security interests in insolvent companies? This article approaches these questions from the perspective of the CCAA's historical origins and purposes, and suggests reforms to address the problems raised by liquidating CCAAs. This analysis is particularly timely as the federal government conducts its five-year review of Canada's bankruptcy and insolvency legislation in 2014 and 2015.

I. — INTRODUCTION

> . . . the manner in which a country addresses insolvency is tied to other decisions: about support for entrepreneurial behaviour as an engine of growth, about the promotion of education as a contributor to the well-educated workforce needed for the future, and about the extent to which safety nets are provided by governments to assist those who are less fortunate, among others. In this sense, a country's insolvency laws are framework legislation. They are a key indicator of how a country governs itself, its businesses and its citizens, and about its priorities for its future.[1]

Enacted in 1933, the Companies' Creditors Arrangement Act[2] (CCAA) was an obscure and little-used statute for many years. Resurrected in the 1980s, it has gradually become Canada's statute of choice for resolving large, complex corporate insolvencies.

This paper examines the legislative history of the CCAA, with particular reference to the recent trend toward "liquidating CCAAs" — that is, the court-approved sales of substantially all of the assets of insolvent corporations carried out under the auspices of the CCAA. Liquidating CCAAs are controversial in light of the Act's traditional reorganization purpose. Reorganization implies the survival of the insolvent corporation, whereas liquidating CCAAs may result in the corporation ceasing to exist.[3] Consequently, the growing prevalence of liquidating CCAAs raises questions about the CCAA's role within Canada's bankruptcy and insolvency regime.

A detailed examination of the CCAA's legislative history is somewhat overdue. Over the past 30 years, the CCAA has been transformed from "a rather blunt instrument to one of the most sophisticated systems in the developed world."[4] Three recent landmark Supreme Court of Canada decisions — *Century Services*, *Indalex*,[5] and *AbitibiBowater*[6] — have highlighted some of the uncertainties surrounding the CCAA's role in light of this rapid evolution. In *Century Services*, the Supreme Court stated that in order to properly interpret the CCAA, "it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence."[7] As with much of the CCAA jurisprudence, however, *Century Services* focused largely on the case law and recent amendments to the Act, rather than on the Act's history as a whole.[8]

Part II of this paper sets out the legislative history of the CCAA from its adoption up to the latest round of amendments in 2009. Part III examines liquidating CCAAs and their implications, and suggests further reforms that would address certain problems raised by liquidating CCAAs, having regard to the history and purposes of the Act. Part IV concludes by considering the prospects for further reforms and the future of restructuring law in Canada.

II. — LEGISLATIVE HISTORY OF THE CCAA

1. — Origins

The CCAA has its origins in the Great Depression. Enacted in 1933, the CCAA was introduced in order to provide a legal process by which insolvent companies could reorganize themselves.[9] At the time, Canadian law only permitted bankrupt companies to reorganize. The Tassé Report[10] explains that Parliament amended the Bankruptcy Act[11] in 1923 to address complaints that debtors were using bribes and other fraudulent means to obtain their creditors' consent to reorganization proposals, in order to avoid bankruptcy.[12] In response, Parliament introduced requirements in 1923 that a debtor be declared bankrupt and hold a first meeting of its creditors before it could make a proposal.[13] By 1933, these requirements had received sufficient criticism that Parliament introduced the CCAA, which provided an alternative method for insolvent companies to reorganize and avoid bankruptcy.

The advent of the Great Depression necessitated legislation that permitted insolvent Canadian companies to reorganize. Prior to 1914, Canadian companies typically had obtained their financing in England. English law permitted a majority of debenture holders of a company to modify the terms of the company's trust deeds. This permitted Canadian companies with English financing to make arrangements with their creditors and reorganize. During the 1920s, however, many Canadian companies began to obtain financing in the United States. In contrast to English law, U.S. law typically did not permit debenture holders to modify the terms of a company's trust deeds. Consequently, the trust deeds of Canadian companies that had obtained financing in the United States often contained no clauses permitting reorganization by agreement of the debenture holders.[14] When many of these companies became insolvent during the Depression, they discovered that the terms of their trust deeds did not allow them to reorganize, "[often] to the embarrassment of the directors."[15] As a result, these companies were forced into bankruptcy.

2. — Structure and Objectives

The CCAA was modeled on the provisions of the English Companies Act of 1929.[16] At the first reading of the CCAA in the House of Commons, the Hon. C.H. Cahan, then Secretary of State, explained that the legislation was intended to allow an insolvent company to avoid bankruptcy and to survive by reorganizing.[17] The Secretary explained that some reorganization mechanism was necessary because so many companies had become insolvent during the Depression:

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> At the present time, some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression and it was thought by the government that we should adopt some method whereby compromises might be carried into effect under the supervision of the court without utterly destroying the company or its organization without loss of good will and without forcing the improvident sales of its assets. [18]

The economic context of the CCAA's enactment during the Depression is significant. In a seminal article published in 1947, [19] Stanley Edwards reiterated the Hon. C.H. Cahan's remarks and emphasized the legislation's importance in providing a reorganization mechanism for companies to continue as "ongoing concerns" [20] in the event of future economic downturns. [21]

Initially, Parliament intended that the CCAA would facilitate arrangements between companies and their secured creditors only. [22] Secured creditors were protected both by the legislation itself and by the terms of most trust deeds, which gave indenture trustees the right to intervene in the debtor's affairs on certain conditions. [23] Institutional investors also had the power to intervene to prevent serious abuses. However, as discussed below, unsecured creditors lacked the protections available to them in the Bankruptcy Act, resulting in abuses that led to significant reforms of the CCAA in 1953.

3. — Early Reform Attempts

In the years following its enactment, some insolvent companies began using the CCAA to make arrangements with their unsecured creditors as an alternative to the Bankruptcy Act. Since the CCAA was not designed for arrangements with unsecured creditors, it contained no provisions protecting them. As such, unsecured creditors were vulnerable to insolvent companies that made false and misleading statements in order to induce their acceptance of unfair proposals. [24] Trade creditors, in particular, found that debtor companies were using the CCAA to escape their mercantile liabilities. [25] The consequent lobbying by these creditor groups led Parliament to consider repealing the CCAA in 1938. [26] However, the Dominion Mortgage and Investment Association strongly opposed repealing the CCAA and lobbied to keep the Act, chiefly because U.S. law prohibited the sale of securities that did not have associated legislation enabling holders of those securities to effect a reorganization of the company. [27] Since the CCAA was the only statute by which Canadian companies could reorganize, repealing the CCAA would have made it impossible for Canadian companies to obtain financing in the United States or for their security holders to sell their securities in the United States. The plans to repeal the CCAA were therefore stalled while debates about the debtor company's control over the reorganization process under the CCAA continued for several years. [28]

In 1946, renewed reform efforts resulted in Bill A5, which proposed repealing the CCAA and bringing all corporate reorganizations under the Bankruptcy Act. [29] However, Bill A5 contained no provisions to address the situation of investor creditors. In particular, no provision was made for representation orders, which would have provided representation to groups of creditors in reorganization proceedings. Also, the legislation required that service be effected on all creditors in a reorganization, which was often practically impossible. [30] Once again, the Dominion Mortgage and Investments Association opposed repealing the CCAA. Instead, it recommended amendments restricting the CCAA's scope to arrangements relating to a debtor company's outstanding bonds and debentures, and excluding the debts of unsecured creditors. [31] While the Bankruptcy Act was amended in 1949, [32] efforts to reform the CCAA stalled again and the plans to repeal the Act were abandoned.

4. — The 1953 Amendments

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Following several years of intermittent debates, Parliament adopted the Dominion Mortgage and Investments Association's recommendations and amended the CCAA in 1953. The CCAA's scope was restricted to arrangements between debtor companies and their debenture holders. [33] The Hon. Stuart S. Garson, then Minister of Justice, explained the reasons for the amendments as follows: [34]

> With the passage of this bill it will leave companies that have complex financial structures, and a large number of investor creditors, able to use the Companies' Creditors Arrangement Act for the purpose of reorganization. Moreover they will be able to use it efficiently; because as a rule, the terms of their own trust deed provide for a trustee of the creditors whose business it will be to look after their interests properly, a provision which is almost invariably absent in the case of mercantile creditors. The mercantile companies will be able to use the provision of part III of the new revised Bankruptcy Act, which, unlike the Bankruptcy Act in force in 1933, has a provision whereby companies may apply for an extension to work out their affairs without incurring the stigma of bankruptcy.

These amendments arguably reinforced the intentions of the CCAA's original drafters to facilitate arrangements between insolvent companies and their secured creditors, but they also made the Act much less flexible. Writing in 1970, the Tassé Committee explained that the CCAA had worked well in its early years and "gave general satisfaction to investors and companies with secured indebtedness who wished to make arrangements with their creditors." [35] However, the 1953 amendments restricted access to the CCAA and the Act fell into prolonged disuse. Moreover, it had become common by 1970 for trust indentures to include terms permitting the contractual reorganization of the debtor, thus rendering the CCAA largely redundant. [36]

5. — The Tassé Committee

Sustained criticism of the 1949 Bankruptcy Act as obsolete, inefficient, and prone to fraud led to a new round of reforms in 1966. [37] With An Act to Amend the Bankruptcy Act, [38] Parliament introduced amendments empowering the court to appoint interim receivers and providing that insolvent persons would be assigned into bankruptcy if their creditors or the court rejected their proposal. [39] At the same time, the federal government formed the Study Committee on Bankruptcy and Insolvency Legislation (Tassé Committee) and commissioned a report recommending further changes to Canada's bankruptcy and insolvency regime. The Tassé Committee presented its report to the Minister of Consumer and Corporate Affairs in June of 1970. [40]

Among other things, the Tassé Report recommended repealing the CCAA and introducing a new, single and integrated bankruptcy and insolvency statute. [41] This new statute would have incorporated the reorganization procedures of the CCAA. However, Parliament never adopted this recommendation. In fact, the government introduced six bankruptcy bills into Parliament unsuccessfully between 1970 and 1984. Jacob Ziegel has cited a number of reasons for these failed attempts at a "sweeping reform of the bankruptcy system." [42] Firstly, the federal government found it difficult to respond to the lobbying of numerous competing special interest groups. This lobbying intensified significantly due to the many business failures in the 1980s. [43] At the same time, the federal government lacked sufficient information, in the form of legal and economic studies, to formulate policy. [44]

6. — The Colter Committee

In 1984, the new Mulroney government assumed power. Following the previous government's string of failed attempts to enact comprehensive reforms, the new government pursued more modest reforms. The Minister of Consumer and Corporate Affairs convened the Advisory Committee on Bankruptcy and Insolvency (Colter Committee) to recommend

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the most urgent amendments to the existing legislation.[45] Meanwhile, the government consolidated the Bankruptcy Act, leading to passage of the Bankruptcy and Insolvency Act (BIA) in 1985.[46] Jacob Ziegel has called this approach a "phased-in program of reform."[47] Rather than pursue a "single massive overhaul" of bankruptcy and insolvency legislation, Parliament opted for piecemeal, gradual reform.[48] As a result, the BIA and CCAA were not integrated, and Canada continues to have a bifurcated insolvency reorganization system today.[49]

The Colter Committee completed its report in 1986, and Parliament largely adopted its recommendations in the 1992 amendments to the BIA. Among these changes to the BIA were: increased protections for wage earners,[50] new proposal procedures imposing a stay on secured creditors,[51] and new provisions dealing with international insolvencies.[52] These amendments addressed some of the Colter Committee's most pressing concerns and modernized the BIA, but they did not address the long-standing issue of CCAA and BIA integration.

Significantly, the Colter Report did not revive the Tassé Report's earlier recommendation to repeal the CCAA. By 1986, after years of relative obscurity, the CCAA had come into use again as a tool for facilitating large reorganizations. Courts began permitting corporations that had not issued trust deeds to reorganize under the CCAA, despite the restriction introduced in the 1953 amendments. They did so by adopting the concept of "instant trust deeds" — trust deeds that insolvent companies would issue to their creditors so as to qualify for CCAA protection.[53] This practice caused considerable controversy. The courts in a number of provinces refused to recognize instant trust deeds, on the grounds that they did not satisfy the CCAA's requirements and were not contemplated by the Act.[54] However, the practice gained gradual acceptance until the restriction was eventually removed in 1997.[55]

In 1992, the House of Commons Committee examining Bill C-22[56] recommended repealing the CCAA within three years following the enactment of new provisions for business reorganizations in Part III of the BIA.[57] However, many insolvency practitioners preferred the CCAA to Part III of the BIA, and they lobbied to keep the CCAA.[58] Accordingly, the government decided to delay its decision on repealing the CCAA until the new reorganization provisions of the BIA had been tested.[59]

7. — The 1997 Amendments

In 1993, Industry Canada established the Bankruptcy and Insolvency Act Advisory Committee (BIAC) to recommend further amendments to the BIA. Parliament adopted many of the Committee's recommendations in Bill C-5, amending both the BIA and the CCAA in 1997.[60] As previous committees had done, the BIAC also recommended repealing the CCAA in favour of a single, integrated reorganization regime under the BIA. However, insolvency practitioners again successfully opposed the repeal of the CCAA on the grounds that the Act provided the necessary flexibility for large, complex reorganizations.[61]

Among the more important changes introduced to the CCAA in 1997 were: new provisions restricting the CCAA's application to corporate debtors with at least $5 million in debt; removal of the requirement in s. 3 for an outstanding issue of debentures or bonds and a trust deed in order to use the CCAA; new requirements for a court-appointed monitor to protect creditors' interests and report to the court while the debtor prepared a reorganization plan; and provisions recognizing foreign insolvencies and allowing Canadian courts to assist foreign insolvency administrators.[62] Far from providing for the repeal of the CCAA, these amendments reinvigorated the CCAA and firmly established a bifurcated restructuring system in Canada.[63]

8. — Industry Canada Report (2002)

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The 1997 amendments contemplated further changes to the bankruptcy and insolvency legislation in the future. In particular, the federal government was required to report to Parliament on the operation of the BIA and CCAA within five years of the amendments. Accordingly, Industry Canada published its *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* in 2002. [64] In this report, Industry Canada cautioned that while the 1997 amendments had introduced substantive changes, they fell short of comprehensive reforms, and many issues had been overlooked. Specifically, the report cited the problem that CCAA reorganizations were not subject to an administrative supervision process: [65]

> [It is] practically impossible to assess procedures under the CCAA or to verify whether services are being performed properly. ... to measure the effectiveness of the reorganization schemes or to verify whether they are being applied and administered consistently.

Additionally, the absence of a centralized public database of CCAA proceedings made it very difficult "to determine which companies use the CCAA in a given year ... [and] to ascertain their profiles or how successful their reorganization processes were." [66] The report further warned that there were no formal qualification requirements or rules of professional conduct for CCAA monitors and that many stakeholders had expressed concerns about the "numerous potential conflicts of interest [monitors] might face, especially if they are acting in various other capacities for the debtor company." [67] At that time, stakeholders estimated that the CCAA was used in "upwards of 50 cases a year, with a typical case involving in excess of $100 million in assets." [68] However, the report concluded that it was "impossible to measure the impact of the CCAA's use on the Canadian economy" without concrete data. [69]

9. — 2003 Senate Report and Bills C-55 and C-62

In 2003, the Senate Committee on Banking, Trade and Commerce conducted the required five-year review of bankruptcy and insolvency legislation following the 1997 amendments. The Senate committee's report, entitled *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, [70] contained 34 recommendations related to commercial insolvency law. The government proposed to adopt most of the Senate committee's recommendations in June of 2005, with Bill C-55. Unfortunately, however, the bill was rushed through Parliament without debate in the final days of the Martin government in 2005, and suffered from hurried drafting. [71] The Senate Committee also expressed its disappointment with the House's treatment of the Bill, stating:

> We recognize the extraordinary circumstances that exist with the impending dissolution of Parliament, but believe we had an inadequate opportunity to review comprehensively such an important piece of framework legislation. [72]

The Senate agreed to pass Bill C-55 on the understanding that the government would delay proclamation until the bill's shortcomings could be addressed with additional revisions. Upon enactment, Bill C-55 became Chapter 47 of the Statutes of Canada. [73]

Revisions came in June of 2007, when the new Harper government tabled Bill C-62. [74] Although the House passed Bill C-62, it died on the Order Paper when Parliament was prorogued on September 14, 2007. It was then reintroduced as Bill C-12, which the House passed on October 27 of the same year, and was referred to the Senate Committee on November 15. [75] Following enactment, it became Chapter 36, [76] and came into force on September 18, 2009.

Together, Bill C-55 and Bill C-12 made significant changes to both the BIA and CCAA. Among these changes were new provisions that required a debtor company to pay specified amounts of its pension liabilities and employees' wages before a court could approve a reorganization plan; provisions permitting the assignment and disclaimer of leases under

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the BIA and CCAA; codification of interim or debtor-in-possession (DIP) financing procedures; and new cross-border insolvency provisions based upon the UNCITRAL Model Law on Cross-Border Insolvency, with some modifications. [77]

Perhaps most significantly, Parliament also amended the CCAA to introduce provisions governing the court approval of asset sales, in the new s. 36. Section 36 arguably permits a debtor to sell assets not only as part of a larger reorganization plan, but also *en bloc* and with no prospect of the debtor continuing in business after the sale. As will be discussed below in Part III, this is surprising in light of the CCAA's traditional purposes.

10. — Conclusions on the CCAA's Origins and Legislative History

The CCAA has had a long and tortuous history. The reform process has been slow, and efforts to enact comprehensive reforms have failed repeatedly. Instead, Parliament has adopted various piecemeal reforms over many years. The most recent round of amendments in 2009, in particular, left much to be desired. The amendments suffered from hurried drafting at the outset and were rushed through the House of Commons. [78] In addition, the amendments contained little direction for the courts on how to apply the new provisions of the Act. As the controversy over liquidating CCAAs demonstrates, this was an unfortunate oversight in the reform process.

III. — LIQUIDATING CCAAs

1. — Background — Purposes of the CCAA

The CCAA was a skeletal statute when it was first enacted. Only the Act's long title, "An Act to facilitate compromises and arrangements between companies and their creditors", points to its reorganization purpose. In addition, the Act is largely silent about the powers that it confers upon courts. [79]

Although the Act itself was skeletal, early cases and commentaries clearly established that the CCAA was designed to facilitate reorganizations. The Supreme Court of Canada recognized this purpose in its very first decision interpreting the CCAA, *Reference re Companies' Creditors Arrangement Act*: [80]

> [T]he aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy.
>
> . . . . .
>
> The ultimate purpose would appear to be to enable the Court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well, it may be, as to the shareholders.

Significantly, the Supreme Court interpreted the purposes of the Act quite narrowly: the Act was designed to prevent bankruptcies and improvident liquidations. In concurring but separate reasons, Cannon and Lamont JJ. echoed the majority's interpretation of the nature and purposes of the Act: [81]

> Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part.

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The Supreme Court's reasons in *Re CCAA* are significant because they clearly distinguish the bankruptcy regime, which necessarily involves liquidation of substantially all of the debtor's assets, from the CCAA, which is aimed at rescuing insolvent companies. At the time that the CCAA was first adopted, neither Parliament nor the Supreme Court of Canada imagined that the Act would be used for liquidations.

More recently, in *Century Services*, the Supreme Court of Canada again made this important distinction between reorganization under the CCAA and liquidation under the BIA or through receivership: [82]

> Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA*
>
> proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership.

The Supreme Court reiterated the CCAA's basic reorganization purpose, stating that "the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets." [83] Significantly, the Supreme Court went on to say that encouraging reorganization over liquidation was one of the key goals of recent Canadian insolvency law reforms. [84]

The Supreme Court of Canada's statements in *Re CCAA* and *Century Services* suggest that liquidating CCAAs are inconsistent with the Act, insofar as they preclude reorganization and the survival of insolvent companies. As discussed in more detail below, however, courts now commonly approve wholesale liquidations under the CCAA, with no possibility of the insolvent debtor surviving the CCAA process. On its face, it is difficult to reconcile this practice with Parliament's and the Supreme Court's statements about the purposes of the Act.

2. — Recent Developments

In order to understand the CCAA's evolution and its role within Canada's bankruptcy and insolvency framework, it is helpful to consider the data on recent CCAA cases. In a 2006 report to the Office of the Superintendent of Bankruptcy Canada (OSB), Janis Sarra presented a model to track filings and collect data on CCAA proceedings. [85] Previously, Industry Canada estimated that there were about 175 total cases under the CCAA between 1983 and 2005. Sarra's study identified 219 cases in those years. By contrast, there are only seven known CCAA cases prior to 1983, all from the early years of the Act before it fell into disuse for roughly 40 years. [86]

More recently, I examined the outcomes of CCAA proceedings that occurred between the years 2002 and 2012. [87] This study identified a total of 250 proceedings in those years, of which roughly one-third were liquidating CCAAs. Most of these liquidating CCAAs were carried out before the debtor had presented a formal plan of arrangement to its creditors, despite the Act's clear purpose of facilitating reorganization plans. [88]

Most liquidating CCAAs have occurred in Ontario, where the court's jurisdiction to approve them was first recognized in 1998. [89] Although the courts of other provinces were more skeptical of liquidating CCAAs at first, they have gradually begun approving them. This change may be due, in part, to Parliament's introduction of s. 36 of the CCAA in 2009. The relevant provisions of s. 36 are as follows:

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> *Restriction on disposition of business assets*
>
> 36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> *Notice to creditors*
>
> (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> *Factors to be considered*
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Although s. 36 grants courts the jurisdiction to approve asset sales, liquidating CCAAs remain controversial for at least two reasons. Firstly, s. 36 does not explicitly permit the sale of substantially all of a debtor's assets in the absence of a plan of arrangement, and there are good reasons to think that it should not do so.[90] Secondly, s. 36 does not provide courts with substantive direction in deciding whether to permit a sale. When the Senate Committee first recommended that Parliament adopt s. 36, the Committee stated that s. 36 should provide "substantive direction" to courts in deciding whether to approve asset sales.[91] The Committee also stated:[92]

> The Committee also believes that there are circumstances where all stakeholders would benefit from an opportunity for an insolvent company involved in reorganization to divest itself of all or part of its assets, whether to raise capital, eliminate further loss for creditors or focus on the solvent operations of the business. *We feel, however, that the court must be involved in approving such sales and that it should be provided with some guidance regarding the minimum requirements to be met during the sale process.* [emphasis added]

Despite these statements, some courts have suggested that s. 36 is not substantive and that its criteria are not minimum requirements to be met in approving a sale.[93] Moreover, s. 36 is rarely the substantive test for approving liquidating CCAAs, because it is only triggered when the court is asked to approve an "actual sale", rather than the process leading to the sale.[94] In *Re Brainhunter*, for example, the court held that the correct test for approving a sale process under the CCAA is not s. 36, but the test set out in *Nortel Networks*.[95] The *Nortel* test asks the court to consider the following questions:[96]

> (a) Is a sale transaction warranted at this time?
> (b) Will the sale benefit the whole "economic community"?

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(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
(d) Is there a better viable alternative?

Clearly, the criteria of s. 36 and those of the *Nortel* test overlap to some degree. Accordingly, a CCAA court that is asked to approve a sale under s. 36 often will have considered some of the s. 36 factors already when it approved the sale process. It is difficult to imagine a case in which the court would refuse to approve a sale pursuant to s. 36 where the court previously approved the sale process. As such, s. 36 cannot provide the "substantive direction" that the Senate Committee intended. [97]

3. — Reorganization vs. Liquidation

David Bish argues that Canadian restructuring law has undergone a paradigm shift in recent decades. Specifically, he argues that the CCAA's traditional rehabilitation focus has given way to a new realization focus:

> Ironically, we appear to have come full circle. After a century of having increasingly embraced restructuring, expanded notions of rehabilitation and voluntary, debtor-in-possession (DIP) insolvency proceedings, we have increasingly reverted to giving creditors greater control of insolvency processes, proceedings and outcomes at the expense of the debtors' opportunity to restructure. The current climate is extraordinarily receptive to realization over restructuring. [98]

Bish further notes that "there has been an intentional confusing of realization and restructuring: it has become routine to refer to realization proceedings as a form of restructuring, obfuscating the distinction." [99] In other words, the CCAA is increasingly being used as a liquidation tool, but the language of the CCAA — and, indeed, the whole framework of the Act — are still geared toward reorganization.

This shift in focus from reorganization to liquidation has important implications. Bish observes that the CCAA's historical purposes "had nothing to do with creditor realizations, and a purposive approach to statutory interpretation does not support the idea that the CCAA was intended to be a creditor's tool of choice for realizing on security." [100] In my view, there are two key principles that have driven Canadian restructuring law historically which are relevant to this recent shift in the CCAA's focus: the preservation of going-concern value, and the public interest.

(a) — Preserving Going-Concern Value

According to this principle, insolvency law aims to solve a common pool problem. Specifically, when a firm becomes insolvent, a collective action problem arises as the distressed firm's creditors race to enforce their individual security interests against the firm's assets, thereby dismantling the firm piecemeal when it was worth more as a going concern. [101] Insolvency law prevents this race by imposing a compulsory and collective process on all creditors. It is implicit in this process that the creditors as a whole would favour preserving an insolvent firm's business where doing so would result in greater returns for all of them. [102]

In the United States, bankruptcy law scholars have been engaged in a long debate over the merits of rehabilitating insolvent firms. For example, Douglas Baird has argued that the reorganization provisions of Chapter 11 of the U.S. Bankruptcy Code [103] merely delay the inevitable for many insolvent firms. According to Baird, most firms that enter Chapter 11 cannot survive in the marketplace because their business models are fundamentally flawed: [104]

> [M]ost of the firms in Chapter 11 are relatively small enterprises that cannot survive in the marketplace. For them, Chapter 11 only postpones the inevitable. The firm is a retail establishment that has picked the wrong product or the wrong location or both. Some firms, like some horses, should be taken out to the back pasture and shot.

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More recently, Baird and Robert Rasmussen have argued that financial innovations and changes in the capital structure of firms may have rendered traditional reorganizations obsolete: [105]

> In the past, the bargains that parties reached among themselves followed a few familiar patterns. While there were many possible deals, the players naturally gravitated toward only a few. In the new environment, with different players holding different stakes, the old patterns no longer apply and new ones have yet to take shape. There are no longer organized groups ... The types of institutions vary — from banks and broker-dealers to hedge funds and private equity firms. The current environment is one in which there are no natural leaders (or followers) among the creditors to perform the shuttle diplomacy required to build a consensus. Without familiar benchmarks, there is no shared understanding of what form a plan should take. Coalition formation is harder. Worse yet, in some cases there may be no stable equilibrium at all. To use the language of cooperative game theory, the core may be empty.

On the other hand, Elizabeth Warren and Jay Westbrook have argued that Chapter 11 success rates are reasonably high for firms that survive the initial filing and go on to propose a reorganization plan. In addition, the Chapter 11 process eliminates the truly hopeless firms fairly quickly: [106]

> The data reveal that the cases — both those that exit the system and those that confirm plans of reorganization — moved at a lively pace. They also suggest that, at least between 1994 and 2002, the system showed signs of improvement. While the data cannot answer the normative question about whether the movement is as substantial as it should have been, they are adequate to dispel the notion that great numbers of debtors were hiding out in Chapter 11 for years, just mowing the lawn and waiting for the market to turn.

Moreover, Lynn LoPucki and Joseph Doherty have presented research suggesting that on average, Chapter 11 sales yield dramatically lower returns for creditors than reorganizations. [107] Accordingly, market efficiency cannot explain the shift toward sales, and more sinister factors must be at play: [108]

> Possible explanations for this market failure are not in short supply. The managers who decided to sell these companies rather than reorganize them frequently had conflicts of interest. So did the investment bankers who advised the managers and solicited bids. The stalking-horse bidders received protections in the form of breakup fees and substantial minimum bid increments that discouraged other bidders. The costs of participating in the bidding were high because the companies' situations were complex and changed rapidly. Bidders other than the stalking horse had little chance of winning. As a result, only a single bidder appeared at most bankruptcy auctions.

As for the "empty core" problem, Baird and Rasmussen are clearly correct that financial innovations have made modern restructurings more complicated than they were in the past. Nor is this development unique to restructurings in the United States. For instance, Vanessa Finch has raised similar concerns in the United Kingdom:

> A particular worry relating to insolvency risks is the possibility that the popularity of derivatives may impede recoveries in times of corporate trouble because the hedge funds or other holders of credit will enforce debts rapidly against defaulters. In the world of the "new capital" the troubled company may have no friendly ear at the bank to turn to and creditors who have purchased derivatives may possess few motivations to explore turnaround possibilities. [109]

But Finch suggests that the problem is manageable and could be addressed by maximising transparency with respect to the interests held in companies, "whether these be structured debt packages or retentions of title." [110] Moreover, it is worth noting that reorganizations have always been complex matters. For example, David Skeel has pointed out that the traditional characterization of reorganization as a straightforward negotiation among several groups of like-minded creditors merely "provided a template for a messy and complicated process." [111] There were challenges to achieving

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consensus in reorganizations in the past, just as there are today, and "there were corporate raiders in the early twentieth century, just as there are now."[112]

Although the Chapter 11 debate in the United States is currently at a standstill, the debate in Canada over the relative merits of reorganization and liquidation is only beginning. This debate focuses on the question of whether and under what circumstances liquidating CCAAs should be permitted. Clearly, s. 36 authorizes courts to approve asset sales under the CCAA, but it says little about how courts should exercise this power. So far as the creditor value-maximization theory is concerned, the wholesale liquidation of an insolvent firm's assets under the CCAA would be justified if the sale yielded greater returns for creditors than a sale through receivership or bankruptcy. However, proponents of liquidating CCAAs have produced no evidence to support the assertion that liquidating CCAAs are more efficient or more likely to maximize returns for creditors generally than bankruptcy or receivership sales.

(b) — The Public Interest

The second key principle underlying Canadian restructuring law is the "public interest." In *Century Services*, the Supreme Court of Canada stated that courts supervising insolvency reorganizations should consider the impact of the reorganization process on the broader community:[113]

> [T]he court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company ... *In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed.* [emphasis added]

Although the Supreme Court provided little guidance as to what the "public interest" means in the context of the CCAA, it pointed to earlier decisions and commentaries that do provide some guidance. For example, the court cited *Canadian Red Cross*[114] and *Air Canada*[115] as examples of restructurings where the outcomes clearly had implications for the broader community. The court also recognized the historical importance of the CCAA's public interest goal, as early commentators such as Stanley Edwards expressed:[116]

> 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.

The above statements reflect the widely accepted principle that corporate insolvency law should do more than simply maximize returns for a narrowly defined group of creditors, but should also consider the needs of the broader community of insolvency stakeholders. Roy Goode has expressed this concept as follows:[117]

> But there are values to be protected that go beyond the interests of those with accrued rights at the commencement of the insolvency process. One of these is the investigation of the directors' conduct with a view to sanctions for improper trading and disqualification so as to protect the public against future misconduct, a course of action available in England through the winding up process even where the company has no assets at all. Another is the interest of the workforce in preserving its investment of labour, expertise and loyalty to the enterprise, and a third is that of the community at large, for example, in the continuance of the business or the payment of clean-up costs of pollution. To focus so exclusively on maximizing returns to creditors is to ignore the fact that there may be different

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> ways of protecting creditors, some of which will also benefit other interests, such as those of employees, shareholders and the local community, and in so doing may even advance creditors' interests.

It is beyond the scope of this paper to fully explore the concept of the public interest and its role in CCAA proceedings. Suffice it to say that the CCAA was not intended merely to serve the interests of creditors — it also has a broader goal of minimizing the negative consequences of insolvency for employees, suppliers, customers and the wider community. At the same time, we should recognize that the concept of the public interest is closely tied to the CCAA's traditional rescue purpose, and both its meaning and application are blurred in liquidating CCAAs.

(c) — Conclusions on Reorganization vs. Liquidation, Preserving Going-Concern Value, and the Public Interest

The CCAA was designed to facilitate reorganization plans, and the structure of the Act reflects this purpose: [118]

> The whole CCAA process is geared towards the development of a plan of arrangement that will be presented before the creditors for their acceptance or rejection. ... Indeed, the very title of the Act anticipates the negotiation of a consensual arrangement amongst the creditors and the debtor.

Despite this clear purpose, courts now regularly approve liquidating CCAAs in cases where the debtor has no intention of presenting a plan to its creditors. [119] As they did with instant trust deeds, a number of courts have suggested that the requirement of a plan is now outdated and unnecessary. [120] The salient difference between trust deeds and plans of arrangement, however, is that the CCAA is fundamentally an Act to facilitate plans of arrangement. This clear mismatch between the CCAA's traditional purposes and its modern use as a liquidation mechanism has led to predictable problems. There is controversy in the courts and the academy over the purposes of the legislation, and this has made judicial outcomes less predictable. Beyond these concerns, however, there are additional reasons why liquidating CCAAs that are carried out in the absence of plans of arrangement are problematic. Put simply, the risk is that the sale process will be used to alter the distributional entitlements that creditors would enjoy in a traditional restructuring or liquidation. Stephanie Ben-Ishai and Stephen Lubben have expressed this problem as follows: [121]

> It is not a harm to creditors, voluntary or involuntary, when a sale results in little or no recovery for unsecured creditors or shareholders. Rather, the key issue is whether the sale results in the realization of less value by junior claimants than a traditional reorganization or liquidation ... A sale thus could result in the realization of equal value, but see that value diverted to senior creditors. This is a problem of redistribution ... Thus, there is a real concern that the sale process might facilitate collusion between management and senior creditors to squeeze out junior creditors and shareholders.

Similarly, Ralph Brubaker and Charles Tabb have argued that new approaches to Chapter 11 reorganizations may be undermining creditors' rights:

> The heart of the matter is this: whether reorganization value is captured by "sale" or by "plan" is not the critical question, as long as the method chosen preserves and upholds chapter 11's distributional norms. Given that any particular "plan" can be structured as a "sale," and any "sale" can be effectuated through a "plan" structure, it may simply be impossible to meaningfully distinguish between the two through some sort of "true sale" versus "true reorganization" construct in a manner that can preserve those distributional norms. We submit, therefore, that courts confronting these issues must keep their primary focus on the core need to protect the normative distributional entitlements of stakeholders, whether the reorganization proceeds by sale or plan. If the mechanism used impairs or obstructs the court's ability to fulfill that central protective role, then and only then should the court reject the reorganization vehicle. [122]

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In the United Kingdom, John Armour, Audrey Hsu and Adrian Walters recently compared realizations from sales in receiverships with those carried out under the Enterprise Act 2002. [123] The Enterprise Act marked an important shift in British insolvency law because it introduced an "administration" procedure that favoured rescue over liquidation. Ostensibly, the Enterprise Act shifted power away from secured to unsecured creditors in order to promote value-maximization in insolvency sales. [124] However, the results of Armour, Hsu and Walters' study show that although administration sales increased recoveries compared to receivership sales, the direct costs of administration were also significantly higher. [125] In other words, unsecured creditors may be no better off under administration than receivership, despite the clear purpose of the Enterprise Act to improve unsecured creditors' positions. One possible explanation for these results is that administration costs were higher because insolvency practitioners were still familiarizing themselves with the new regime. [126] Whatever the reasons may be, however, secured creditors may well prefer administration sales because they are faster procedures than receiverships. [127]

The above issues have received only limited attention in Canada. In *Indalex*, for example, the Supreme Court of Canada dealt with a liquidating CCAA carried out pursuant to cross-border proceedings under Chapter 7 of the U.S. Bankruptcy Code. The Supreme Court acknowledged that Indalex "chose to sell its assets under the *CCAA*, not the *BIA*." [128] Evidently, the Supreme Court took no issue with this. However, the Supreme Court did not explain how to reconcile this statement with its statements in *Century Services* that the purpose of the CCAA is to promote reorganization over liquidation and "to permit the debtor to continue to carry on business." [129] It is also noteworthy that the liquidating CCAA in *Indalex* occurred before s. 36 of the CCAA came into force, and the case turned mainly upon the Supreme Court's analysis of how the CCAA interacted with provincial pension law. Accordingly, the decision provides little guidance with respect to the liquidation vs. reorganization debate.

In my view, the CCAA owes much of its present popularity to the fact that it is an effective tool for circumventing various provincial laws that might impede quick realizations for senior secured creditors. CCAA sales often can be completed more quickly than receivership sales, and the CCAA vesting order eliminates many of the liabilities that would otherwise survive in receivership sales, making the CCAA a more attractive option for senior secured creditors who are guaranteed a full recovery, despite the potentially lower returns and higher costs of CCAA proceedings. [130] While some would argue that it is appropriate for senior creditors to resort to such mechanisms on the basis that they have more at stake than other types of creditors in insolvencies, [131] this view is surely inconsistent with the CCAA's public interest purpose and with the Supreme Court's statement in *Century Services* that "chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit." [132] Moreover, the use of the CCAA as a realization mechanism for individual creditors — in effect, as a superior form of receivership — undermines the collective nature and aims of insolvency law generally: [133]

> Theoretically, the key characteristic of a bankruptcy procedure is that it provides not an option for collection of individual claims, but rather a *collective* remedy for *all* creditors of a debtor incapable of satisfying all claimants in full. Individual creditors should press their claims in the individual enforcement system in the first (and usually exclusive) instance. Only in rare cases should the law allow, much less encourage, individual creditors to engage the bankruptcy system, and then only to provide an ultimate backstop to limit and equitably allocate the losses that a debtor's insolvency causes to all creditors.

In addition, the fact that proponents of liquidating CCAAs have not advanced any evidence to support the claim that liquidating CCAAs enhance value for creditors is particularly troubling given that the CCAA was not designed with liquidations in mind, and that liquidating CCAAs may adversely affect certain types of creditors as well as the broader community.

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4. — Reconciling Liquidating CCAAs with the History and Purposes of the Act

The problems with liquidating CCAAs point up a fundamental problem with Canada's "piecemeal approach to bankruptcy reform." This piecemeal approach has left important gaps in the bankruptcy and insolvency legislation. [134] Liquidating CCAAs are just one example of this problem, but there are others. Canada's bifurcated insolvency reorganization system itself is a result of the piecemeal reform process. In most other advanced economies, the insolvency reorganization laws are found in a single statute. Canada's bifurcated system would not be so problematic if the CCAA's purposes were clearly defined, but they are not. In practice, courts interpret the CCAA very flexibly and their own powers under it very broadly, which has led to considerable controversy.

Three key changes would help to reconcile liquidating CCAAs with the original purposes of the Act. Firstly, Parliament should amend s. 36 to clarify that it is a substantive test that sets out the minimum requirements to be met for approving a sale. This change would clarify the criteria for approving sales, thereby enhancing the predictability of the CCAA process and reducing participants' costs. [135] Secondly, s. 36 should require an insolvent debtor to obtain its creditors' approval by way of a plan before selling substantially all of its assets. This change would reduce the likelihood that the CCAA process will adversely impact certain types of creditors by altering distributional outcomes in ways that the Act has never contemplated. In addition, this change would help to ensure that liquidating CCAAs are only used where they are likely to result in better returns for creditors as a whole than bankruptcy or receivership sales, since the creditors will favour whichever process maximizes their returns. Thirdly, Parliament should add a purpose clause to the CCAA clarifying that the Act is a reorganization statute, not a liquidation statute. This would encourage courts to scrutinize CCAA applications particularly where the debtor has no intention of reorganizing, and merely intends to use the CCAA as a realization mechanism. Lastly, any reform of the CCAA should address, more broadly, the need to integrate the BIA and CCAA into one comprehensive statute. Canada's bifurcated system has given rise to inconsistencies and made outcomes less predictable. Such inconsistencies raise transaction and litigation costs in restructurings, and Parliament should address them. Moreover, integration would achieve the goal of harmonizing the common aspects of the BIA and CCAA that has been at the core of Parliament's most recent reform efforts. [136]

IV. — CONCLUSION

Philip Wood has observed that a nation's bankruptcy and insolvency laws often have significant implications for other areas of law:

> Bankruptcy law is the profound motivator of commercial and financial law because, if there is not enough brandy and biscuits on the raft, the law is at its most ruthless in having to choose who to pay. [137]

Of course, there will always be winners and losers in insolvency. But we should not expect courts to decide who wins and who loses without reference to clear rules. Such decisions necessarily turn on policy questions which Parliament must answer. Parliament should do so by providing clear and substantive direction in the legislation. In failing to address the shortcomings in the CCAA's sale provisions, Parliament has forced insolvency judges and practitioners to resolve the many attendant problems as best they can in each case. This outcome is unfortunate because it has generated controversy in the courts and uncertainty in the restructuring regime. It also reflects a broader problem with Canada's insolvency law reform process. Canada's "piecemeal approach to bankruptcy reform" has left important gaps in the body of bankruptcy and insolvency law which will only worsen unless Parliament addresses them. [138]

Clearly, commerce and finance have grown increasingly complex in the 80 years since the CCAA was adopted. Necessarily, restructuring law must keep pace with changes in these areas, and it is more important than ever that Parliament provides clear, substantive direction to courts in the legislation. I have suggested that Parliament could best do so by undertaking a much broader reform effort than it has done so far, so as to correct the problems that have arisen

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from years of tortuous, piecemeal reform. Such a comprehensive reform effort would provide an opportunity to examine more carefully the problems discussed in this paper, to clarify the underlying policy goals of the existing legislation, and to chart a clear roadmap for the future of Canadian restructuring law.

Notes de bas de page

* Of the Bar of Ontario. M.Phil/Ph.D. Student (Law), University College London. This article evolved from part of an LL.M. thesis completed under the supervision of Thomas Telfer at the University of Western Ontario. I am grateful to Thomas Telfer and Roderick Wood for their comments on earlier drafts, and to Richard Jones for a number of enlightening discussions.

1 Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003, Chair: Richard H. Kroft) ("Senate Report"), at p. 8.

2 R.S.C. 1985, c. C-36.

3 It is increasingly common for insolvent corporations to begin liquidating substantially all of their assets upon initiating the CCAA process, with no prospect of the corporation presenting a formal plan of arrangement to its creditors or of continuing in business following the conclusion of the CCAA process. See Alfonso Nocilla, "Is 'Corporate Rescue' Working in Canada?" (2013), 53 C.B.L.J. 382.

4 *Century Services Inc. v. Canada (A.G.); Ted Leroy Trucking Ltd. Re* (2010), 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, 72 C.B.R. (5th) 170, 196 A.C.W.S. (3d) 27, 2010 CLB 31458, (*sub nom. Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006, [2011] 2 W.W.R. 383, 326 D.L.R. (4th) 577, 196 A.C.W.S. (3d) 27, 2010 CLB 31458 (Eng.), (*sub nom. Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, 12 B.C.L.R. (5th) 1, 296 B.C.A.C. 1, 409 N.R. 201, 196 A.C.W.S. (3d) 27, 326 D.L.R. (4th) 577, 2010 CLB 31458, [2010] G.S.T.C. 186, 2011 G.T.C. 2006 (Eng.), 2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, 326 D.L.R. (4th) 577, 196 A.C.W.S. (3d) 27, 2010 CLB 31458 (S.C.C.), at para. 21, citing Richard B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law" in J. Sarra, *Annual Review of Insolvency Law 2005* (Toronto, Carswell, 2006), at p. 481.

5 *Re Indalex Ltd.* (2013), 354 D.L.R. (4th) 581, 223 A.C.W.S. (3d) 1049, 2013 CLB 1411, (*sub nom. Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, 20 P.P.S.A.C. (3d) 1, 301 O.A.C. 1, 439 N.R. 235, 223 A.C.W.S. (3d) 1049, 354 D.L.R. (4th) 581, 2013 CLB 1411, 2 C.C.P.B. (2nd) 1, D.T.E. 2013T-97, 2013 CarswellOnt 733, 2013 CarswellOnt 734, [2013] S.C.J. No. 6, 2013 SCC 6, 354 D.L.R. (4th) 581, 223 A.C.W.S. (3d) 1049, 2013 CLB 1411 (S.C.C.).

6 *Re AbitibiBowater Inc.* (2012), 352 D.L.R. (4th) 399, 221 A.C.W.S. (3d) 264, 2012 CLB 34432, (*sub nom. Newfoundland and Labrador v. AbitibiBowater Inc.*) [2012] 3 S.C.R. 443, 95 C.B.R. (5th) 200, 71 C.E.L.R. (3d) 1, 438 N.R. 134, 221 A.C.W.S. (3d) 264, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 2012 CLB 34432, [2012] A.C.S. No. 67, [2012] S.C.J. No. 67, 2012 SCC 67, 352 D.L.R. (4th) 399, 221 A.C.W.S. (3d) 264, 2012 CLB 34432 (S.C.C.).

7 *Century Services*, *supra*, footnote 4, at para. 11.

8 Generally, scholars have focused on discrete time periods and specific reforms of the CCAA. For example, see Jacob S. Ziegel, "Bill C-55 and Canada's Insolvency Law Reform Process" (2006), 43 C.B.L.J. 76; George G. Triantis, "Mitigating the Collective Action Problem of Debt Enforcement Through Bankruptcy Law: Bill C-22 and its Shadow" (1992), 20 C.B.L.J. 242.

9 The term "reorganization" is not used in the legislation. However, as Duggan *et al.* explain, the term has become common in Canada and the United States to refer to the restructuring of an insolvent corporation's debts. The CCAA refers only to an "arrangement", which generally is understood to mean an agreement between the company and its creditors to compromise the company's debt. Such agreements may also involve the restructuring of the classes of creditors and equity holders of the debtor company. See Anthony J. Duggan, Stephanie Ben-Ishai, Thomas Telfer, Roderick Wood, Jacob S. Ziegel, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials*, 2nd ed. (Toronto, Emond Montgomery, 2009) at p. 477, note 1.

10 House of Commons, Study Committee on Bankruptcy and Insolvency Legislation, *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (June 1970, Chair: Roger Tassé) ("Tassé Report").

11 9-10 Geo. V, S.C. 1919, c. 36.

12 Tassé Report, *supra*, footnote 10, at para. 1.2.21. See also The Bankruptcy Act Amendment Act, 1923, 13-14 Geo. V, S.C. 1923, c. 31.

13 *Ibid.*

14 Tassé Report, *supra*, footnote 10, at para. 1.2.19. See also Duggan *et al.*, *supra*, footnote 9, at pp. 15-22.

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15 *Ibid.*

16 *Ibid.*, at para. 1.2.21. See also Duggan *et al.*, *supra*, footnote 9, at p. 478.

17 *House of Commons Debates*, 17th Parliament, 4th Session, Vol. 4 (1933) at 4090 (Hon. C.H. Cahan).

18 *Ibid.*

19 Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act (1947), 25 Can. Bar Rev. 587.

20 That is, to return to profitability and continue operating.

21 Edwards, *supra*, footnote 19, at p. 590.

22 Tassé Report, *supra*, footnote 10, at para. 1.2.23.

23 *Ibid.*, at para. 1.2.24.

24 *Ibid.*, at para. 1.2.23.

25 *Ibid.*, at para. 1.2.27.

26 *Ibid.*

27 *House of Commons Debates*, 21st Parl., 7th Sess., Vol. 2 (1952-1953), at p. 1269.

28 Janis Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (Toronto, Thomson Carswell, 2007), at p. 14.

29 Senator Fogo outlined these amendments, contained in Bill A5, during debates preceding the enactment of the Bankruptcy Act of 1949. *Debates of the Senate*, 21st Parl., 2nd Sess. (1949), at p. 97 (Hon. James Gordon Fogo).

30 Tassé Report, *supra*, footnote 10, at para. 1.2.25.

31 *Ibid.*, at para. 1.2.26.

32 Bankruptcy Act, 1949, 13 Geo. VI, S.C. 1949 (2nd Sess.), c. 7.

33 An Act to Amend the Companies' Creditors Arrangement Act, 1933, 1-2 El. II, S.C. 1952-53, c. 3.

34 *House of Commons Debates*, 21st Parl., 7th Sess., Vol. 2 (1952-1953), at p. 1269.

35 Tassé Report, *supra*, footnote 10, at para. 1.2.23.

36 *Ibid.*, at para. 1.2.28. The Tassé Committee may have overstated the impact of the 1953 amendments. Although the amendments restricted the CCAA's use, the Act was rarely used at that time anyway. For example, Stanley Edwards found only 7 reported decisions dealing with or referring to proposals under the CCAA between 1933 and 1947. See Edwards, *supra*, footnote 19 at p. 591, note 3.

37 House of Commons, Advisory Committee on Bankruptcy and Insolvency, *Report of the Advisory Committee on Bankruptcy and Insolvency* (January 1986, Chair: Gary F. Colter) ("Colter Report"), at p. 18.

38 14-15 El. II, S.C. 1966-67, c. 32.

39 *Ibid.*, ss. 7 and 8.

40 Tassé Report, *supra*, footnote 10.

41 *Ibid.*

42 Colter Report, *supra*, footnote 37, at p. 18.

43 Jacob S. Ziegel, "The Travails of Bill C-12" (1983), 8 C.B.L.J. 374, at p. 375.

44 *Ibid.*

45 See Ziegel, *supra*, footnote 8.

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

47 Jacob S. Ziegel, "Canada's Phased-In Bankruptcy Law Reform" (1996), 70 Am. Bankr. L.J. 383.

48 Jacob S. Ziegel, "The Modernization of Canada's Bankruptcy Law in a Comparative Context" (1999), 4 Can. Bankr. Rep. (4th) 151.

49 For an overview of Jacob Ziegel's articles on the insolvency reform process, see Thomas G.W. Telfer, "Canadian Insolvency Law Reform and 'Our Bankrupt Legislative Process'", in J. Sarra, *Annual Review of Insolvency Law 2010* (Toronto, Carswell, 2010), p. 583.

50 Colter Report, *supra*, footnote 37, at p. 21.

51 *Ibid.*, at p. 56.

52 *Ibid.*, at p. 99.

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53 See *Re United Maritime Fishermen Co-op.* (1988), 67 C.B.R. (N.S.) 44, 214 A.P.R. 415, 84 N.B.R. (2d) 415, 8 A.C.W.S. (3d) 116, 1988 CarswellNB 18, 1988 CLB 8598 (N.B. Q.B.), varied (1988), 68 C.B.R. (N.S.) 170, 221 A.P.R. 333, 87 N.B.R. (2d) 333, 9 A.C.W.S. (3d) 418, 1988 CarswellNB 20, 1988 CLB 8599 (N.B. Q.B.), reversed on other grounds (1988), (*sub nom. Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op*.) 51 D.L.R. (4th) 618, 69 C.B.R. (N.S.) 161, 224 A.P.R. 253, 88 N.B.R. (2d) 253, 11 A.C.W.S. (3d) 19, 1988 CarswellNB 24, [1988] N.B.J. No. 512, 1988 CLB 548 (N.B. C.A.); *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248, 25 A.C.W.S. (3d) 1071, 1990 CarswellBC 373, [1991] B.C.J. No. 604, 1991 CLB 2793 (B.C. S.C.); *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.).

54 See *Re Canadian Bed & Breakfast Registry Ltd.* (1986), 65 C.B.R. (N.S.) 115, 2 A.C.W.S. (3d) 125, 1986 CarswellBC 504, 1986 CLB 6278 (B.C. S.C. [In Chambers]); *Re Norm's Hauling Ltd.* (1991), 6 C.B.R. (3d) 16, [1991] 3 W.W.R. 23, 25 A.C.W.S. (3d) 57, 1991 CLB 7722, (*sub nom. Norm's Hauling Ltd. v. Canadian Imperial Bank of Commerce*) 91 Sask. R. 210, 25 A.C.W.S. (3d) 57, 1991 CarswellSask 38, [1991] S.J. No. 53, 1991 CLB 7722 (Sask. Q.B.).

55 We might question why it was necessary to permit companies without outstanding trust deeds to use the CCAA in the first place. George Triantis suggested that one purpose of the trust deed requirement may have been to ensure that the insolvent debtor had "a sufficiently complex capital structure such that there are likely enough creditors to create a collective action obstacle to the preservation of going-concern value of the firm." In the absence of a complex capital structure that would undermine a going-concern solution, a receivership would be a more appropriate tool for rehabilitating the insolvent debtor. Even in cases where the insolvent debtor has a large and complex business, it may be more appropriate to appoint a number of receivers to manage the different divisions of the business than to initiate CCAA proceedings. See Triantis, *supra*, footnote 8, at pp. 256-257.

56 Bill C-22, 34th Parl., 3rd Sess. (1991). This amending act became law in 1992 as the Bankruptcy and Insolvency Act, R.S.C. 1992, c C-27.

57 House of Commons, Standing Committee on Consumer and Corporate Affairs and Government Operations, "Pre-Study of Bill C-22" in *Official Report of Debates (Hansard)*, No. 15 (October 7, 1991), at p. 14.

58 Duggan et al., *supra*, footnote 9, at p. 478.

59 Ziegel, *supra*, footnote 47, at pp. 396-397.

60 Bill C-5, S.C. 1997, c. 12.

61 Ziegel, *supra*, footnote 47, at p. 397.

62 *Ibid.* See also Duggan *et al.*, *supra*, footnote 9, at p. 18 for a further discussion of these amendments.

63 Ziegel, *supra*, footnote 47, at p. 396.

64 Industry Canada, Marketplace Framework Policy Branch, Policy Sector (Ottawa, Industry Canada, 2002).

65 *Ibid.*, at p. 18.

66 *Ibid.*, at p. 19.

67 *Ibid.*

68 *Ibid.*, at p. 40.

69 *Ibid.* The report suggested the implementation of several changes to increase the transparency of the CCAA reorganization process, such as: the establishment of a national public registry, mechanisms for addressing complaints, and requirements for monitors. However, no specific legislative proposals were made.

70 Senate Report, *supra*, footnote 1.

71 Stephanie Ben-Ishai and Anthony Duggan, *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (Markham, Ontario, LexisNexis, 2007), at p. 5. The authors also cite, among other sources: Insolvency Institute of Canada (IIC), "Insolvency Experts Say Proposed Legislation is Flawed", News Release, November 17, 2005, online: http://www.insolvency.ca/papers/Bill%20C-55%20Press%20Release%20for%20IIC_final-Nov17.pdf; IIC, *Position Paper on Bill C-55* (October 12, 2005), online: http://www.insolvency.ca/papers/IIC%20Position%20Paper%20re%20Bill%20C-55_Oct%2012.pdf.

72 Senate Standing Committee on Banking, Trade and Commerce, "Seventeenth Report" in *Official Report of Debates* (*Hansard*), (November 24, 2005).

73 Ben-Ishai and Duggan, *supra*, footnote 71, at p. 6.

74 An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, June 13, 2007.

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75 "Background" of Bill C-12: An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, Parliament of Canada Virtual Library, Law and Government Division, December 14, 2007, online:http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c12&source=library_prb&Parl=39&Ses=2.

76 An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, 39th Parl., 1st Sess. (October 27, 2007).

77 United Nations Commission on International Trade Law, *Model Law on Cross-Border Insolvency*, GA Res. 52/158, arts. 25-27, UN Doc A/Res/52/158 (January 30, 1998).

78 Ziegel, *supra*, footnote 8.

79 Judges have created almost all of the remedial and supervisory powers of the CCAA court. See Bill Kaplan, "Liquidating CCAAs: Discretion Gone Awry?" in J. Sarra, *Annual Review of Insolvency Law 2008* (Toronto, Carswell, 2009), at p. 80:

> [U]nder the rubric of statutory interpretation (and sometimes by reference to inherent jurisdiction), and in a purported furtherance of defined statutory objectives, courts have fashioned a fulsome and penetrating supervisory jurisdiction over the entire process of reorganization contemplated by the statute.

80 *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] 4 D.L.R. 75, [1934] S.C.R. 659, 16 C.B.R. 1, 1934 CarswellNat 1 (S.C.C.), at pp. 661-662, Duff C.J.C.

81 *Reference re Companies' Creditors Arrangement Act (Canada)*, *supra*, footnote 80, at p. 664.

82 *Century Services*, *supra*, footnote 4, at para. 14.

83 *Century Services*, *supra*, footnote 4, at para. 15.

84 *Century Services*, *supra*, footnote 4, at para. 23.

85 Janis Sarra, "Development of a Model to Track Filings and Collect Data for Proceedings under the CCAA", Final Report to the Office of the Superintendent of Bankruptcy (March 2006), online: http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01669.html.

86 Janis Sarra, "The Evolution of the Companies' Creditors Arrangement Act in Light of Recent Developments" (2011), 50 C.B.L.J. 211.

87 See Nocilla, *supra*, footnote 3.

88 *Ibid.* at p. 393.

89 *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299, 81 A.C.W.S. (3d) 932, 72 O.T.C. 99, 1998 CarswellOnt 3346, [1998] O.J. No. 3306, 1998 CLB 4258 (Ont. Gen. Div. [Commercial List]), additional reasons (1998), 5 C.B.R. (4th) 319, 1998 CarswellOnt 3347 (Ont. Gen. Div. [Commercial List]), additional reasons (1998), 5 C.B.R. (4th) 321, 1998 CarswellOnt 3345 (Ont. Gen. Div. [Commercial List]), leave to appeal refused (1998), 32 C.B.R. (4th) 21, 1998 CarswellOnt 5967, [1998] O.J. No. 6562 (Ont. C.A.).

90 See *Re Medical Intelligence Technologies inc.*, 2009 CarswellQue 6075, EYB 2009-160465, 2009 QCCS 2725 (C.S. Que.), at para. 39: "La liquidation des actifs, *en l'absence de plan d'arrangement*, ne respecte ni la lettre ni l'esprit de la LACC" (emphasis in original). See also *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 296 D.L.R. (4th) 577, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 434 W.A.C. 187, 83 B.C.L.R. (4th) 214, 258 B.C.A.C. 187, 168 A.C.W.S. (3d) 785, 2008 CarswellBC 1758, [2008] B.C.J. No. 1587, 2008 BCCA 327, 2008 CLB 6607 (B.C. C.A.), at para. 32:

> I query whether the court should grant a stay under the CCAA to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

And Shelley C. Fitzpatrick, "Liquidating CCAAs — Are We Praying to False Gods?" in J. Sarra, *Annual Review of Insolvency Law 2008* (Toronto, Carswell, 2009), at pp. 44-45: the question is whether "the creditors and court must endorse a substantive course of action proposed by the debtor company under the CCAA instead of the asset liquidations being presented to the creditors as a *fait accompli*."

91 Senate Report, *supra*, footnote 1, at p. 146.

92 *Ibid.* at pp. 147-148.

93 See, for example, *Re White Birch Paper Holding Co.* (2010), 72 C.B.R. (5th) 49, 193 A.C.W.S. (3d) 1067, 2010 CarswellQue 10954, 2010 CLB 25807, EYB 2010-180748, [2010] Q.J. No. 10469, 2010 QCCS 4915, 193 A.C.W.S. (3d) 1067, 2010 CLB

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25807 (C.S. Que.) at paras. 48-49, leave to appeal refused (2010), 72 C.B.R. (5th) 74, 195 A.C.W.S. (3d) 618, 2010 CarswellQue 11534, 2010 CLB 27253, EYB 2010-181272, 2010 QCCA 1950, 195 A.C.W.S. (3d) 618, 2010 CLB 27253 (C.A. Que.):

> The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section ... the Court could grant the process for reasons other ... than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.

94 See *Re Brainhunter Inc.* (2009), 62 C.B.R. (5th) 41, 183 A.C.W.S. (3d) 905, 2009 CarswellOnt 8207, 2009 CLB 23493 (Ont. S.C.J. [Commercial List]), at paras. 16-17.

95 *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229, 179 A.C.W.S. (3d) 265, 2009 CarswellOnt 4467, [2009] O.J. No. 3169, 2009 CLB 10254 (Ont. S.C.J. [Commercial List]).

96 *Ibid.*, at para. 48.

97 See Alfonso Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012), 52 C.B.L.J. 226 for a further discussion of this issue.

98 David Bish, "The Plight of Receiverships in a CCAA World" (2013), 2 J. Insol. Inst. Can. 221, at pp. 223-224.

99 *Ibid.*, at note 12.

100 *Ibid.*, at p. 232.

101 The primary method by which insolvency law resolves this problem is by establishing a collective proceeding which groups all possible actions against the debtor. See *Century Services*, *supra*, footnote 4, at para. 22: "The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt."

102 See Triantis, *supra*, footnote 8, at pp. 242-243: "The predominant rationale for bankruptcy reorganization law is to solve the collective action problem among creditors that prevents the preservation of insolvent firms that are worth more as going concerns than the sum of the value of their assets." The same principle is prominent in U.S. bankruptcy law, and although there has been a clear shift in recent decades toward sales rather than reorganizations, the preservation of going concern value remains the driving principle. See David A. Skeel, Jr., "Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time to Spare" (2009), Mich. St. L. Rev. 1187, at p. 1198.

103 11 U.S.C. 101, *et seq.*

104 Douglas G. Baird, "The Dark Side of Chapter 11: A Comment on Professor Triantis' Article" (1992), 20 C.B.L.J. 261, at p. 262.

105 Douglas G. Baird and Robert K. Rasmussen, "Antibankruptcy" (2010), 119 Yale L.J. 648, at p. 652.

106 Elizabeth Warren and Jay Lawrence Westbrook, "The Success of Chapter 11: A Challenge to the Critics" (2009), 107 Mich. L. Rev. 603, at p. 640.

107 Lynn M. LoPucki and Joseph W. Doherty, "Bankruptcy Fire Sales" (2007), 106 Mich. L. Rev. 1:

> We found that, on average, reorganizations yielded 80% or 91% of book value, while sales yielded only 35% of book value. Those findings warrant the conclusion that, on average, companies sell for less than would be realized in their reorganizations.

108 *Ibid.*, at pp. 44-45.

109 Vanessa Finch, "Corporate Rescue in a World of Debt" (2008), 8 J.B.L. 756, at p. 764.

110 *Ibid.*, at p. 776.

111 See Skeel, *supra*, footnote 102, at p. 1193.

112 *Ibid.*, at p. 1191.

113 *Century Services*, *supra*, footnote 4, at para. 60.

114 See *Canadian Red Cross*, *supra*, footnote 89, especially at para. 2:

> All insolvency re-organizations involve unfortunate situations, both from personal and monetary perspectives. Many which make their way through the courts have implications beyond simply the resolution of the debt structure between corporate debtor and creditors. They touch the lives of employees. They have an impact on the continued success of others who do business with the debtor company. Occasionally, they affect the fabric of a community itself.

115 *Re Air Canada* (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]).

116 Edwards, *supra*, footnote 19, at p. 593.

117 Roy Goode, *Principles of Corporate Insolvency Law*, 4th ed. (London, Sweet & Maxwell, 2011), at p. 73. See also *N.L.R.B. v. Bildisco*, 11 Bankr. Ct. Dec. 564, Bankr. L. Rep. 69,580, 5 Employee Benefits Cas. 1015, 79 L.Ed.2d 482, 115 L.R.R.M.

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2805, 100 Lab. Cas. P. 10,771, 104 S.Ct. 1188, 465 U.S. 513 (U.S. Sup. Ct., 1984), at p. 528 (U.S.): "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."

118 Roderick J. Wood, "Rescue and Liquidation in Restructuring Law" (2013), 53 C.B.L.J. 407, at p. 410.

119 See for example *Nortel*, *supra*, footnote 95, at para. 48; *Brainhunter*, *supra*, footnote 94, at para 15; and *Re First Leaside Wealth Management Inc.* (2012), 213 A.C.W.S. (3d) 266, 2012 CarswellOnt 2559, 2012 ONSC 1299, 2012 CLB 4598 (Ont. S.C.J. [Commercial List]), at paras. 32-37. See also *Re Komtech Inc.* (2011), 106 O.R. (3d) 654, 81 C.B.R. (5th) 256, 205 A.C.W.S. (3d) 24, 2011 CarswellOnt 6577, 2011 ONSC 3230, 2011 CLB 17935 (Ont. S.C.J.), at para. 33, in which the court held that s. 65.13 of the BIA authorizes a court to approve the sale of substantially all of a debtor's assets in the absence of a proposal in a BIA reorganization.

120 See *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302, 233 Man. R. (2d) 267, 172 A.C.W.S. (3d) 564, 2008 CarswellMan 560, 2008 MBQB 297, 2008 CLB 12443 (Man. Q.B.), at paras. 41-42. Not all courts have accepted this view. See, for example, *Cliffs* and *Medical Intelligence*, *supra*, footnote 90.

121 Stephanie Ben-Ishai and Stephen J. Lubben, "Involuntary Creditors and Corporate Bankruptcy" (2012), 45 U.B.C. L. Rev. 253, at p. 276.

122 Ralph E. Brubaker and Charles J. Tabb, "Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM" (2010), U. of Ill. L. Rev. 1375, at pp. 1379-1380.

123 2002 Ch. 40 (Eng.). See John Armour, Audrey Hsu and Adrian Walters, "Corporate Insolvency in the United Kingdom: The Impact of the Enterprise Act 2002" (2008), 5 E.C.F.R. 148.

124 *Ibid.*, at pp. 159-161.

125 *Ibid.*, at pp. 170-171.

126 *Ibid.*

127 "The Costs and Benefits of Secured Creditor Control in Bankruptcy: Evidence from the UK" (2012), 8 Rev. L. Econ. 101, at p. 131: "We find that cases conducted under the new administration procedure are much quicker than receiverships, taking on average a little over half the time."

128 *Re Indalex*, *supra*, footnote 5, at para. 51.

129 *Century Services*, *supra*, footnote 4, at paras. 15 and 23.

130 See Wood, *supra*, footnote 118, at p. 409:

> Fully secured creditors typically prefer a liquidation to a traditional restructuring notwithstanding that the total value of the assets might be maximized in a restructuring. Moreover, they will prefer a quick liquidation to a slower liquidation that yields greater value if the expected sale proceeds are sufficient to pay out their claim.

131 Bish, *supra*, footnote 98, alludes to this argument at p. 244:

> Arguably, much can be said for a system that recognizes those having a principal economic interest and affording them a pre-eminent seat at the table. Equity does not require equality.

132 *Century Services*, *supra*, footnote 4, at para. 70.

133 Jason Kilborn and Adrian Walters, "Involuntary Bankruptcy As Debt Collection: Multi-Jurisdictional Lessons in Choosing the Right Tool for the Job" (2013), 87 Am. Bankr. L.J. 123, at pp. 123-124.

134 Jacob S. Ziegel, "New and Old Challenges in Approaching Phase Three Amendments to Canada's Commercial Insolvency Laws" (2002), 37 C.B.L.J. 75, at p. 76.

135 For a more detailed discussion of this issue, see Nocilla, *supra*, footnote 3, at pp. 404-406.

136 *Century Services*, *supra*, footnote 4, at para. 24.

137 Philip R. Wood, "The Bankruptcy Ladder of Priorities and the Inequalities of Life" (2011), 40 Hofstra L. Rev. 93.

138 Ziegel, *supra*, footnote 134.

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30 — PENSION DEEMED TRUST: WHAT'S LEFT?

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PENSION DEEMED TRUST: WHAT'S LEFT?

Alain Prévost [*]

Since the 2008 financial crisis, several employers sponsoring supplemental pension plans have experienced financial difficulties that have precluded them from adequately funding these pension plans. As a result, many workers and retirees have unfortunately had their pension benefits reduced, sometimes significantly. Yet, a legal device designed to protect the funding of supplemental pension plans has for long been part of pension legislation: the deemed trust. Such provisions create a legal fiction that assets of the employer in an amount equal to the sums to be paid to the pension fund are deemed to form no part of the estate of the employer so as to protect these assets from the claims of other creditors. However, this device has not really been effective in the case of insolvent employers. Over the last few years, Québec courts have had to rule in at least four instances on the application of provisions creating a deemed trust for amounts due to a pension fund. However, *decisions rendered in the matter of White Birch*, *Timminco*, *Aveos and Bloom Lake are somewhat difficult to reconcile. Based on a review of these four recent decisions involving proceedings under the Companies' Creditors Arrangement Act*, *this article attempts to lay out the main conclusions to be drawn and also to encourage legislators to clarify the situation. In this article*, *the effectiveness of the pension deemed trust in insolvency is examined primarily from the perspective of Québec civil law. However, as the conclusions to be drawn in that regard relate to the application of federal insolvency legislation, most of them apply equally in respect of common law provinces.*

I. — INTRODUCTION

The constant increase of life expectancy leads many people to raise questions about the financing of retirement and, in particular, about the financial sustainability of existing public and private pension plans. [1] The financial condition of pension funds was particularly affected by the 2008 financial crisis and by the slowing down of the economy and the continued low interest rates that have resulted from it. Transformation of the labor market also raises concerns. This situation has led governments to introduce measures such as voluntary retirement saving plans [2] while others have proposed enhancing existing public pension plans [3] or creating new ones. [4]

With respect to private plans, several employers sponsoring supplemental pension plans for the benefit of their employees have experienced financial difficulties that have precluded them from adequately funding these plans. The situation is particularly difficult in respect of defined benefit pension plans. [5] As a result, many workers and retirees have unfortunately had their pension benefits reduced, sometimes significantly. Although contributions that have already been paid into the pension fund are beyond the reach of the employer's creditors as they are held by a trustee or by an insurer, this is not the case for those contributions that are yet to be made by the employer. Yet, a legal device designed to protect the funding of supplemental pension plans has for long been part of pension legislation: the deemed trust. Such provisions create a legal fiction that assets of the employer in an amount equal to the sums to be paid to the pension fund are deemed to form no part of the estate of the employer so as to protect these assets from the claims of other

creditors. [6] In principle, these provisions should particularly be relevant if the employer were to become insolvent. They are meant to increase the chances that retirees and other beneficiaries of the pension plan can actually receive the pension benefits they were promised. It must however be acknowledged that this device has not really been effective in the case of insolvent employers. Courts have generally given a restrictive interpretation to these provisions as deemed trusts usually cover significant amounts that would otherwise reduce the assets available to satisfy the claims of all other creditors of the employer. Many actually deplore the fact that Canadian legislation affords little protection to the claims of pension plan beneficiaries when an employer becomes insolvent. [7] Over the last few years, Québec courts have had to rule in at least four instances on the application of provisions creating a deemed trust for amounts due to a pension fund. Further, during the same period, the Supreme Court of Canada has ruled on similar provisions of the Ontario legislation in the matter of *Indalex*. [8]

However, decisions that Québec courts have rendered in the matter of *White Birch*, *Timminco*, *Aveos* and *Bloom Lake* are somewhat difficult to reconcile. Thus, in the matter of *White Birch*, [9] Mongeon J. initially concluded that the deemed trust under Québec pension legislation was not effective, in particular because it did not meet all the conditions necessary for the creation of a real trust. However, the same judge reversed his conclusion in that regard in *Timminco*, [10] where he concluded that the deemed trust under Québec legislation was duly effective and had priority over the claims of secured creditors. In the matter of *Aveos*, [11] Schrager J. [12] ruled that the deemed trust under federal pension legislation did not have priority over the claims of secured creditors whose security interest was perfected prior to the creation of the deemed trust. Finally, in the matter of *Bloom Lake*, [13] Hamilton J. concluded that the deemed trust under federal legislation was implicitly excluded by the Companies' Creditors Arrangement Act [14] so that it did not prevent the court from granting a super-priority to another creditor under that Act. It must be noted that none of these decisions from the Québec Superior Court was appealed, except that a motion for leave to appeal was denied in *Bloom Lake*. [15]

This article attempts to lay out the main conclusions to be drawn from these decisions and, by the same token, to share some thoughts for the benefit of those lawyers and other professionals who might face similar questions in the future. Hopefully, this article might also encourage legislators to clarify the situation. [16] In this article, the effectiveness of both provincial and federal pension deemed trusts in insolvency is examined primarily from the perspective of Québec civil law. However, as the conclusions to be drawn in that regard relate to the application of federal insolvency legislation, most of them apply equally in respect of common law provinces.

II. — HISTORICAL BACKGROUND

The number of supplemental pension plans sponsored by employers for the benefit of their employees grew significantly after the Second World War, which led provincial and federal governments to introduce regulatory frameworks designed primarily to protect the rights of beneficiaries. In that respect, the first statutes of general application were enacted in the 1960s. As supplemental pension plans are ancillary to employment contracts, it must be noted that the constitutional division of powers over such plans reflects that applicable in labour law matters. The majority of pension plans in Canada thus fall under provincial jurisdiction while federal legislation only applies in respect of those plans sponsored by employers under federal jurisdiction (such as banks, telecommunications companies and airlines).

The concept of deemed trust was first introduced in tax legislation in order to protect the legitimate interest of the State to collect from employers payroll deductions they were required to make from their employees' salaries. [17] As the assets representing the amount of such deductions were often commingled with other assets of an employer, they were accessible to all its creditors, notably in case of the employer's insolvency. Similar provisions were also introduced in other statutes requiring employers to make payroll deductions for contributions to public schemes such as the Canada Pension Plan [18] or the Employment Insurance Act. [19] These deemed trusts are established for the benefit of the State and they cover contributions taken from employees' salaries. Similarly, statutes governing supplemental pension plans were

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also amended to create a deemed trust for the benefit of plan beneficiaries so as to increase the chances that amounts required to properly fund these plans would actually be paid into the pension fund. [20] These deemed trusts cover both contributions taken from employees' salaries as well as contributions payable by employers.

The question as to whether a deemed trust is effective when a debtor company becomes insolvent has generated the development of extensive and complex case law. [21] As such, it is well established that a provincial statute cannot impede the application of federal insolvency legislation as a result of the doctrine of federal paramountcy. [22] For example, a provincial statute creating a deemed trust cannot have the effect of altering the order of priorities for the payment of claims that is set out in s. 136 of the Bankruptcy and Insolvency Act. [23] Further, the question as to whether the claims of the beneficiaries of a deemed trust have priority over the claims of secured creditors was first decided in 1997 by the Supreme Court of Canada in *Royal Bank v. Sparrow Electric Corp.* [24] In that case, the Supreme Court determined that the claims arising from the deemed trust under the Income Tax Act ("ITA") did not prevail over the claims of those secured creditors whose security interest was created prior to the deemed trust attaching to the relevant assets of the debtor. In response to that decision, Parliament thereafter quickly amended the ITA so as to expressly grant priority to the deemed trust under that Act over the claims of secured creditors. [25] The deemed trust provisions of the Canada Pension Plan and of the Employment Insurance Act were similarly amended at the same time, [26] while the deemed trust under the Excise Tax Act was amended in 2000. [27] However, no such amendments were made to the various statutes governing supplemental pension plans.

Furthermore, likely as a result of the proliferation of provisions creating a deemed trust, federal insolvency legislation was amended so as to limit the number of deemed trusts whose effectiveness is expressly recognized in case of insolvency. [28] The drafting technique that was used in that respect was to provide that no deemed trust *for Her Majesty* (*i.e.*, the State) has any effect in case of insolvency, except for those expressly preserved by insolvency legislation and those otherwise meeting the necessary conditions for the creation of a real trust [29] (under civil law in Québec [30] or under common law elsewhere in Canada). [31] Perhaps because most deemed trusts are established for the benefit of Her Majesty, some have seen in these amendments an intent by Parliament to deprive *all deemed trusts* of any effect in insolvency except for those whose effectiveness is expressly preserved by insolvency legislation. As will be seen below, such an over-generalization is still prevalent in some recent court decisions. [32]

More recently, several amendments were made to federal insolvency statutes, including for granting a relative priority to part of the claims arising from pension plans sponsored by an insolvent employer. [33] Generally, that priority relates to claims for normal cost (called "current service contributions" in the Québec pension legislation) required to be paid to the pension fund, but not to special payments (called "amortization payments" in Québec). [34] Some of these amendments came into force in July 2008, [35] while others came into force in September 2009 [36] (collectively "the 2009 amendments"). [37] However, the impact of these new provisions on deemed trusts established under either federal or provincial pension legislation remains to be determined.

It must finally be noted that, despite the extensive case law on the matter, many grey areas still exist regarding the concept of deemed trust, some of which arise from the differences between civil law and common law. Courts have often described a deemed trust as a floating charge over all the assets of a debtor company. [38] Once the application of a deemed trust is triggered, the debtor company nonetheless retains all its rights over the assets to be covered by the deemed trust, including the right to dispose of them. [39] As for the beneficiaries of the deemed trust, they have no right in these assets, including no tracing rights. [40] The legal effects of a deemed trust thus resemble those arising from a priority of payment, namely the right to be paid in preference over other creditors from the proceeds of disposition of the assets of the debtor company. [41]

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III. — ONTARIO LEGISLATION

The deemed trust that applies in respect of pension plans governed by Ontario legislation is established by s. 57 of the Pension Benefits Act;[42] s. 57(3) and (4) of that Act provide as follows:

> (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

It must be noted that Ontario legislation has a special feature arising from s. 30(7) of the Personal Property Security Act.[43] That provision expressly grants priority to the pension deemed trust over a security interest attaching to certain assets of a debtor company;[44] it reads as follows:

> (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act, 2000*, the *Pension Benefits Act* or the *Pooled Registered Pension Plans Act, 2015*.

For the purposes of this article, the interest in considering the Ontario legislation arises from the fact that the Supreme Court of Canada recently examined in *Indalex* its application in the context of proceedings under the CCAA and laid out in that decision certain principles that would also be applicable to other pension statutes creating a deemed trust.

1. — The Decision in *Indalex*

Experiencing serious financial difficulties, Indalex sought court protection under the CCAA in April 2009. In the context of those proceedings, the company's assets were ultimately sold but the buyer did not assume Indalex's responsibility for the pension plans. As the proceeds of the sale of assets were not sufficient to cover for the payment of all claims, the main question to be decided was whether amounts accrued but not yet due to the pension fund at the time of the wind up of the plan were covered by the deemed trust established under s. 57(4) of the Ontario pension legislation. If so, the court further had to determine if the claim based on the deemed trust had priority over the claim under the DIP financing agreement[45] that had been approved by the trial judge pursuant to the CCAA. The court order provided in that respect that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise"[46] (commonly referred to as a "super-priority").

The decision rendered by the Supreme Court is complex, as three groups of judges gave separate reasons dealing with several related questions and in which they agreed on certain points and disagreed on others. In summary, a majority of judges concluded that amounts accrued in respect of the wind up deficit of one of the relevant plans were indeed covered by the deemed trust under Ontario legislation. However, all judges agreed that the claim based on the DIP financing agreement had priority over the claim based on the pension deemed trust as a result of the operation of the doctrine of federal paramountcy.[47]

For the purposes of this article, the interest of the *Indalex* decision lies primarily in the fact that the Supreme Court confirmed therein that deemed trusts created by provincial legislation continue to apply in respect of companies having obtained court protection under the CCAA, which in principle is not the case for those companies that are liquidated under the BIA.[48] In that regard, Deschamps J. expressed the following view:

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> [51] ... Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA* ...
>
> [52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

Although it must be acknowlegded that the other two groups of judges who provided reasons in *Indalex* did not explicitly deal with that issue, their conclusions necessarily imply that they agreed with this position. In any event, this position simply reflects the general principle pursuant to which provincial laws continue to apply to companies that become insolvent, except to the extent that provincial laws conflict with federal insolvency legislation. [49]

However, it must be noted that the facts giving rise to the decision in *Indalex* predated the coming into force in 2009 of the legislative amendments made to the CCAA. This issue will be considered further below.

IV. — QUÉBEC LEGISLATION

Pension plans that fall under the jurisdiction of Québec are governed by the Supplemental Pension Plans Act ("SPPA"). [50] Section 49 of that Act reads as follows:

> 49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

Unlike other deemed trust provisions, the wording of s. 49 does not include any reference to a triggering event upon which the legal fiction is to take effect. For example, the deemed trust under federal pension legislation provides that it applies "[i]n the event of any liquidation, assignment or bankruptcy of an employer", while that under Ontario legislation applies "[w]here a pension plan is wound up in whole or in part". With respect to Québec legislation, it thus appears that the deemed trust takes effect immediately when the contributions and accrued interest become due and payable. [51]

Moreover, unlike both federal and Ontario legislation, Québec legislation does not specify that an employer is deemed to hold in trust "an amount (of money) equal to" those contributions that are to be paid into the fund. However, it must be acknowledged that in reality all three statutes are to the same effect as, until they are formerly segregated from the other assets of the employer, unpaid contributions are simply assets that the employer could use to pay such contributions. This difference in the wording of the Québec legislation thus appears to simply arise from the civil law drafting style.

Further, s. 264 of the SPPA provides as follows:

> 264. Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:
>
> (1) all contributions paid or payable into the pension fund or to the insurer, with accrued interest;
>
> (2) all amounts refunded or pension benefits paid under a pension plan or this Act.

It must be noted that the rule set out in the first paragraph of s. 264 appears to be unique to Québec. [52] Indeed, although other federal and provincial statutes governing supplemental pension plans provide that pension benefits paid to plan beneficiaries are both unassignable and unseizable, [53] it seems that none of these statutes provide that contributions that have yet to be paid into the pension fund cannot be assigned or seized.

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The effectiveness of the deemed trust established under s. 49 of the SPPA was examined in both *White Birch* and *Timminco*. In addition, the scope of s. 264 of the SPPA was also considered in this last decision.

1. — The Decision in *White Birch*

In *White Birch*, various pulp and paper companies had obtained court protection under the CCAA in February 2010. Following the Ontario Court of Appeal decision in *Indalex*,[54] an application for a declaratory judgment was filed in October 2011 on behalf of certain groups of employees and retirees of these companies seeking to have priority granted to the special payments due to the pension fund over the claims of the lenders having a super-priority under the CCAA.

At the outset, it must be noted that the decision in *White Birch* was issued prior to the release by the Supreme Court of Canada of its judgment in *Indalex*, which overturned the decision of the Ontario Court of Appeal. Nonetheless, Mongeon J. rejected the application by the relevant groups of employees and retirees on various grounds. While it is not necessary to examine them all in detail, some of his conclusions deserve special attention.

Justice Mongeon first concluded that the deemed trust under s. 49 of the SPPA can only be effective if it meets all the conditions required under Québec civil law[55] for the creation of a real trust, which he held was not the case in *White Birch*. However, he reversed his conclusion in that regard in *Timminco* and that last decision appears well founded. Indeed, a legislature has full authority to declare that a given situation is deemed to produce the legal effects of a trust even though all the conditions necessary for the creation of a conventional trust are not met. Such a trust is established by operation of law.[56] However, by reason of the doctrine of federal paramountcy, a trust established by a provincial statute will produce no effect if it conflicts with federal insolvency legislation. In that regard, case law has established that a deemed trust created under provincial legislation is not a trust within the meaning of para. 67(1)(a) of the BIA and accordingly cannot alter the priorities set out in s. 136 of that Act.[57] However, the CCAA contains no such provisions.[58] Although certain decisions might have suggested that the priorities set out in the BIA were also applicable in the context of CCAA proceedings,[59] the Supreme Court of Canada rejected that approach in *Indalex*.[60] Therefore, a deemed trust does not need to meet the conditions required for the creation of a real trust in order to produce its effects in the context of the CCAA.

The court in *White Birch* also concluded that because no provision of the CCAA confirms the validity of the deemed trust under s. 49 of the SPPA, such a deemed trust could not be applied against a company that had obtained court protection under the CCAA.[61] However, this position fails to distinguish between deemed trusts established for the benefit of Her Majesty, which are rendered ineffective by s. 37(1) of the CCAA unless they are expressly preserved by that Act, and other deemed trusts that are not covered by a similar provision.[62] This position is based on the minority opinion by Fish J. in *Century Services* pursuant to which a deemed trust could only be recognized if there is a provision creating a deemed trust and another provision in the CCAA or the BIA expressly confirming that deemed trust. Yet, this opinion by Fish J. was explicitly rejected by the majority judges in that decision.[63]

As an alternative ground, Mongeon J. finally concluded that even if the deemed trust under s. 49 of the SPPA were to be considered effective in the context of CCAA proceedings, it could not, as a result of the doctrine of federal paramountcy, prevail over the claims of lenders having been granted a super-priority under that Act.[64] As Mongeon J. himself acknowledged in *Timminco*,[65] this last conclusion remains the sole compelling ground in support of his decision in *White Birch*. This conclusion is also consistent with the Supreme Court of Canada's subsequent decision in *Indalex*.

2. — The Decision in *Timminco*

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Facing financial difficulties, Timminco Inc. and its subsidiary Silicium Bécancour Inc. (SBI) obtained in January 2012 a protection order under the CCAA from the Ontario Superior Court of Justice. The main question to be decided in that matter was whether the claims of the SBI pension plan beneficiaries were to be granted priority over the claims of Investissement Québec pursuant to a universal hypothec without delivery over all movable and immovable property of SBI. As the pension plans sponsored by SBI were governed by Québec legislation, the Ontario court referred that question for determination by the Superior Court of Québec.

Contrary to the decision he had reached in *White Birch*, Mongeon J. concluded that s. 49 of the SPPA duly created a deemed trust [66] which covered all contributions due by the debtor company, including special payments, but excluding amounts required to pay off the unfunded actuarial liability. [67]

Under s. 49 of the SPPA, the deemed trust takes effect as soon as the contributions and accrued interest become due and payable. Yet, in *Timminco*, the deemed trust had taken effect *after* the hypothec held by Investissement Québec had been perfected. According to the principles set out in the *Sparrow* decision, [68] it would have been necessary for s. 49 of the SPPA (or for any other provision of Québec legislation) to expressly provide that the deemed trust had priority over the claims of secured creditors. [69] Absent such a provision, one would have had to conclude that the assets covered by the deemed trust were already charged by a hypothec when the deemed trust took effect to purportedly remove them from the estate of the debtor company. Following that logic, the claim of Investissement Québec under its hypothec would have trumped the claims of the pension plan beneficiaries. [70]

Nonetheless, Mongeon J. then turned to s. 264 of the SPPA which, as indicated previously, provides that all contributions to be paid to the pension fund cannot be assigned or seized. [71] He expressed the following views:

> [135] Serait donc insaisissable ou incessible toute cotisation versée ou qui doit être versée à la caisse de retraite des employés syndiqués on [*sic*] non-syndiqués de SBI. S'il faut donner un sens à cet article, il faut conclure que les cotisations ... « à être versées » ... sont littéralement hors de la portée des autres créanciers de SBI, que ces derniers soient garantis ou non, qu'ils bénéficient d'une garantie antérieure à la date d'exigibilité des cotisations payées ou non.
>
> [*Translation*] [135] Any contribution paid or payable to the pension fund established for the unionized or the non-unionized employees of SBI would therefore be unseizable or unassignable. In order to give meaning to this provision, it must be concluded that contributions ... "payable" ... are literally beyond the reach of the other creditors of SBI, whether they are secured or unsecured creditors, whether their security interest arose prior to the date when the contributions became due, whether paid or not.

On this basis, the court held that the reasoning followed in *Sparrow* could not be applied in the case at hand. [72] The decision reached in *Timminco* thus appears to mean that, even though the assets covered by the deemed trust were already charged by a hypothec when the deemed trust took effect to purportedly remove them from the estate of the debtor company, the secured creditor could no longer exercise its right against the secured assets because in the meantime they had become exempt from assignment and seizure. Nonetheless, if the relevant assets became unassignable as soon as the contributions payable to the pension fund became due, a question arises as to how these assets could have been removed from the estate of SBI by operation of the deemed trust. Logically, one would probably have to assume that the deemed trust created by s. 49 of the SPPA should be considered to have taken effect immediately before the relevant assets became unassignable pursuant to s. 264 of that Act. Further, once these assets were deemed to have been removed from the estate of the debtor company, one would probably have to assume that they became unseizable by its creditors while the company was holding them in trust for the plan beneficiaries. However, the fact that the assets became unseizable would likely not prevent the beneficiaries from being able to force the debtor company acting as trustee to deliver these

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assets to them at the termination of the trust. [73] Clearly, the combined application of ss. 49 and 264 of the SPPA raises some interesting conceptual difficulties. [74]

Although the decision in *Timminco* has the advantage of increasing the protection afforded to pension plan beneficiaries in Québec, one must nonetheless acknowledge that it might have serious consequences for lenders and other creditors of companies sponsoring pension plans if it were to be followed by future court decisions. [75] Incidentally, Mongeon J. made the following additional comments:

> [160] Finalement, force est de constater que l'article 264 LRCR a, par analogie, sensiblement le même effet que l'article 30(7) de la *Loi ontarienne sur les sûretés mobilières* (LRO 1990, ch. D-10 [*sic*]) que l'on appelle communément le « PPSA » et qui subordonne les sûretés mobilières à l'intérêt du bénéficiaire d'une fiducie réputée créée par une loi portant sur les régimes de retraite.
>
> —
>
> [*Translation*] [160] Finally, it must be acknowledged that section 264 of the SPPA has, by analogy, substantially the same effect as section 30(7) of the Ontario *Personal Property Security Act* (RSO 1990, c. P-10) which is commonly known as the "PPSA" and which makes security interests subordinate to the interest of the beneficiary of a deemed trust created by pension legislation.

However, it must be recalled that the deemed trust under Ontario legislation only takes effect when a pension plan is wound up in whole or in part. By contrast, the fact that assets of the employer in an amount equal to the contributions to be made to the pension fund would be exempt from assignment and seizure could be raised sporadically at any stage of the life of a company.

Furthermore, it must be noted that unseizability is the exception and that provisions exempting property from seizure must thus be narrowly construed. [76] Generally, such provisions are meant to protect those assets and sources of revenue that are necessary for the subsistence of individuals. Accordingly, most of them only apply in respect of property held by individuals. [77] Although certain exemptions from seizure appear to have a wide enough scope to encompass property held by corporations, it must be acknowledged that exempting such assets from seizure could have strange consequences if the creditors of a company being liquidated could be denied access to the assets on account of their unseizability while the assets could ultimately be remitted to that company's shareholders at the end of the liquidation process. [78] With respect to the exemption from seizure covering contributions payable to a pension fund, paragraph 1 of s. 264 of the SPPA could be construed so as to cover contributions payable either by employees, by the employer or by both of them. [79] In *Timminco*, Mongeon J. concluded that both contributions payable by employees and those payable by the employer, including special payments, were covered by the exemption from seizure. [80] However, as provisions exempting property from seizure are to be narrowly construed, it might be appropriate to make a distinction between the various types of contributions to be covered by such exemption. [81] In addition, even though it might be argued that exempting contributions payable by an employer from seizure is ultimately meant to protect the sources of revenue that are necessary for the subsistence of pension plan beneficiaries, one must acknowledge that there is only an indirect link between the exemption and the beneficiaries. In reality, this amounts to exempting from seizure assets that the employer might use to fund the future retirement benefits payable to plan beneficiaries. Furthermore, it must be emphasized that the exemption from seizure would apply in all respects, *i.e.*, even if the relevant assets are not actually covered by a deemed trust or if the equivalent amounts are not ultimately paid into the pension fund.

In addition, in the context of a bankruptcy, assets exempted from seizure under s. 264 of the SPPA would be excluded from the property of the bankrupt pursuant to para. 67(1)(b) of the BIA, which incorporates by reference provincial legislation applicable in that regard. Some creditors could however try to argue that s. 264 of the SPPA should be construed narrowly because significant assets could otherwise be excluded from the estate of the debtor company to

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the benefit of pension plan beneficiaries, which would accordingly have the effect of altering the priorities set out in s. 136 of the BIA.

All the above reasons suggest that the interpretation adopted in the *Timminco* decision with respect to the unseizability of contributions payable to a pension fund might not be followed in future court decisions. [82]

Finally, it must be noted that the impact of the 2009 amendments to insolvency legislation on the deemed trust established under Québec pension legislation was not raised in either *White Birch* or *Timminco*.

V. — FEDERAL LEGISLATION

Supplementary pension plans that are subject to federal jurisdiction (such as those sponsored by banks, telecommunications companies and airlines) are governed by the Pension Benefits Standards Act, 1985 [83] (the "PBSA"). [84] Subsections 8(1) and (2) of that Act provide as follows:

> 8. (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> (a) the moneys in the pension fund,
>
> (b) an amount equal to the aggregate of the following payments that have accrued to date:
>
> (i) the prescribed payments, and
>
> (ii) the payments that are required to be made under a workout agreement; and
>
> (c) all of the following amounts that have not been remitted to the pension fund:
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).
>
> (2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

The effect of the deemed trust established under these provisions was recently examined by the Superior Court of Québec in the matters of *Aveos* and *Bloom Lake*.

1. — The Decision in *Aveos*

Aveos was an enterprise involved in the maintenance of aircraft. It was previously a division of Air Canada and many of its employees were actually former employees of Air Canada. Experiencing serious financial difficulties, Aveos applied for court protection under the CCAA in March 2012. In the context of those proceedings, substantially all of its assets were ultimately sold.

The main issue was whether amounts due to fund a pension plan sponsored by Aveos and that were covered by a deemed trust were to be paid in priority to the claims of secured lenders. [85] It must be noted that when a pension plan is wound up under federal legislation, the deemed trust does not cover all the amounts that would have been required to pay the

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funding deficiency of the pension fund (approximately $29.7 million in the case of Aveos) but only a portion of these amounts (approximately $2.8 million). [86]

In *Aveos*, [87] Schrager J. essentially concluded that the deemed trust established by federal legislation did not trump the claims of the relevant secured creditors as their hypothecs or other security interests had been created prior to the deemed trust taking effect. He mainly relied in that regard on the Supreme Court of Canada's decision in *Sparrow*. [88] However, Schrager J. did not clearly indicate whether the deemed trust had actually attached to the assets of Aveos but was subordinate to the claims of the secured lenders as it arose after their security interests were created, or whether the deemed trust had no effect at all on these assets. He expressed his conclusion in that respect as follows:

> Consequently, this Court agrees with the Secured Lenders first position that their security was created before any deemed trust for the $2.8 million could have existed. Since the assets were already charged, any deemed trust under Section (8)(2) P.B.S.A. is *at best* subordinate to the security of the Secured Lenders. [89] [Emphasis added]

As previously indicated, *Sparrow* dealt with the deemed trust created under the Income Tax Act ("ITA") as it read prior to the legislative amendments that were made to that Act in 1998. [90] The wording that was then used in the ITA was similar to that currently found in the PBSA and accordingly it did not expressly provide that the deemed trust had priority over the claims of secured creditors. The Supreme Court decision in *Sparrow* appears to be based on the conclusion that the deemed trust under the ITA could not attach to assets that had already been granted as security because the debtor *no longer owned them.* [91] For civil law lawyers, that conclusion might appear puzzling. However, the common law sometimes provides for a bifurcation of ownership rights. By way of example, in the case of a mortgage, the mortgagee is considered as the legal owner of the secured assets at common law, while the mortgagor is considered as the beneficial owner of those assets under the rules of equity. However, such a distinction does not exist under Québec civil law, pursuant to which the mortgagor retains full ownership of the secured assets under a hypothec. [92] It is thus open to the mortgagor, at least in principle, to grant another security interest over the same assets. The priority between various security interests granted over the same assets is determined based on the date of their registration pursuant to the rules regarding the publication of rights. [93]

In order to determine the priority between the claims arising from a deemed trust and those under a hypothec in the context of Québec civil law, one could not therefore rely on the fact the secured creditor owns the secured assets. Under civil law, a deemed trust can actually attach to the assets that a debtor has already granted as security to another creditor pursuant to a hypothec. However, for the purposes of determining priority between such competing claims, given that the legislation creating a deemed trust for amounts due to a pension fund does not specify that the deemed trust has priority over secured creditors, the claims of those creditors whose security interests were previously created should rank ahead of the claims of the deemed trust beneficiaries based on the prior date of creation or registration of those security interests. Further, as the legislation does not specify the exact moment when the deemed trust becomes effective, it is reasonable to conclude that the deemed trust should be considered to be effective from the moment the amounts covered by it become due or are accrued [94] (subject to any applicable triggering event) without the need to have the deemed trust registered. Nonetheless, it is acknowledged that it might sometimes be difficult to determine the exact moment from which the deemed trust should be considered to be effective because of the diversity and complexity of the various funding regimes applicable in respect of pension plans.

In *Aveos*, Schrager J. also addressed certain alternative arguments that need to be considered. He concluded that the deemed trust created by the PBSA is not effective in a CCAA proceeding, at least with respect to secured creditors whose security interest was previously perfected. [95] However, this conclusion is ambiguous as the first part implies that the deemed trust created under federal legislation produces no effect at all in the context of the CCAA, while the second part implies that the deemed trust is effective but only in respect of certain creditors.

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Justice Schrager relied in that respect on the Supreme Court decision in *Century Services*, notably on the reasons expressed by Fish J., to support the argument that a deemed trust cannot be effective in an insolvency context unless its validity is expressly preserved by insolvency legislation.[96] However, that argument suffers from at least two flaws. Firstly, it fails to distinguish between deemed trusts established for the benefit of Her Majesty and other deemed trusts, including those created in favour of beneficiaries of pension plans.[97] Yet, only the first are covered by s. 37(1) of the CCAA, which provides that no deemed trust for Her Majesty is effective unless it is expressly provided for in that Act. Actually, as previously indicated, the view expressed by Fish J. had explicitly been rejected by the majority judges in *Century Services*.[98] Secondly, the Supreme Court in *Indalex* confirmed that the deemed trust established by Ontario pension legislation continues to apply in CCAA proceedings (subject of course to the doctrine of federal paramountcy). The same rationale should in principle apply in respect of the deemed trust created by federal legislation because the CCAA does not expressly exclude the application of pension deemed trusts established under either provincial or federal legislation. As a matter of fact, it must be added that in *Bloom Lake*, Hamilton J. noted his disagreement with the opinion expressed in that regard by Schrager J.[99] The position expressed by Hamilton J. appears well-founded.

In order to set aside the application of the deemed trust under the PBSA, Schrager J. also invoked the amendments that were made in 2009 to insolvency legislation and that provide some limited protection to certain claims relating to pension plans.[100] This issue will be examined in more detail in the context of the decision in *Bloom Lake*.

In any event, Schrager J. did not conclude that the deemed trust under the PBSA was not effective at all in CCAA proceedings. In that respect, he simply repeated his main conclusion according to which the deemed trust was only effective in respect of certain creditors. He expressed his view as follows:[101]

> The Superintendent legitimately poses the rhetorical question of what use is the deemed trust? Certainly it is useful for the protection of special payments but only *vis-à-vis* creditors who do not hold security over the assets of the debtor company which was perfected prior to the deemed trust attaching to the assets.

2. — The Decision in *Bloom Lake*

In May 2015, a group of enterprises engaged in mining and rail transportation operations in Labrador and Québec sought and obtained protection under the CCAA from the Superior Court of Québec.[102] The main question to be resolved was whether the court should grant a super-priority to the lenders providing interim financing to the debtors, particularly as it related to the claims of beneficiaries of pension deemed trust. At the outset, it must be noted that the pension plans covering some of the affected employees were subject to federal legislation while those covering other employees were governed by the pension legislation of Newfoundland and Labrador. Accordingly, this case involved the application of both the pension deemed trust established by federal legislation and that created by provincial legislation.

As is often the case in CCAA proceedings, Hamilton J. granted the super-priority that was sought. However, what is perhaps not so common is the fact that he ruled at that early stage on the effectiveness of the deemed trust.[103] After having reviewed the relevant legislative provisions, he concluded as follows:[104]

> [78] For all of these reasons, the Court concludes that Parliament's intent is that federal pension claims are protected in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*, notwithstanding the potentially broader language in the *PBSA*.
>
> [79] In the alternative, the Court could conclude that a liquidation under the *CCAA* does not fall within the term "liquidation" in Section 8(2) *PBSA* such that there has been no triggering event.

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> [80] Either way, the Court concludes that the deemed trust under Section 8(2) *PBSA* does not prevent the Court from granting priority to the Interim Lender Charge, if the conditions of Section 11.2 *CCAA* are met.

It must be recalled that the deemed trust under the PBSA is only triggered "[i]n the event of *any liquidation*, assignment or bankruptcy of an employer" (emphasis added). Many enterprises seeking protection under the CCAA hope to be able to reach a compromise with their creditors so as to be able to emerge from such proceedings after a certain period and resume their business. However, other enterprises know right from the start that they will not survive; they thus commence a liquidation process that will ultimately lead to their dissolution. [105] It can therefore be difficult to determine precisely at which stage of the CCAA proceedings such an enterprise should be considered to be in "liquidation". Yet, the deemed trust under federal legislation is only triggered at that moment. [106]

Based on the facts reported in the *Bloom Lake* decision, one could conclude that the applicants had actually reached that point at the moment the court approved a process for the sale of their assets. [107] On the other hand, if they never reached that point and were thus not in liquidation, the deemed trust simply did not apply. Nonetheless, assuming the applicants were actually in liquidation, Hamilton J. indicated that he could alternatively conclude that a liquidation under the CCAA does not fall within the term "liquidation" in s. 8(2) of the PBSA (at para. 79 quoted above). Yet, such a conclusion does not appear very convincing. Indeed, it seems difficult to pretend that an enterprise that undertakes to sell, under court supervision and outside the ordinary course of business, all or substantially all of its assets with a view to have the proceeds of the sale distributed amongst its creditors is not in "liquidation" within the ordinary meaning of that term. [108]

The main conclusion reached by Hamilton J. appears however more convincing (at para. 78 quoted above). As Schrager J. had done in an alternative manner in *Aveos* to set aside the application of the PBSA deemed trust, Hamilton J. invoked the 2009 amendments to insolvency legislation that have granted a limited protection to certain claims relating to pension plans. [109] In that regard, it must be recalled that this situation raises a potential conflict between two federal statutes (the PBSA and the CCAA) as opposed to a conflict between a federal and a provincial statute in respect of which the doctrine of federal paramountcy can be invoked. Justice Hamilton made the following comments:

> [74] It is difficult to reconcile Sections 6(6) and 36(7) *CCAA* with a broad interpretation of Section 8(2) *PBSA*. Why would the legislator give specific protection to the normal payments by amending the *CCAA* in 2009 if the deemed trust protecting not only the normal payments but also the special payments was effective in the *CCAA* context? Why would the legislator not protect the special payments under Sections 6(6) and 36(7) *CCAA* if they were already protected under a deemed trust? What happens to the deemed trust for the special payments if there is an arrangement or an asset sale? Because both statutes were adopted by the same legislator, we must try to determine the legislator's intent.
>
> ...
>
> [77] The Court therefore adopts the following reasoning to resolve the conflict in the present case:
>
>> Given that the pension provisions of the *BIA* and *CCAA* came into force much later than s. 8 of the *PBSA*, normal interpretation would require that the later legislation be deemed to be remedial in nature. Likewise, since those provisions of the *BIA* and *CCAA* are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the protection given to pension claims in the *BIA* and the *CCAA* would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection. In enacting *BIA* subs. 60(1.5) and 65.13(8) and ss. 81.5 and 81.6 and *CCAA* subs. 6(6) and 37(6) [*sic*], [110] while not amending subs. 8(2) of the *PBSA* (by adding explicit priority language or by removing the insolvency trigger), *Parliament demonstrated the intent that pension claims would*

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> *have protection in insolvency and restructurings only to the limited extent set out in the BIA and the CCAA.* [111] [Emphasis added]

Although it must be acknowledged that this rationale appears quite convincing, plausible arguments could nonetheless be made to support the opposite view. [112] In that respect, while it is true that as part of the 2009 amendments a limited level of protection was granted to pension plan beneficiaries in case of insolvency of the sponsoring employer, [113] Parliament did not go as far as to revoke the PBSA deemed trust or to expressly set aside its application in the context of CCAA proceedings. Actually, Parliament subsequently amended the scope of the PBSA deemed trust, [114] which necessarily implies that it intended to maintain its application. Although the scope of the protection afforded by ss. 6(6) and 36(7) of the CCAA might well be narrower than that granted by the PBSA, the relevant provisions might not be inconsistent to the point where one should conclude that the PBSA deemed trust has been completely superseded by the 2009 amendments to the CCAA and the BIA. For example, in attempting to reconcile these provisions, it could be argued that the objective pursued by the 2009 amendments was to set a minimum threshold enabling pension plan beneficiaries to receive payment of part of their claims in priority to the claims of secured creditors whose security interest had attached to the relevant assets prior to the creation of the deemed trust (thus setting aside the effect of the *Sparrow* decision). However, with respect to their residual claims under the pension plans (including those relating to special payments), these claims would continue to be covered by the deemed trust and should therefore be paid, on the one hand, *after* those of secured creditors whose security interest had attached prior to the creation of the deemed trust and, on the other hand, *before* the claims of other secured creditors and those of ordinary creditors. As for those creditors having been granted a super-priority, the order issued under the CCAA could explicitly set aside the application of the PBSA deemed trust in respect of them, thus giving precedence to the CCAA over the PBSA. [115]

In addition, it must be recalled that the principles of statutory interpretation relied on in *Bloom Lake* and according to which priority should be given, on the one hand, to the later provision over the earlier one and, on the other hand, to the specific provision over the general one, do not constitute legally-binding principles. [116] Moreover, their application can lead to very different outcomes depending on which provision is considered the later or the earlier one, or which one is considered the specific or the general one. [117]

It must however be recognized that the argument according to which the objective of the 2009 legislative amendments was to set a minimum level of protection without necessarily superseding the application of the PBSA deemed trust nonetheless raises some conceptual difficulties. Although this argument might appear to be well founded if one views the deemed trust as granting a priority of payment, [118] it does not sit well with how a deemed trust is supposed to operate. Indeed, once the application of the deemed trust has been triggered and the assets of the employer are deemed to have been removed from its estate, such assets would in principle no longer be available to satisfy the claims of those creditors having been granted a super-priority or another priority under the CCAA.

In summary, if the main conclusion reached by Hamilton J. were to be followed by future court decisions, it would mean that the PBSA deemed trust would have absolutely no effect in the context of CCAA proceedings. [119] As a matter of fact, the same conclusion would likely apply in respect of all pension deemed trusts established under provincial legislation. [120] Nonetheless, it must be noted that in the context of the motion for leave to appeal the decision of Hamilton J. in *Bloom Lake*, Kasirer J.A. from the Québec Court of Appeal expressed the view that the matter was not settled. He made the following remarks: [121]

> [36] ... While I recognize the care with which the CCAA Judge examined the question of statutory interpretation, as well as the alternative argument as to whether "any liquidation" within the meaning of subs. 8(2) PBSA includes CCAA proceedings — a point not given full analysis in *Aveos* — the matter of the effectiveness of the federal deemed trust in CCAA proceedings is not settled law and remains important to CCAA practice.

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Finally, it must be noted that the 2009 legislative amendments have codified the power of a court to approve the creation of a charge (or security) on the property of a debtor company in favour of a lender providing it with interim funding and to order that the charge rank in priority over the claim of any secured creditor (*i.e.*, a super-priority). [122] Yet, although the beneficiaries of a pension deemed trust are often treated as secured creditors, they are not expressly included in the definition of that term in s. 2(1) of the CCAA, unlike for the definition of "secured creditor" in the ITA. [123] This raises a question as to whether a court actually has the power under s. 11.2 of the CCAA to grant a super-priority over the claims of pension plan beneficiaries; if not, it remains to be determined if a court would retain such power under its residual authority. [124] It does not appear that this issue has been addressed by the courts since the coming into force of the 2009 legislative amendments. As these amendments were meant to codify the powers that a court previously had under the former legislation, there will likely be a lot of pressure to find a way to maintain that interpretation. [125] Nonetheless, the legislation appears to be clear: the definition of "secured creditor" in the CCAA does not explicitly cover the beneficiaries of a pension deemed trust.

In any event, if the deemed trust is actually effective in the context of CCAA proceedings, certain assets of the debtor company will be deemed to have been removed from its estate. It could then be argued that the court would thus be deprived of its authority to impose a charge on these assets in priority over the claims of plan beneficiaries as such assets would no longer be "the company's property" within the meaning of s. 11.2 of the CCAA. However, the conclusion expressed by Hamilton J. in para. 95 of his decision implies that he felt the court actually has such authority. [126] Indeed, if one considers that the deemed trust grants a priority of payment and that the beneficiaries of that deemed trust are secured creditors within the meaning of the CCAA, it could be concluded that s. 11.2 of that Act actually empowers the court to impose a charge on the employer's property having priority over the claims of these beneficiaries. However, if one considers that the deemed trust produces no effect in the context of CCAA proceedings, the residual claims of plan beneficiaries would only rank as ordinary claims and would thus automatically be subject to the charge imposed by the court on the employer's property.

As can be seen, the coexistence of the PBSA deemed trust and of the limited protection granted since 2009 by the CCAA and the BIA gives rise to a situation that is not at all clear. Accordingly, a legislative clarification would be most welcome.

VI. — CONCLUSION

Out of the five court decisions considered in this article, only the one in the matter of *Timminco* was decided in favour of pension plan beneficiaries and yet this result was solely due to the particularities of Québec legislation. However, the reasoning followed in each of these decisions was often quite different. Moreover, some of these decisions did not even address certain arguments that could have been conclusive.

In any event, in light of these decisions, it appears the following conclusions can be drawn with respect to the application of pension plan deemed trusts in the context of CCAA proceedings:

1. A court may grant a super-priority over the claims of the beneficiaries of any deemed trust [127] established under:
   (a) provincial pension legislation, by application of the doctrine of federal paramountcy (*Indalex* and *White Birch*); or
   (b) federal pension legislation (*Bloom Lake*).
2. If the 2009 legislative amendments *are exhaustive*, *i.e.*, if the limited protection they grant implicitly precludes the application of any deemed trust established by either federal or provincial pension legislation, such a deemed trust produces no effect when the debtor company is the subject of insolvency proceedings (*Bloom Lake*).
3. If the 2009 legislative amendments *are not exhaustive*, any deemed trust established under either federal or provincial pension legislation continues to apply in the context of CCAA proceedings (*Indalex*), in accordance with the following principles:

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(a) the claims of secured creditors whose security interest has attached *before* the creation of the deemed trust have priority over the claims of the beneficiaries of any deemed trust established under either federal or provincial pension legislation (*Sparrow* and *Aveos*); [128]

(b) the claims of the beneficiaries of any deemed trust established under either federal or provincial pension legislation have priority over the claims of secured creditors whose security interest has attached *after* the creation of the deemed trust and over the claims of ordinary creditors (*Sparrow* and *Aveos*, *a contrario*).

4. Even if a deemed trust can be applied in priority to the claims of certain creditors as set out above in paragraph 3, it is always open to the debtor company or to one of its creditors to apply to have the CCAA order lifted in order to allow the company to file an assignment in bankruptcy, which would trigger the application of the priorities set out in the BIA and thus set aside the application of any deemed trust established under either federal [129] or provincial pension legislation (*Century Services* and *Indalex*).

5. Naturally, a deemed trust produces no effect if its application has not been triggered pursuant to any relevant legislative provisions [130] (for example, if the employer is not in liquidation within the meaning of the federal pension legislation or if the relevant pension plan is not in wind-up within the meaning of the Ontario pension legislation) (*Indalex*).

6. However, if the *Timminco* decision were to be followed by future court decisions, in the case of a pension plan that is subject either to provincial or federal jurisdiction and that is sponsored by an enterprise based in Québec or that has assets located in that province:

(a) assets of that enterprise in an amount equal to the contributions payable to the pension fund would be exempt from assignment and seizure in each of the above-noted scenarios (without necessarily being covered by a deemed trust); and

(b) in the scenario referred to above in paragraph 3, the exemption from assignment and seizure would make any deemed trust under either provincial or federal pension legislation rank in priority over the claims of secured creditors whose security interest has attached *before* the creation of the deemed trust (*Timminco*).

The above summary highlights the degree of uncertainty that exists concerning the effectiveness of pension deemed trusts in insolvency. To some extent, this situation is reminiscent of the one that existed at the time of the *Sparrow* decision concerning the effectiveness of the income tax deemed trust. In that respect, the views expressed at that time by Gonthier J. could likely be transposed to the current situation: [131]

> It has been unfortunate that the development of the case law, to this point, has not inspired the degree of certainty which is so manifestly desirable in this area of commercial law.

Yet, Parliament recently intervened to set a minimum level of protection for pension plan beneficiaries where the sponsoring employer becomes insolvent. However, although the intent of Parliament in doing so was perhaps to set aside the application of any deemed trust established under either provincial or federal pension legislation, [132] Parliament was not explicit, and so there remains the possibility that pension deemed trust might be effective in case of the insolvency of a debtor company.

It seems clear the limited level of protection introduced by the 2009 legislative amendments should be increased, especially as it relates to beneficiaries of defined benefit pension plans. [133] Otherwise, the pressure put on public pension plans and social assistance programs will no doubt continue to increase. It is of course a delicate exercise for Parliament to alter the priorities established under insolvency legislation as this would affect the conflicting legitimate interests of various affected parties. However, other options could also be considered for enhancing the protection of plan beneficiaries. [134] Nonetheless, beyond focusing on the level of protection to be afforded, it is imperative to increase the degree of certainty regarding the effectiveness of pension deemed trusts. Of course, future cases may clarify the situation. However, it seems clear that the best solution would involve making legislative amendments, in particular to insolvency statutes. [135]

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The current uncertainty regarding the effectiveness of pension deemed trust results in significant costs for all interested parties as well as for the court system as a whole. Judges overseeing CCAA proceedings are called upon to rule on multiple difficult questions, often in very short timeframes. The lack of clarity surrounding pension deemed trust only increases their burden. Moreover, considering the significant amounts usually at stake in pension litigation as well as the important social costs that can flow from court decisions in this area, there is a high risk that such decisions will be appealed. In addition, the numerous court proceedings that take place before a decision can be issued in cases relating to a pension deemed trust generate significant costs for all affected parties. The costs borne in that respect by the CCAA monitor and the debtor company, in particular the fees to be paid to their legal counsel and other professional advisors, reduce the remaining assets available to enable the debtor company to emerge from CCAA proceedings or, should this fail, to make a distribution amongst all its creditors.

As the pension deemed trust seems to have a very limited impact, if any, in insolvency situations, the insolvency legislation should perhaps be amended to deprive the deemed trust of its effect, as was previously done in respect of deemed trusts for Her Majesty. [136] As a *quid pro quo*, Parliament could then consider enhancing the limited level of protection that is currently granted by such legislation to pension plan beneficiaries. [137] Depending on the solution that could be adopted in that regard, institutions providing financing to enterprises sponsoring pension plans might be in a better position to predict how their claims would be treated vis-à-vis those of plan beneficiaries. These institutions could likely adjust the cost of their financing to the level of risk involved.

In 2014, the federal government undertook a five-year statutory review of Canada's insolvency legislation. [138] After conducting a public consultation, the government tabled a report in the fall of 2014, which will subsequently be submitted for review by a parliamentary committee. [139] This would no doubt provide an excellent opportunity to review the question of the effectiveness of pension deemed trusts in the context the insolvency of an employer sponsoring a pension plan.

Notes de bas de page

* Retired Lawyer and Member of the Barreau du Québec. The author spent his career with the Department of Justice of Canada where, in particular, he held the position of General Counsel for the Office of the Superintendent of Financial Institutions from 1996 to 2014. However, the views expressed in this article are solely those of the author. This article was originally published in French in the *Revue du Barreau du Québec*, Tome 75 (2016), p. 23. It was slightly adapted for publication in English and is being published here with the kind permission of the *Revue du Barreau*.

1 See in particular the Report by the Expert Committee on the Future of the Québec Retirement System, *Innovating for a Sustainable Retirement System* (Government of Québec, 2013), online: http://www.rrq.gouv.qc.ca/SiteCollectionDocuments/www.rrq.gouv.qc/Anglais/publications/rapport_comite/rapport.pdf ("D'Amours Report").

2 See the federal Pooled Registered Pension Plans Act, S.C. 2012, c. 16; and the Québec Voluntary Retirement Savings Plans Act, C.Q.L.R., c. R-17.0.1.

3 Notably the Canada Pension Plan and its Québec equivalent, the Québec Pension Plan.

4 See in particular the Ontario Retirement Pension Plan Act, 2015, S.O. 2015, c. 5, which was subsequently repealed by S.O. 2016, c. 37, sch. 18, as well as the recommendation in the D'Amours Report to implement a longevity pension scheme.

5 There are two broad categories of supplemental pension plans: defined benefit plans (DB) and defined contribution plans (DC). DB plans include a commitment to pay pension benefits that are determined by a pre-defined formula. DC plans do not include such a commitment; pension benefits to be paid under such plans are determined based on the performance of the pension fund. More recently, new types of more flexible plans have emerged, including target benefit plans.

6 At the federal level, the Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.), s. 8(2) ("PBSA" or "federal pension legislation"). In Québec, the Supplemental Pension Plans Act, C.Q.L.R., c. R-15.1, s. 49 ("SPPA" or "Québec pension legislation"). In Ontario, the Pension Benefits Act, R.S.O. 1990, c. P.8, s. 57(3) and (4) ("PBA" or "Ontario pension legislation").

7 See for example the following quote from Dr. Janis Sarra:

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> The most recent legislative amendments enhanced the priority of wage and pension claims under Canadian Insolvency Law. Still, internationally, Canada falls near the bottom of more than 60 countries in its protection of employees and pensioners in insolvency. Canada should consider further enhancement of the priorities granted.

Janis Sarra, *Examining the Insolvency Toolkit*, *Report of the Public Meetings on the Canadian Commercial Insolvency Law System* (July 2012, online: https://www.insolvency.ca/en/iicresources/resources/Examining_the_Insolvency_Toolkit_Dr._J_Sarra_2012.pdf, at p. 96.

8 *Re Indalex Ltd.; Sun Indalex Finance LLC v. United Steelworkers*, 2013 SCC 6 (S.C.C.).

9 *Re White Birch Paper Holding Co.*, 2012 QCCS 1679 (C.S. Que.).

10 *Re Timminco ltée*, 2014 QCCS 174 (Que. Bktcy.).

11 *Re Aveos Fleet Performance Inc./Aveos Performance aéronautique inc.*, 2013 QCCS 5762 (C.S. Que.).

12 Justice Schrager was appointed to the Québec Court of Appeal on June 13, 2014.

13 *Re Bloom Lake General Partner Ltd.*, 2015 QCCS 3064 (Que. Bktcy.).

14 R.S.C. 1985, c. C-36 ("CCAA").

15 *Re Bloom Lake General Partner Ltd.*, 2015 QCCA 1351 (C.A. Que.).

16 In 2014, the federal government undertook the five-year statutory review of Canada's insolvency legislation; see *Fresh Start: A Review of Canada's Insolvency Laws* (Ottawa, Industry Canada, 2014), online: https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/review_canada_insolvency_laws-eng.pdf/$file/review_canada_insolvency_laws-eng.pdf.

17 See in particular ss. 227(4) and (4.1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) ("ITA").

18 R.S.C. 1985, c. C-8, s. 23(3) and (4).

19 S.C. 1996, c. 23, s. 86(2) and (2.1).

20 See *supra*, footnote 6. However, the scope of these deemed trusts varies considerably, as some only cover contributions that are due but not yet paid, while others cover all amounts required to fund the plan's deficit.

21 See in particular *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182 (S.C.C.); *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.); *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.); *Re Nolisair International Inc.*, [1999] 1 S.C.R. 759 (S.C.C.); see also Louis L'Heureux, *La fiducie présumée de la Loi de l'impôt sur le revenu* (Toronto, Carswell, 2002), pp. 13-22; and Roger P. Simard, "The Federal Enhanced Deemed Trust: a New Source of Liability for Financial Institutions?", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2008* (Toronto, Carswell, 2009), p. 373, pp. 376-385.

22 See in particular *British Columbia v. Henfrey Samson Belair Ltd.*, *supra*, footnote 21; and more recently *Indalex*, *supra*, footnote 8.

23 R.S.C. 1985, c. B-3 ("BIA").

24 [1997] 1 S.C.R. 411 (S.C.C.).

25 S.C. 1998, c. 19, s. 226. In *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49 (S.C.C.), the Supreme Court subsequently confirmed the validity of these legislative amendments (see para. 28).

26 S.C. 1998, c. 19, ss. 252 and 266.

27 R.S.C. 1985, c. E-15, s. 222, as amended by S.C. 2000, c. 30, ss. 50 and 158; however, this deemed trust was not added to the list set out in s. 37(2) of the CCAA; in that respect, see *Century Services Inc. v. Canada (A.G.); Re Ted Leroy Trucking Ltd.*, 2010 SCC 60 (S.C.C.).

28 CCAA, s. 37(1) and (2) (previously s. 18.3) and BIA, s. 67(2) and (3).

29 This last scenario is referred to in s. 67(2) of the BIA and s. 37(1) of the CCAA; this last provision reads as follows: "property of a debtor company shall not be regarded as being held in trust for Her Majesty *unless it would be so regarded in the absence of that statutory provision*" [emphasis added].

30 It must be noted that the concept of trust was only formally introduced in Québec with the coming into force of the Civil Code of Québec, C.Q.L.R. c. C.C.Q.-1991 ("C.C.Q.") in 1994 (arts. 1260-1298).

31 See *Québec (Revenue) v. Caisse populaire Desjardins de Montmagny; Re Alternative granite & marbre inc.*, 2009 SCC 49 (S.C.C.), at para. 15; see also *Re Groupe Sutton-Royal inc.*, 2015 QCCA 1069 (C.A. Que.), at paras. 71-74, leave to appeal refused *Demos c. Demers Beaulne inc.*, 2016 CarswellQue 3451 (S.C.C.); and ss. 8.1 and 8.2 of the Interpretation Act, R.S.C. 1985, c. I-21.

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32 See in particular the decisions in *White Birch* and *Aveos*, *supra*, footnotes 9 and 11.

33 S.C. 2005, c. 47 and S.C. 2007, c. 36, with respect to ss. 6(6) and 36(7) of the CCAA as well as ss. 60(1.5), 65.13(8), 81.5 and 81.6 of the BIA. In a nutshell, these provisions require that any compromise, arrangement or sale of assets to be approved by the court under the CCAA provide for the payment of the following amounts into the pension fund: amounts deducted from the employees' remuneration for payment to the fund, the normal cost to be paid by the employer to the fund and all amounts required to be paid by the employer to the fund under a defined contribution provision or a pooled registered pension plan. The BIA provides for similar rules as well as for the creation of a charge to secure the payment of these amounts.

34 As for defined contribution plans (DC), defined benefit plans (DB) are funded by the employer's contributions and usually also by employees' contributions. In respect of DB plans, employer's contributions are of two types: normal cost contributions (in Québec "current service contributions") and special payments (in Québec "amortization payments"). The latter contributions are meant to amortize over a period of usually 5 to 15 years the payments required to fund the actuarial deficit of the plan. Under Québec pension legislation, the rules governing the funding of DB plans were substantially revised by S.Q. 2015, c. 29.

35 SI/2008-78, in respect of ss. 81.5 and 81.6 of the BIA.

36 SI/2009-68, in respect of ss. 6(6) and 36(7) of the CCAA and ss. 60(1.5) and 65.13(8) of the BIA.

37 Some companies are excluded from the scope of both the BIA and the CCAA, notably banks and insurance companies, which are covered by the Winding-up and Restructuring Act, R.S.C. 1985, c. W-11. As such, the beneficiaries of pension plans sponsored by these companies do not benefit from a similar priority of their claims if their employer were to become insolvent.

38 See in particular *First Vancouver Finance v. Minister of National Revenue*, *supra*, footnote 25, para. 40. However, the concept of floating charge does not exist in civil law; in that respect, see L'Heureux, *supra*, footnote 21, p. 15.

39 In the case of a real trust, the settlor of the trust does not have any right to dispose of the assets once they are vested in trust, both under civil law (see art. 1261 C.C.Q) and under common law (pursuant to which both the trustee and the beneficiaries of the trust share ownership rights over the vested assets). If assets covered by a deemed trust were to be disposed of, such deemed trust would extend to the proceeds of the disposition of these assets; in that respect, see *First Vancouver Finance v. Minister of National Revenue*, *supra*, footnote 25, para. 5 and 42.

40 Subject to any relevant legislative provisions.

41 See in particular Simard, *supra*, footnote 21, p. 394.

42 *Supra*, footnote 6; see also s. 57(1) and (6).

43 R.S.O. 1990, c. P.10 ("PPSA").

44 However, that provision was ultimately found not to apply in *Indalex* as the Supreme Court concluded that the claim arising from a financing agreement to the debtor company approved under the CCAA had priority over the claim based on the pension deemed trust, as a result of the operation of the doctrine of federal paramountcy.

45 DIP refers to "debtor-in-possession".

46 *Indalex*, *supra*, footnote 8, para. 60.

47 *Indalex*, *supra*, footnote 8, paras. 60, 242 and 265.

48 *Indalex*, *supra*, footnote 8, para. 8.

49 See in particular *Husky Oil Operations Ltd. v. Minister of National Revenue*, *supra*, footnote 21, para. 81; and *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (S.C.C.), at para. 43.

50 See *supra*, footnote 6.

51 It must be noted that the amendments that were made to deemed trusts under federal statutes following the decision in *Sparrow*, *supra*, footnote 24, have removed any reference to a triggering event; see *supra*, footnotes 25 to 27.

52 Although s. 264 of the SPPA likely applies only in respect of those pension plans that fall under the jurisdiction of Québec, it must be noted that s. 696 of the "new" Code of Civil Procedure, C.Q.L.R., c. C-25.01, is to the same effect. Therefore, this provision should also be applicable in Québec in respect of pension plans falling under federal jurisdiction.

53 For example, like para. 2 of s. 264 of the SPPA, s. 36(2) of the PBSA and s. 65(1) of the Ontario PBA provide that pension benefits paid to plan beneficiaries are unassignable; s. 66(1) of the PBA also provides that such pension benefits cannot be seized, as is the case for pension legislation in most other provinces.

54 *Re Indalex Ltd.*, 2011 ONCA 265 (Ont. C.A.).

55 *White Birch*, *supra*, footnote 9, paras. 145-146 and 193. Although certain portions of the judgment, including para. 136, refer to the conditions imposed under common law for the creation of a trust, Mongeon J. appears to have rightly concluded that

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such conditions are not applicable in Québec; in that respect, see ss. 8.1 and 8.2 of the Interpretation Act, *supra*, footnote 31; see also *Groupe Sutton-Royal Inc.*, *supra*, footnote 31.

56 C.C.Q., art. 1262.

57 See in particular *British Columbia v. Henfrey Samson Belair Ltd.*, *supra*, footnote 21; see also *Re Ivaco Inc.*, 2006 CarswellOnt 6292 (Ont. C.A.), leave to appeal allowed 2007 CarswellOnt 2855 (S.C.C.), but appeal discontinued on October 31, 2007.

58 Subject to the possible impact of the 2009 legislative amendments.

59 See in particular *Century Services*, *supra*, footnote 27, para. 23.

60 *Indalex*, *supra*, footnote 8, para. 51.

61 *White Birch*, *supra*, footnote 9, paras. 157-158. In *Timminco*, Mongeon J. did not discuss this argument, except perhaps in an indirect way in para. 173.

62 See *supra*, footnote 28 and the text relating to it.

63 "With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible."; *Century Services*, *supra*, footnote 27, para. 40.

64 *White Birch*, *supra*, footnote 9, para. 217.

65 *Timminco*, *supra*, footnote 10, paras. 84-85. See also *Re White Birch Paper Holding Co.*, 2014 QCCS 4709 (C.S. Que.), in which Mongeon J. concluded that his first decision in *White Birch* had acquired the authority of *res judicata* and that his subsequent decision in *Timminco* could therefore not be applied to that case.

66 *Timminco*, *supra*, footnote 10, paras. 128 and 132.

67 *Timminco*, *supra*, footnote 10, para. 80.

68 *Sparrow*, *supra*, footnote 24.

69 *Timminco*, *supra*, footnote 10, para. 119.

70 *Timminco*, *supra*, footnote 10, para. 132(f).

71 In para. 137, Mongeon J. also cites another provision to the same effect, namely s. 553(7) of the "former" Code of Civil Procedure, C.Q.L.R., c. C-25, as it read before January 1, 2016. This provision can now be found in item 3 of the second paragraph of s. 696 of the "new" Code of Civil Procedure, C.Q.L.R., c. C-25.01. In that respect, see the comments *supra*, footnote 52.

72 *Timminco*, *supra*, footnote 10, para. 156.

73 In accordance with art. 1297 of the C.C.Q.

74 The *Timminco* decision appears to be the only one where s. 264 of the SPPA, or its equivalent in the Code of Civil Procedure, was applied in respect of contributions payable by an employer to a pension fund.

75 See in particular the summary of the arguments raised in that respect on behalf of Investissement Québec in paras. 62-66 of the *Timminco* decision.

76 See *Poulin c. Serge Morency & Associés inc.*, [1999] 3 S.C.R. 351 (S.C.C.), at para. 18; and *Metacad 2000 inc. c. Lamb Canada*, 2004 CarswellQue 628 (C.A. Que.), at paras. 15-16.

77 *Metacad 2000 inc. c. Lamb Canada*, *supra*, footnote 76, paras. 18 and 22.

78 *Metacad 2000 inc. c. Lamb Canada*, *supra*, footnote 76, para. 24.

79 It must be noted that para. 1 of s. 264 of the SPPA previously included the words "(all) member or employer (contributions)"; these words have been removed by S.Q. 2000, c. 41, s. 171.

80 *Timminco*, *supra*, footnote 10, paras. 51-54, 80 and 136.

81 See in particular the summary of the arguments raised on behalf of Investissement Québec in paras. 62-66 of the *Timminco* decision, according to which s. 264 should only be considered to cover those contributions that have physically been segregated from the property of the employer in anticipation of making a payment into the pension fund.

82 This argument was raised in *Bloom Lake* (see *supra*, footnote 13, para. 37) but the court did not appear to have ruled on it.

83 See s*upra*, footnote 6; see also the Pooled Registered Pension Plans Act, s*upra*, footnote 2, s. 31(1) and (2).

84 In French, the short form description for that Act is "LNPP", which stands for "Loi de 1985 sur les normes de prestation de pension".

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85 It must be noted that Aveos had not obtained any debtor-in-possession (DIP) financing so that there were no claim based on any super-priority that could have been granted in that respect under the CCAA; however, there was a priority charge in favour of the directors of Aveos.

86 PBSA, s. 29(6), (6.4) and (6.5).

87 *Aveos*, *supra*, footnote 11.

88 *Sparrow*, *supra*, footnote 24.

89 *Aveos*, *supra*, footnote 11, para. 67.

90 See *supra*, footnote 25.

91 *Sparrow*, *supra*, footnote 24, para. 98: But in my view, this answer cannot succeed because the inventory was not an unencumbered asset at the moment the taxes came due. It was subject to the respondent's security interest and therefore was legally the respondent's and not attachable by the deemed trust. As Gonthier J. himself says (at para. 39):

> [Section 227(4)] does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor.

Although the Supreme Court in *Sparrow* seems to have applied the above reasoning in respect of both the Bank Act special security (which grants the bank a form of ownership interest in the secured assets) and the PPSA security interest, the latter conclusion appears inconsistent with reasons expressed in subsequent cases, in particular in *Innovation Credit Union v. Bank of Montreal*, 2010 SCC 47 (S.C.C.) (see para. 43).

92 C.C.Q., art. 2733; see also L'Heureux, *supra*, footnote 21, p. 15, note 31.

93 C.C.Q., art. 2945*ff*.

94 By analogy with the principles established in the case law dealing with the deemed trust under the ITA, in particular in *First Vancouver Finance v. M.N.R.*, *supra*, footnote 25.

95 *Aveos*, *supra*, footnote 11, para. 68.

96 *Aveos*, *supra*, footnote 11, para. 71.

97 Although this distinction was raised in *Aveos*, Schrager J. does not appear to have dealt with it in a convincing way; see *Aveos*, *supra*, footnote 11, para. 74-75.

98 See *supra*, footnote 63.

99 *Bloom Lake*, *supra*, footnote 13, para. 72:

> The court respectfully disagrees with Justice Schrager in *Aveos* on this issue and concludes that there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency. Deemed trusts will be interpreted restrictively as exceptions to the general principle that the assets of the debtor are available for all of the creditors, but there is no general rule that they are ineffective.

100 *Aveos*, *supra*, footnote 11, para. 76; see also *supra*, footnote 33.

101 *Aveos*, *supra*, footnote 11, para. 83.

102 It must be noted that even though this decision is cited under the name of "Bloom Lake", the applicants in these proceedings were designated as the "Wabush CCAA Parties". These proceedings were combined with those that had previously been initiated under the CCAA in January 2015 by parties designated as the "Bloom Lake CCAA Parties"; see *Re Bloom Lake, g.p.l.*, 2015 QCCS 169 (Que. Bktcy.).

103 The procedure followed in these proceedings was likely influenced by the principles set out in *Indalex* concerning the fiduciary duties of pension plan administrators; see *Bloom Lake*, *supra*, footnote 13, para. 136.

104 The court also concluded that the deemed trust created by the legislation of Newfoundland and Labrador did not prevent the granting of a super-priority by reason of the doctrine of federal paramountcy; see *Bloom Lake*, *supra*, footnote 13, paras. 89 and 101.

105 These enterprises usually prefer to opt for the flexibility offered by a liquidation under the CCAA as opposed to the rigidity of the procedure under the BIA. Although this approach is sometimes criticized, it is nonetheless widely used.

106 Except where an assignment is made or a bankruptcy application is filed.

107 *Bloom Lake*, *supra*, footnote 13, para. 24 ("Sale and Investor Solicitation Process — SISP").

108 In French, *Le Petit Robert* defines the word "liquidation" as the "action de rendre liquide" ([*Translation*] "action of making something liquid"), which in the present context would refer to the action of transforming illiquid assets into liquid assets with

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a view to facilitating their distribution to creditors. See also *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, *supra*, footnote 21, p. 1201: "It appears to me that there is no reason not to give the word "liquidation" its wide meaning in usual language." Further, it must be noted that the English version of s. 31(2) of the Pooled Registered Pension Plans Act, *supra*, footnote 2, uses the term "winding-up" instead of "liquidation"; in that regard, see Sam Babe, "What About Federal Pension Claims? The Status of *Pension Benefits Standards Act*, *1985* and *Pooled Registered Pension Plans Act* Deemed Trust Claims in Insolvency" (2013), 28 Nat. Creditor Debtor Rev. 25, p. 28.

109 See *supra*, footnote 33.

110 The reference should rather have been made to s. 36(7), as was done in the article quoted from. By the way, as others have already pointed this out, this provision itself contains an erroneous cross-reference to paras. 6(4)(a) and 6(5)(a); s. 36(7) should rather refer to paras. 6(5)(a) and 6(6)(a) of the CCAA.

111 Citation quoted from the article by Babe, *supra*, footnote 108, p. 30.

112 See in particular the comments made by Kasirer J.A. in *Bloom Lake* (C.A. Que.), *supra*, footnote 15, para. 43.

113 See in particular the comments made by Deschamps J. in *Indalex*, *supra*, footnote 8, at para. 81, quoting from the 2003 report tabled by the Standing Senate Committee on Banking, Trade and Commerce as part of the review of the BIA and the CCAA.

114 S.C. 2010, c. 12, ss. 1791 and 1816. As part of those amendments, s. 29(6.4) of the PBSA was added to make immediately payable upon the winding-up of the plan or the liquidation of the employer all amounts required to fund the plan. However, s. 29(6.5) removed those amounts from the scope of the deemed trust set out in s. 8(2), except in respect of amounts already accrued but not remitted. In addition, ss. 29(6)(b) and 8(1)(c)(ii) were amended to make payable on plan termination any special payments that would have become due between the date of termination and the end of the plan year in which the plan was terminated. Nonetheless, as these amendments were part of a budget implementation bill, few indicia exist to determine what the intent of Parliament was; in that vein, see the reservations expressed in *Century Services*, *supra*, footnote 27, para. 49.

115 A court-ordered priority based on the CCAA has the same effect as a statutory priority; see *Indalex*, *supra*, footnote 8, para. 60; however, see the argument raised in the text relating to footnote 123, *infra*.

116 See in particular Pierre-André Côté, *Interprétation des lois*, 4th ed. (Montréal, Thémis, 2009), p. 416 (para. 1335). The decision in *Century Services* highlights the difficulties of applying the principle according to which priority should be given to the later provision over the earlier one; see *supra*, footnote 27.

117 See Côté, *ibid.*, p. 420 (para. 1346) and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, LexisNexis, 2014), p. 365 (para. 11.60). In that respect, it must be pointed out that the article by Sam Babe, which is quoted by Hamilton J., does not indicate why the CCAA should be considered as the special legislation and the PBSA as the general one.

118 See *supra*, footnote 41 and the text relating to it.

119 This is also the conclusion reached by Sam Babe; see *supra*, footnote 108, p. 31.

120 See Babe, *supra*, footnote 108, p. 34 (in note 24); to the same effect, see Sam Babe, "After *Indalex*: Pension Claims under the New *CCAA*" (2013), 28 Nat. Creditor Debtor Rev. 13. Even if there is no direct conflict as was the case in *Indalex* or *White Birch*, the operation of provincial pension legislation would likely frustrate the purpose of federal insolvency legislation; in that respect, see in particular *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 (S.C.C.).

121 *Bloom Lake* (C.A. Que.), *supra*, footnote 15.

122 CCAA, s. 11.2.

123 See Jassmine Girgis, "*Indalex*: Priority of Provincial Deemed Trusts in a CCAA Restructuring", *ABlawg.ca* (March 6, 2013), online: http://ablawg.ca/wp-content/uploads/2013/03/Blog_JG_Indalex_March2013.pdf; see also the definitions of "secured creditor" and "security interest" in s. 224(1.3) of the ITA, which expressly cover deemed trusts. In that respect, the following quote from para. 76 of the *Indalex* decision appears misleading: "The definition of "secured creditor" in s. 2 of the CCAA includes a trust in respect of the debtor's property." This definition appears to cover only a trust securing any bond issued by a debtor company.

124 However, the general authority of the court under s. 11 of the CCAA is expressly made subject to the other provisions of that Act, in particular s. 11.2 ("subject to the restrictions set out in this Act"). Any residual authority a court might have is uncertain; see *Century Services*, *supra*, footnote 27, paras. 64-66.

125 By arguing for example that "The general language of the CCAA should not be read as being restricted by the availability of more specific orders."; see *Century Services*, *supra*, footnote 27, para. 70.

126 *Bloom Lake*, *supra*, footnote 13, para. 95: "This is sufficient for the Court to conclude that the Interim Financing should be approved and the Interim Lender Charge should be granted with priority over the deemed trust under the PBSA, if it is

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effective in the CCAA context."; see also the comments made by Kasirer J.A. in note 21 at para. 57 in *Bloom Lake* (C.A. Que.), *supra*, footnote 15.

127 However, it could be argued that since the 2009 legislative amendments, a court no longer has authority to impose a charge having priority over the claims of deemed trust beneficiaries as a result of the fact that such beneficiaries are not expressly covered by the definition of "secured creditor" in the CCAA; in that regard, see the text relating to footnote 123, *supra*.

128 Subject to any applicable provincial legislation granting priority to the claims of deemed trust beneficiaries over the claims of secured creditors; unlike Ontario (see *supra*, footnote 43), Québec legislation does not currently grant such a priority.

129 Although it is well settled that any deemed trust created by provincial legislation is not effective in the context of BIA proceedings, the situation is not as clear with respect to the deemed trust established under federal pension legislation. In *Neal v. Toronto Dominion Bank* (1997), 25 O.T.C. 142, 1997 CarswellOnt 403 (Ont. Gen. Div. [Commercial List]), the court concluded that the PBSA deemed trust was applicable in the context of the BIA (however, this decision has been criticized in light of the *Sparrow* decision for granting priority to the claims of deemed trust beneficiaries over those of secured creditors; see Babe, *supra*, footnote 108, pp. 29-30). If the 2009 amendments are exhaustive, the BIA provisions clearly have precedence over the PBSA deemed trust. If they are not exhaustive, the priorities set out in s. 136 of the BIA likely render ineffective the PBSA deemed trust (to the same effect, see Babe, *ibid.*, p. 31).

130 Comments made by Deschamps J. in *Indalex* seem to indicate that it is sufficient for the deemed trust to have been triggered before the employer's assets are sold (see para. 46). However, the Ontario Superior Court of Justice held that the deemed trust must have been triggered before the initial order is issued under the CCAA; see *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, 2013 ONSC 5933 (Ont. S.C.J. [Commercial List]), affirmed *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 CarswellOnt 11970 (Ont. C.A.); however, in the latter decision, the Ontario Court of Appeal did not clearly rule on that point. This matter is of particular importance in Ontario because of the priority granted to the PBA deemed trust over the claims of secured creditors pursuant to s. 30(7) of the Personal Property Security Act, *supra*, footnote 43.

131 *Sparrow*, *supra*, footnote 24, para. 23.

132 See the 2003 report by the Senate Standing Committee on Banking, Trade and Commerce that is cited in para. 81 of the *Indalex* decision, *supra*, footnote 8.

133 See in particular the comments made by Dr. Janis Sarra, *supra*, footnote 7.

134 For example, the funding rules for pension plans could be enhanced or a guarantee fund could be established; in that respect, see in particular the comments submitted by Jean-Daniel Breton as part of the 2014 review of insolvency legislation: online, https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Jean-Daniel_Breton_July_14_2014.pdf/$FILE/Jean-Daniel_Breton_July_14_2014.pdf, p. 25 (no 19).

135 For a similar suggestion, see *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, *supra*, footnote 130, para. 131. Further, although the status of pension deemed trusts appears to be clearer in the context of proceedings under the BIA, providing additional clarity in that respect would be welcome; see in particular the comment made in footnote 129, *supra*.

136 CCAA, s. 37(1) and BIA, s. 67(2). For a similar recommendation, see the comments submitted by Jean-Daniel Breton, *supra*, footnote 134, p. 53 (no 7). Moreover, in light of the *Timminco* decision, a question also arises as to whether the application of provisions making pension contributions exempt from assignment and seizure should also be set aside by insolvency legislation.

137 See *supra*, footnote 33.

138 Such a review is mandated by s. 63 of the CCAA and s. 285 of the BIA.

139 *Fresh Start: A Review of Canada's Insolvency Laws*, *supra*, footnote 16. However, consideration of that report by a parliamentary committee was delayed as a result of the federal elections of October 2015.

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Comp. conseil privé, gouverneur général en conseil
Angl. *lieutenant governor in council*

Ligne *n.f.*

☐ Suite des générations successives de parents.

Rem. Selon le *Code civil du Québec*, chaque génération forme un degré et la suite des degrés forme la ligne.
Comp. degré, fente, génération, unilinéaire
Angl. *line*

- **Ligne collatérale:** Suite des générations entre personnes qui ne descendent pas les unes des autres, mais qui sont issues d'un auteur commun. Ex. Les frères et soeurs, oncles et tantes, neveux et nièces.

  Comp. collatéral
  Angl. *collateral line*

- **Ligne directe:** Suite des générations entre personnes qui descendent les unes des autres. Ex. Le père et le fils.

  Comp. ligne directe ascendante, ligne directe descendante
  Angl. *direct line*

- **Ligne directe ascendante:** Suite des générations entre une personne et celles de qui elle descend. Ex. La fille, la mère, la grand-mère.

  Comp. ligne directe descendante
  Angl. *direct ascending line*

- **Ligne directe descendante:** Suite des générations entre une personne et celles qui descendent d'elles. Ex. Le grand-père, le père, le fils.

  Comp. ligne directe ascendante
  Angl. *direct descending line*

- **Ligne maternelle:** Ensemble des parents d'une personne du côté de sa mère; plus particulièrement, la branche maternelle de la ligne directe ascendante.

  Comp. ligne paternelle
  Angl. *maternal line*

- **Ligne paternelle:** Ensemble des parents d'une personne du côté de son père; plus particulièrement, la branche paternelle de la ligne directe ascendante.

  Comp. ligne maternelle
  Angl. *paternal line*

Limitatif, ive *adj.*

☐ V. CLAUSE LIMITATIVE DE RESPONSABILITÉ.

Limité, ée *adj.*

☐ Terme que l'on ajoute à la dénomination sociale d'une entreprise pour désigner son statut corporatif et le caractère limité de la responsabilité de ses actionnaires.

Rem. On utilise toujours son abréviation «ltée». Ex. La compagnie XYZ ltée.
Syn. incorporé
Comp. enregistré
Angl. *limited*

Liquidateur *n.m.*

☐ Personne ayant pour mission de procéder à la liquidation d'une masse de biens. Ex. Le liquidateur d'une entreprise dont la dissolution a été ordonnée judiciairement, le liquidateur d'une succession.

Comp. liquidation
Angl. *liquidator*

- **Liquidateur de la succession:** Personne désignée par les héritiers ou par le testateur pour veiller, selon le cas, à la liquidation d'une succession *ab intestat* ou testamentaire. Il exerce, à compter de l'ouverture de la succession et pendant le temps nécessaire à la liquidation, la saisine des héritiers et des légataires particuliers.

  Rem. Dans le *Code civil du Bas-Canada*, il porte le nom d'exécuteur testamentaire.
  Syn. testamentaire (exécuteur)
  Comp. liquidation d'une succession, saisine
  Angl. *liquidator of a succession*

Liquidation *n.f.*

☐ **1.** Opération par laquelle une personne, appelée liquidateur, procède au partage d'une masse de biens. Ex. La liquidation d'une entreprise, d'une succession.

Rem. **1.** La liquidation d'une entreprise peut être volontaire ou forcée. Les biens sont alors confiés au liquidateur qui, le cas échéant, termine les activités en cours, désintéresse les créanciers et procède à la vente des actifs en vue d'en distribuer le produit aux personnes y ayant droit. Le *Code civil du Québec* prescrit les règles relatives à la liquidation d'une succession. **2.** La liquidation forcée effectuée sous le

contrôle des tribunaux porte le nom de liquidation judiciaire.

Comp. liquidateur, liquider
Angl. *liquidation, winding up, winding-up*

- **Liquidation d'une succession:** Opération qui consiste à identifier et à appeler les successibles, à déterminer le contenu de la succession, à recouvrer les créances, à payer les dettes de la succession, qu'il s'agisse des dettes du défunt, des charges de la succession ou des dettes alimentaires, à payer les legs particuliers, à rendre compte et à faire la délivrance des biens (*Code civil du Québec*, art. 776).

  Comp. acompte, liquidateur de la succession, saisine
  Angl. *liquidation of a succession*

- **Liquidation du régime matrimonial:** Ensemble des opérations préliminaires au partage des biens à la suite de la dissolution du régime matrimonial.

  Comp. régime matrimonial
  Angl. *liquidation of the matrimonial regime*

☐ 2. Action de rendre liquide, de déterminer de façon définitive le montant d'une créance ou d'une dette. Ex. La liquidation des dépens.

Comp. liquide
Angl. *liquidation, settlement*

☐ 3. Vente de marchandises à bas prix par une entreprise qui cesse de faire commerce ou qui désire se départir rapidement de certains stocks.

Angl. *clearance sale*

Liquide *adj.*

☐ 1. Se dit d'une obligation dont l'existence est certaine et dont le montant est déterminé avec certitude. Ex. Une créance, une dette liquide.

Comp. certain, exigible, liquidation, liquider, liquidité
Angl. *liquid*

☐ 2. Dans le langage courant, désigne l'argent en espèces. Ex. Payer en liquide.

Angl. *cash*

Liquider *v.tr.*

☐ 1. Procéder à la liquidation. Ex. Liquider un syndicat de copropriétaires.

Comp. liquidation, liquide
Angl. *to liquidate*

☐ 2. Rendre liquide. Ex. Liquider une obligation.

Comp. liquidation, liquide
Angl. *to liquidate*

Liquidité *n.f.*

☐ 1. Qualité d'une obligation dont l'existence est certaine et dont le montant est déterminé avec certitude. Ex. La liquidité d'une créance.

Comp. liquide
Angl. *liquidity*

☐ 2.**(au pluriel)** Dans le langage courant, désigne des fonds disponibles dont une entreprise peut disposer immédiatement ou à court terme. Ex. Avoir les liquidités nécessaires.

Comp. liquide
Angl. *liquid assets*

Lis

☐ Terme latin signifiant «litige», «procès».

Lis pendens

☐ Expression latine signifiant «procès pendant», «procès en cours».

Liste *n.f.*

☐ Série de mots, de noms de personnes placés les uns à la suite des autres.

Angl. *list*

- **Liste des actionnaires:** Liste énonçant généralement les noms et adresses des personnes détenant des actions dans une compagnie ou une société par actions ainsi que le nombre d'actions que détient chacune d'elles et contenant toute autre information requise par la loi.

  Comp. registre
  Angl. *shareholder list*

- **Liste électorale:** Liste officielle des personnes habilitées à voter lors d'une élection.

  Rem. Il existe au Québec une liste électorale permanente des électeurs (*Loi sur l'établissement de la liste électorale permanente*, L.R.Q., c. E-12.2).
  Comp. élection
  Angl. *registered voters*

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SULLIVAN ON THE CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

judgments about the ambiguity of a text are apt to vary from one interpreter to the next.

§15.16 ***Overview.*** In this chapter, presumed intent is dealt with under the following headings:

- strict and liberal construction
- strict construction of penal legislation
- strict construction of legislation that takes away rights
- strict construction of legislation that derogates from established law
- liberal construction of social welfare legislation
- presumptions of fault
- explicit policy analysis

Presumptions respecting the entrenched constitution, common law and international law are dealt with in subsequent chapters.

STRICT AND LIBERAL CONSTRUCTION

§15.17 ***Traditional distinction.*** Under the doctrine of strict and liberal construction, statutes are regarded as falling into one of two classes: penal or remedial. Historically, penal statutes were broadly defined as statutes that curtailed liberty or took away property or otherwise interfered with the rights of subjects. To protect individuals from the superior power of the state, penal statutes received a strict construction. The concept of remedial statutes was less sharply defined. This category included statutes designed to cure mischief, advance religion or confer public benefits.[19] In keeping with their benevolent purpose, remedial statutes were liberally construed.[20]

§15.18 The difference between strict and liberal construction is largely one of attitude and elasticity. Legislation that is strictly construed is applied with reluctance, as sparingly as possible. General terms are read down; conditions of application are fully and carefully enforced. Any doubts or ambiguities are resolved in favour of non-application. Liberal construction, by contrast, favours and facilitates the application of legislation to advance the remedial goal. The language of the statute is applied as fully as the conventions of meaning permit. Technicalities and formalism are avoided. If reasonable doubts or ambiguities arise, they are resolved in favour of those seeking the benefit of the statute.

§15.19 Historically, it seems, the penal impact of legislation was more apparent to judges than its benevolent social purpose. Corry points out that after 1700 few statutes were found to be remedial. During the eighteenth and nineteenth

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19 J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1936), 1 U. Toronto L.J. 286, at 296.

20 *Ibid.*, at 296-98.

centuries, strict construction was a potent weapon against legislative initiatives that were judged to interfere unduly with liberty or rights.[21]

§15.20 ***Modern approach.*** In all Canadian jurisdictions, the legislature has attempted to abolish judicial reliance on strict construction by enacting a provision along the following lines.

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.[22]

In the clearest possible language, this statutory directive abolishes the distinction between strict and liberal construction and requires all legislation, penal legislation included, to be interpreted in a purposeful manner, regardless of the impact on private rights or freedom. Initially this provision did little to stop the courts from relying on strict construction. In fact, for many years the provision was largely ignored.[23] However, in recent decades, as the courts have come to adopt a purposive approach to interpretation, they have come to see the remedial side of legislation and to accept that it should be liberally interpreted so as to achieve the legislative purpose.[24]

§15.21 The modern attitude toward remedial legislation is illustrated by the judgment of the Supreme Court of Canada in *Clarke v. Clarke*.[25] After reviewing the objects of Nova Scotia's *Matrimonial Property Act*, as set out in its preamble, the Court concluded:

> ...The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized. In interpreting the provisions of the Act the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose.[26]

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21 *Ibid.*

22 R.S.C. 1985, c. I-21, s. 12. See also R.S.A. 2000, c. I-8, s. 10; R.S.B.C. 1996, c. 238, s. 8; C.C.S.M. c. I80, s. 6; R.S.N.B. 1973, c. I-13, s. 17; R.S.N.L. 1990, c. I-19, s. 16; R.S.N.S. 1989, c. 235, s. 9(5); S.O. 2006, c. 21, Sch. F, s. 64(1); R.S.P.E.I. 1988, c. I-8, s. 9; CQLR, c. I-16, s. 41 [am. 1992, c. 57, s. 602]; S.S. 1995, c. I-11.2, s. 10; R.S.N.W.T. 1988, c. I-8, s. 10; R.S.N.W.T. (Nu) 1988, c. I-8, s. 10; R.S.Y. 2002, c. 125, s. 10.

23 See E. Tucker, "The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's" (1985), 35 U.T.L.J. 113.

24 See, for example, *Re Canada 3000*, [2006] S.C.J. No. 24, [2006] 1 S.C.R. 865, at para. 84 (S.C.C.); *Kelvin Energy Ltd. v. Lee*, [1992] S.C.J. No. 88, [1992] 3 S.C.R. 235, at 256-57 (S.C.C.); *Canadian Assn. of Industrial, Mechanical & Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] S.C.J. No. 107, [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437, at 480 (S.C.C.); *Re British Columbia Development Corp. v. Friedman (Ombudsman) and Attorney General for British Columbia*, [1984] S.C.J. No. 50, [1984] 2 S.C.R. 447, at 137 (S.C.C.).

25 [1990] S.C.J. No. 97, [1990] 2 S.C.R. 795 (S.C.C.).

26 *Ibid.*, at para. 21. See also *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 31, 33-34 (S.C.C.).

§15.22 Acts designed to correct injustice or to protect vulnerable groups from unfair treatment or hardship are "remedial" in an obvious sense. However, the concept is not limited to this type of legislation but extends to any legislation designed to secure a social benefit or correct a defect in existing law. In *Elan Corp. v. Comiskey*, for example, the Ontario Court of Appeal classified the *Companies' Creditors Arrangement Act* as remedial. Doherty J.A. wrote:

> Before turning to these issues, it is necessary to understand the purpose of the Act and the scheme established by the Act for achieving that purpose. The Act first appeared in the midst of the Great Depression.... The Act was intended to provide a means whereby insolvent companies could avoid bankruptcy and continue as ongoing concerns through a reorganization of their financial obligations.
> ...
>
> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> ...
>
> The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose...[27]

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27 [1990] O.J. No. 2180, 1 O.R. (3d) 289, at 306-307. In *Kerr v. Danier Leather Inc.*, [2007] S.C.J. No. 44, [2007] 3 S.C.R. 331 at para. 32 (S.C.C.), the Supreme Court of Canada wrote: "The *Securities Act* is remedial legislation and is to be given a broad interpretation ... It protects investors from the risks of an unregulated market... The Act supplants the 'buyer beware' mind set of the common law with compelled disclosure of relevant information." In *Richardson Greenshields of Canada Ltd. v. Kalmacoff*, [1995] O.J. No. 941, 22 O.R. (3d) 577 (Ont. C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 260 (S.C.C.), the Court found s. 339 of Ontario's *Trust and Loans Companies Act* establishing a derivative action for shareholders to be remedial. See also *Castonguay Blasting Ltd. v. Ontario (Environment)*, [2013] S.C.J. No. 52, 2013 SCC 52, [2013] 3 S.C.R. 323, at para. 9 (S.C.C.); (*Environmental Protect Act* is remedial); *Westmount (City) v. Rossy*, [2012] S.C.J. No. 30, 2012 SCC 30, [2012] 2 S.C.R. 136, at paras. 21, 47, 51 (S.C.C.) (Quebec's no-fault insurance scheme is remedial); *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] S.C.J. No. 6, [1997] 1 S.C.R. 32, at paras. 20-22 (S.C.C.) (*Expropriation Act* is remedial); *BL v Saskatchewan (Ministry of Social Services)*, [2012] S.J. No. 201, 2012 SKCA 38, at para. 66 (Sask. C.A.) (child welfare legislation is remedial); *2130489 Ontario Inc. v. Philthy McNasty's (Enterprises) Inc.*, [2012] O.J. No. 2521, 2012 ONCA 381, at para. 26 (Ont. C.A.) (legislation governing franchise agreements is remedial); *Ontario (Disability Support Program) v. Walsh*, [2012] O.J. No. 2980, 2012 ONCA 463, at para. 23 (Ont. C.A.) (*Ontario Disability Support Program* Act is remedial); *Ontario (Ministry of the Environment) v. Castonguay Blasting Ltd.*, [2012] O.J. No. 1161, 2012 ONCA 165, at para. 31 (Ont. C.A.), affd [2013] S.C.J. No. 52 (S.C.C.) (environmental protection acts are remedial); *Credit Canada Limited v. Welcome Ford Sales Ltd.*, [2011] A.J. No. 592, 2011 ABCA 158, at para. 43 (Alta. C.A.) (*Bankruptcy and Insolvency Act* is remedial); *VSL Canada Ltd. v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2011] N.B.J. No. 281, 2011 NBCA 76, at para. 38 (N.B.C.A.) (workers compensation legislation is remedial); *Tarion Warranty Corporation v. Kozy*, [2011] O.J. No.

While judicial respect for the remedial impulses of the legislature is an important and salutary development, the direction set out in s. 12 and other Canadian Interpretation Acts is not happily formulated. It was introduced at a time when legislation was normally drafted in precise and very detailed terms. For such legislation, it makes sense to require interpretation to be both purposeful and liberal. However, for legislation drafted in general terms, a purposeful interpretation often requires a restrictive interpretation — one in which the scope of the general language is narrowed so as to exclude applications that are outside the purpose.

§15.23 The legislative direction to interpret *all* legislation as remedial is also unfortunate in so far as it suggests that courts should no longer rely on the values underlying strict construction — the enjoyment of individual liberty, privacy, property rights and the like. While these are not the only values worth protecting, they remain an important part of Canadian legal culture. Legislation that invades privacy or takes away rights *should* be interpreted strictly — unless other, more compelling considerations suggest otherwise.

STRICT CONSTRUCTION OF PENAL LEGISLATION

§15.24 ***The strict construction rule.*** Penal legislation is legislation that creates offences punishable by fine, imprisonment or forfeiture of a right or privilege. This includes all offences found in the *Criminal Code*. Whether it includes regulatory offences is more doubtful. In *Merk v. Local 771*, responding to the argument that the provision to be interpreted should receive a strict construction, Binnie J. wrote:

> In my view, with respect, this approach is of limited value when interpreting a regulatory statute such as *The Labour Standards Act*. If it is concluded in all the relevant circumstances that the legislature intended a broad approach, that is the approach that will be adopted.[28]

§15.25 Because of the potential for serious consequences, penal legislation is strictly construed. In *Marcotte v. Canada (Deputy A.G.)*, Dickson J. wrote:

> No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be

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5768, 2011 ONCA 795, at para. 13 (Ont. C.A.) (*Ontario New Home Warranty Program Act* is remedial).

28 *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 771*, [2005] S.C.J. No. 72, [2005] 3 S.C.R. 425, at para. 33 (S.C.C.). See also *R. v. Agpro Grain Inc.*, [1996] S.J. No. 177, at para. 26 (Sask. Q.B.): "I conclude that the legislation and regulations in issue here should be interpreted purposely rather than strictly. The offences created are … regulatory offences and 'not true criminal offences'…."

tory wording to this effect. This latter principle finds early expression in the judgment in *Peacock v. Bell* (1677), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88:

> And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.

This basic principle continues to be applied up to the present day:...[112]

§15.58 Section 646 of the *Canada Shipping Act* conferred jurisdiction on the Admiralty Court for actions arising out of wrongful death. There was nothing in the section purporting to remove jurisdiction from other courts. Thus, Iacobucci and Major JJ. concluded:

> The lack of any express language ... excluding superior court jurisdiction, or vesting sole jurisdiction in the Admiralty Court, is sufficient by itself to justify interpreting s. 646 as conferring on the Admiralty Court only concurrent jurisdiction over fatal accident claims by dependants. This finding accords with the basic principle of statutory construction that a statute should not be interpreted as abrogating the inherent jurisdiction of the superior courts unless it employs clear language to this effect...[113]

Modern courts concede the necessity and desirability of referring some types of dispute to statutory tribunals. However, they are careful to reserve superior courts' jurisdiction to review the decisions of inferior tribunals to ensure compliance with the law. For this reason, and in keeping with s. 96 of the *Constitution Act*, privative clauses are strictly construed.[114]

LIBERAL CONSTRUCTION OF SOCIAL WELFARE LEGISLATION

§15.59 ***Governing principle.*** Social welfare legislation is to be liberally construed so as to advance the benevolent purpose of the legislation. If reasonable doubts or ambiguities arise, they are to be resolved in favour of the claimant. By providing benefits to the community or to groups in the community, social welfare legislature achieves a fairer allocation of social goods and may improve the health, security or dignity of targeted members of the community. The courts' primary concern is ensuring that the intended benefits are received.

§15.60 This "favour the claimant" principle was first asserted by the Supreme Court of Canada in *Abrahams v. Canada (Attorney General)*.[115] The issue in the

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112 *Ibid.*, at para. 46.

113 *Ibid.*, at para. 61. See also *Canada (Attorney General) v. TeleZone Inc.*, [2010] S.C.J. No. 62, 2010 SCC 62, [2010] 3 S.C.R. 585, at paras. 5-6 (S.C.C.); *Vaughan v. Canada*, [2005] S.C.J. No. 12, [2005] 1 S.C.R. 146, at paras. 27-29, 33 (S.C.C.).

114 See *Crevier v. A.-G. (Quebec)*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220, at 236-38 (S.C.C.).

115 [1983] S.C.J. No. 2, [1983] 1 S.C.R. 2, at 7-8 (S.C.C.).

case was whether the appellant was entitled to benefits under the *Unemployment Insurance Act*. Wilson J. wrote:

> Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation of the re-entitlement provisions. I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant. ...[116]

Since *Abrahams* was decided, the notion that social welfare legislation is to receive a liberal construction has become firmly established.

§15.61 In *Gray v. Ontario (Disability Support Program, Director)*,[117] for example, the Ontario Court of Appeal had to decide whether the appellant was a "person with a disability" within the meaning of the *Ontario Disability Support Program Act* and therefore eligible for income support under the Act. In determining that she came within the statutory definition of this expression, the Court relied in part on the liberal construction rule. McMurtry C.J.O. wrote:

> As remedial legislation, the ODSPA should be interpreted broadly and liberally and in accordance with its purpose of providing support to persons with disabilities. ...
>
> It is my view that as social welfare legislation, any ambiguity in the interpretation of the ODSPA should be resolved in the claimant's favour. In *Wedekind v. Ontario (Ministry of Community and Social Services)*[118] ... this court stated:
>
>> [T]he principle of construction . . . applicable to social welfare legislation . . . is, where there is ambiguity in the meaning of a statute, the ambiguity should be resolved in favour of the applicant seeking benefits under the legislation.
>
> The rationale for such an approach was set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*,[119] as follows:
>
>> The liberal approach to remedial legislation flows from the notion that such legislation has a benevolent purpose which courts should be careful to respect.[120]

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116 *Ibid.*, at 7-8. See also *Caron v. Canada (Employment & Immigration Commission)*, [1991] S.C.J. No. 2, [1991] 1 S.C.R. 48, at 59 (S.C.C.); *Fournier v. Ontario (Ministry of Community & Social Services)*, [2013] O.J. No. 2761, 2013 ONSC 2891, at paras. 50-51, 63 (Ont. S.C.J.); *P.A.L. v. Alberta (Criminal Injuries Review Board)*, [2012] A.J. No. 613, 2012 ABCA 177, at para. 42 (Alta. C.A.); *Gill v. Canada (Attorney General)*, [2010] F.C.J. No. 896, 2010 FCA 182, at para. 37 (F.C.A.); *Canada (Attorney General) v. Frye*, [2005] F.C.J. No. 1316, 2005 FCA 264, at para. 14 (F.C.A.); *Morrison Estate v. Cape Breton Development Corp.*, [2003] N.S.J. No. 353, 2003 NSCA 103, at para. 36 (N.S.C.A.); *Villani v. Canada (Attorney General)*, [2001] F.C.J. No. 1217, 2001 FCA 248, [2002] 1 F.C. 130, at para. 27 (F.C.A.); *Canada (Attorney General) v. Haberman*, [2000] F.C.J. No. 1215, at paras. 30-31 (F.C.A.).

117 [2002] O.J. No. 1531, 212 D.L.R. (4th) 353 (Ont. C.A.).

118 [1994] O.J. No. 2849, 21 O.R. (3d) 289, at 296-97 (Ont. C.A.), leave to appeal to S.C.C. refused 191 N.R. 397*n*.

119 [2001] F.C.J. No. 1217, at para. 26, 205 D.L.R. (4th) 58 (F.C.A.).

§15.62 The liberal approach to legislation has also been adopted to prevent abuses of power. In *Machtinger v. HOJ Industries Ltd.*, Iacobucci J. wrote:

> ... The objective of the [Employment Standards] Act is to protect the interests of employees by requiring employers to comply with certain minimum standards, ... To quote Conant Co. Ct. J. in Pickup, ... 'the general intention of this legislation ... is the protection of employees, and to that end it institutes reasonable, fair and uniform minimum standards.'[121] The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers. ...
>
> Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.[122]

§15.63 In a dissenting judgment in *Finlay v. Canada (Minister of Finance)*,[123] McLachlin J. referred to a related principle, which she called the "adequacy principle". The legislation to be interpreted in *Finlay* was a provision of the Canada Assistance Plan setting out what minimum standards of social assistance to the needy would have to be met by provinces to qualify for federal contribution to the costs. McLachlin J. wrote:

> An interpretation which ensures that at least the basic requirements of the person in need are satisfied complies with the principle that a court, faced with general language or contending interpretations arising from ambiguity in statutory language, should adopt an interpretation which best assures adequacy of assistance.[124]

She pointed out that this principle has been invoked in social welfare cases in both Canada[125] and the United States.[126]

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120 *Gray v. Ontario (Disability Support Program, Director)*, [2002] O.J. No. 1531, 212 D.L.R. (4th) 353 at paras. 9, 10 and 12 (Ont. C.A.). See also *Mule v. Ontario (Director, Disability Support Program)*, [2007] O.J. No. 5322, at para. 19 (Ont. C.A.); *Morrison (Estate) v. Cape Breton Development Corp.*, [2003] N.S.J. No. 353, at para. 36 (N.S.C.A.); *Kolodziejski v. Electronic Auto Service Ltd.*, [1999] S.J. No. 276, 174 D.L.R. (4th) 525, at paras. 23-27 (Sask. C.A.).

121 *Pickup v. Litton Business Equipment Ltd.*, [1983] O.J. No. 2401, 3 C.C.E.L. 266, at 274 (Ont. Co. Ct.).

122 *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41, [1992] 1 S.C.R. 986, at paras. 31-32 (S.C.C.). See also *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at para. 36 (S.C.C.).

123 [1993] S.C.J. No. 39, [1993] 1 S.C.R. 1080 (S.C.C.).

124 *Ibid.*, at 1113.

125 See, for example, *Hills v. Canada (Attorney General)*, [1988] S.C.J. No. 22, [1988] 1 S.C.R. 513, 48 D.L.R. (4th) 193, at 211 (S.C.C.); *Canada (Canada Employment and Immigration Commission) v. Gagnon*, [1988] S.C.J. No. 65, [1988] 2 S.C.R. 29, at 38, 52 (S.C.C.); *Caron v. Canada (Canada Employment & Immigration Commission)*, [1991] S.C.J. No. 2, [1991] 1 S.C.R. 48, at 59 (S.C.C.).

126 See cases cited by McLachlin J. in *Finlay v. Canada (Minister of Finance)*, [1993] S.C.J. No. 39, [1993] 1 S.C.R. 1080 at 1114 (S.C.C.).

§15.64 The special consideration given to social welfare legislation also is evident in the context of Charter challenges. In *Schachter v. R.*,[127] for example, in discussing the remedy of reading in, La Forest J. noted that where a provision in a social assistance scheme is found to violate the Charter, the courts are reluctant to cure the breach by declaring the entire scheme invalid. To save this type of legislation, the remedy of reading in may be acceptable, even though in other contexts it is considered too intrusive a remedy.[128]

§15.65 A second concern apparent in cases interpreting social welfare legislation is the need of beneficiaries to understand their rights and responsibilities under the legislation. This concern is expressed very clearly by Kelly J. in *Skinner v. Nova Scotia (Social Assistance Appeal Board)*:

> … The legislative scheme, regardless of who has the obligation of drafting, must be drafted in a manner that is clear and comprehensible. The obligation to provide well drafted and clear policies is not only an obligation to the needy applicant, it is also an obligation to the staff who apply the policy, to the appeal board who must review it, and to the citizens of the community who must ultimately pay for this increasingly costly but nevertheless important social service. …[129]

While clear and comprehensible legislation is an important goal of the legal system in general, it is especially important in social welfare legislation. The community served by this legislation can rarely afford the costs of legal advice. If the entitlements of claimants are not defined clearly, they are liable to be lost.

§15.66 An interesting example of the liberal approach to social welfare legislation is found in the judgment of the Federal Court of Appeal in *Canada (A.G.) v. Cloutier*.[130] Section 14(a) of the *Unemployment Insurance Regulations* provided that the job of a corporate employee is excepted from "insurable employment" if he or she "controls more than 40 per cent of the voting shares of that corporation".[131] The claimant in the case owned 50 per cent of the voting shares of his employer, but under an agreement with the other shareholder more than 25 per cent of this holding was on deposit with a third party and could not be voted by the claimant unless certain conditions were fulfilled. The Court noted that from a strictly legal point of view, based on the principles of corporate law and on a line of tax cases, the claimant could be said to have control within the meaning of the regulations. However, the Court rejected the legalistic approach urged by the Minister. Marceau J. wrote:

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127 [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).
128 *Ibid.*, at 34-35.
129 [1992] N.S.J. No. 199, 112 N.S.R. (2d) 197, at 204 (N.S.T.D.).
130 [1986] F.C.J. No. 778, [1987] 2 F.C. 222 (F.C.A.).
131 *Ibid.*, at para. 1.

> To begin with, I do not think it is appropriate in interpreting social legislation like the Unemployment Insurance Act to adopt an approach similar to that required to give effect to fiscal legislation, ...[132]

Marceau J. focused on the purpose of the exception, which was to exempt employment in situations where the employee was not in a dependent or vulnerable position in relation to the employer. In light of this purpose he concluded:

> However, I think that in order to respect the letter and the spirit of the provision as well as the requirements of fairness, control has to be interpreted as being not only *de jure* control but also, and most importantly, effective control, which means control that can be freely exercised and is not impeded by circumstances independent of the person having control. ...[133]

Marceau J. also had to deal with the Minister's argument that the shares on deposit should not be included in the total number of shares when calculating control. This suggestion appeared to be consistent with the practical, non-formalistic approach taken above. However, it was rejected by Marceau J. on highly technical grounds. In effect, each doubt that arose in interpreting the regulation was resolved in favour of the claimant.

PRESUMPTIONS OF FAULT

§15.67 ***Crimes and regulatory offences distinguished.*** At common law, offences are divided into two classes: (1) crimes, or "true crimes" as they are sometimes called; and (2) regulatory or public welfare offences. This is a long-standing distinction that often is difficult to apply but shows no signs of disappearing from Canadian law. It has figured in a number of Supreme Court of Canada decisions under the Charter. In *R. v. Wholesale Travel Group Inc.*, Cory J. provided a helpful resume of the distinction. He wrote:

> Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.
>
> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are

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[132] *Ibid.*, at para. 4.
[133] *Ibid.*, at para. 5.

RESCUE AND LIQUIDATION IN RESTRUCTURING LAW

Roderick J. Wood*

Two critical questions emerge when considering rescue and liquidation in Canadian restructuring law. The first is whether the use of the traditional restructuring to rescue a financially distressed firm has become a thing of the past — whether it is on its way out and being replaced with a court-supervised sale mechanism as the preferred method for ensuring that the value of the assets of an insolvent firm will be maximized. The second is about the appropriate method for effecting a liquidation in the event that this is considered to be the preferred route — does it make sense to be using a scheme that was originally designed for restructuring to accomplish this task?

I. ARE TRADITIONAL RESTRUCTURINGS DESTINED FOR EXTINCTION?

The first inquiry is really about the best method of maximizing asset value for the benefit of the creditors. It proceeds from the basic idea that a restructuring is an appropriate response only if the creditors are able to obtain at least as much as they would in respect of a liquidation.[1] Some believe that the traditional restructuring is no longer able to outperform a going concern liquidation of the firm. The argument, so it goes, is that the world has changed, and that asset sales are now much more likely able to yield more than can be obtained through keeping the firm intact. How has this come about? It is claimed that this shift has occurred because the types of assets held by firms have changed and markets

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1. The classic statement of this principle is found in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at para. 7 in which Farley J. stated:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

In *Ted Leroy Trucking Ltd., Re* (2010), 326 D.L.R. (4th) 577, 2010 SCC 60 (S.C.C.). at para. 77, Deschamps J. recognized that "participants will measure the impact of a reorganization against the position they would enjoy in liquidation."

have changed. Assets have become more fungible and less firm-specific so that there is less going concern value.[2] Markets are more liquid so that even when there is going concern value the whole enterprise can be sold off.[3]

Clearly, there has been an escalating use of the Companies' Creditors Arrangement Act[4] (CCAA) as a vehicle for effecting asset sales.[5] But we cannot conclude from this alone that the traditional restructuring is on the road to extinction. We cannot assume that a traditional CCAA restructuring would have been commenced in each of these cases had the courts been less receptive to liquidating CCAAs. The increase may be due to the fact that liquidations that normally would have been undertaken pursuant to receivership or bankruptcy proceedings are now being effected under the CCAA. This migration of liquidations has occurred in the past — most notably when a concern over the liability of insolvency professionals resulted in a shift away from receivership proceedings.[6] To get a complete picture, we would need to compare over a period of years the total number of traditional restructurings (under both the CCAA and the commercial proposal provisions of the Bankruptcy and Insolvency Act[7] (BIA)) as against the total number of liquidations (pursuant to bankruptcy and receiverships proceedings as well as liquidations effected through the CCAA or Division I of the BIA). Are liquidations simply migrating to the CCAA from other insolvency regimes? Or are traditional restructurings being replaced with liquidations? One suspects that the answer is that both factors are in play, but we do not know if one dominates over the other.

Even if we were convinced that there has been a significant shift in favour of liquidations, we could still not be certain that value to creditors is being maximized by asset sales. There are alternative (and darker) theories that might explain this phenomenon. It could be that senior creditors have developed more effective strategies to prevent a beneficial restructuring that would yield greater value to

2. Douglas G. Baird and Robert K. Rasmussen, "The End of Bankruptcy" (2002), 55 Stan. L. Rev. 751; Douglas G. Baird, "The New Face of Chapter 11" (2004), 12 Am. Bankr Inst. L. Rev. 69.
3. Douglas G. Baird, "Bankruptcy's Undiscovered Country" (2008), 25 Emory Bankr. Dev. J. 1, at p. 7.
4. R.S.C. 1985, c. C-36.
5. Alfonso Nocilla, "Is 'Corporate Rescue' Working in Canada?" (2013), 53 C.B.L.J. 382.
6. See Roderick J. Wood, *Bankruptcy and Insolvency Law* (Toronto, Irwin Law, 2009), p. 465.
7. R.S.C. 1985, c. B-3.

the creditors as a group. Fully secured creditors typically prefer a liquidation to a traditional restructuring notwithstanding that the total value of the assets might be maximized in a restructuring.[8] Moreover, they will prefer a quick liquidation to a slower liquidation that yields greater value if the expected sale proceeds are sufficient to pay out their claim.[9] There is always a risk in a restructuring that the firm will not be able to turn itself around and that the cost and delay of the restructuring attempt will mean that the secured creditor will not receive full recovery of its claim. This risk is magnified given the wide use of court authorized super-priority charges such as those that secure the costs of administration, interim ("debtor-in-possession" or DIP) financing and the indemnification of directors and officers.[10] A senior creditor has a strong incentive to steer the insolvency towards a liquidation if it can. An increase in the relative number of liquidations may be an indication that senior creditors have been able to devise a number of devices and strategies that allow them to better exercise control over the insolvency proceedings.

There are two interrelated methods by which a secured lender can obtain control.[11] The first is through the use of contractual provisions in the financing agreements that are entered into after the restructuring proceedings are commenced. The business requires interim (DIP) financing in order to pay its post-restructuring obligations. In many cases, this financing is provided by a pre-existing secured lender. A secured lender can influence the direction of the insolvency proceedings by the use of negative and positive covenants in the interim (DIP) financing agreement.[12] These may set strict time-lines that make it less likely that a traditional restructuring can be achieved or that will limit access and use of cash flow. The agreements may also include events of default that effectively impose onerous financial stress tests that are difficult to satisfy.

The second method of gaining control is through influencing management of the business. The secured lender will often be able

8. Jason Berge, "An Efficiency Model of Section 363(b) Sales" (2006), 92 Va. L. Rev. 1639.
9. See, for example, *Royal Bank v. Vista Homes Ltd.* (1985), 57 C.B.R. (N.S.) 80 (B.C. S.C.), at para. 15.
10. CCAA, ss. 11.2(2), 11.51(2) and 11.52(2).
11. See Kenneth M. Ayotte and Edward R. Morrison, "Creditor Control and Conflict in Chapter 11" (2009), 1 J. Legal Analysis 511.
12. David A. Skeel, Jr., "The Past, Present and Future of Debtor-in-Possession Financing" (2004), 25 Cardozo L. Rev. 1905, at pp. 1916-1919; George W. Kuney, "Hijacking Chapter 11" (2004), 21 Emory Bankr. Dev. J. 19, at pp. 52-59.

to exercise control over the choice of management. For example, in the CCAA proceedings in respect of Crystallex International Corporation, the DIP loan stipulated that the board of directors was reduced to five, two drawn from the existing directors, two drawn from the DIP lenders, and one independent director agreed upon by the parties.[13] The secured lender will also be able to influence the compensation of the senior managers that remain. Key employee retention programs (KERPS) are established so that key personnel will be "incentivized to remain in their current positions during the CCAA process."[14] But KERPS may also have the effect of aligning the interests of the debtor's senior management with those of the secured lender.[15]

As a result, we encounter two diametrically opposed views of the world. The first is that CCAA liquidations are good because they are the most efficient way of maximizing aggregate recovery by the creditors. The second is that CCAA liquidations are bad because they are used by secured lenders to force liquidations in circumstances where a traditional restructuring would maximize aggregate recovery by creditors. This leads us directly to the next question. Why are we using a restructuring regime (the CCAA) to effect going concern sales when there are other insolvency regimes that are specifically designed for this purpose?

II. WHY IS THE CCAA USED FOR GOING CONCERN SALES?

The second critical question concerns the choice of insolvency regimes where liquidation is considered to be the preferred outcome. The CCAA, at first glance, does not seem to be a likely candidate for this role. The whole CCAA process is geared towards the development of a plan of arrangement that will be presented before the creditors for their acceptance or rejection. That this is the objective of the legislation is confirmed in the parliamentary debates, and in judicial statements at the highest level.[16] Indeed, the very title of the Act anticipates the negotiation of a consensual arrangement amongst the creditors and the debtor. The statute sets

13. *Crystallex International Corp., Re* (2012), 91 C.B.R. (5th) 207, 2012 ONCA 404 (Ont. C.A.), at para. 24, additional reasons (2012), 219 A.C.W.S. (3d) 61, 2012 ONCA 527, leave to appeal refused 2012 CarswellOnt 11931 (S.C.C.).
14. *Timminco Ltd., Re* (2012), 85 C.B.R. (5th) 169, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]), at para. 75.
15. See Skeel, *supra*, footnote 12, at pp. 1922-1923; Kuney, *supra*, footnote 12, at pp. 74-90.
16. *Ted Leroy Trucking Ltd., Re*, *supra*, footnote 1, at paras. 15-18 and 70.

out rules as to the mandatory features of the plan of arrangement[17] and it contains rules for the classification of claims, voting, and court approval of the plan.[18] A liquidating CCAA severely truncates the insolvency process contemplated by the CCAA. The rules that govern the initiation of the process and the rules that keep the lights on and the creditors at bay are utilized, but those that deal with the attributes of a plan of arrangement and its approval by the creditors and by the court are all jettisoned.

It was hardly surprising, therefore, that courts initially took the view that receivership or bankruptcy proceedings were the more appropriate vehicle for liquidations.[19] As we know, this attitude has changed. Over the last decade, there has been an increasing willingness on the part of the courts to permit the restructuring regimes to be utilized for going concern liquidations of insolvent businesses. This idea was not uniformly embraced by courts across Canada. There was greater enthusiasm for liquidating CCAAs in Ontario, and perhaps Québec, than in British Columbia and Alberta.[20] The 2009 amendments to the CCAA now give the court the power to authorize a sale of assets, but the provisions do not provide much guidance on when it is appropriate for the court to exercise this power.[21]

The argument in favour of liquidating CCAAs is simply this: if using the CCAA process yields a greater return from the sale process than a bankruptcy or receivership, it is in the interests of all concerned that the CCAA be made available notwithstanding that the restructuring regime was designed for an altogether different purpose.[22] To critically assess this claim, we need to understand precisely why a sale process conducted under the CCAA is said to produce higher returns. Although bankruptcy often involves a piecemeal liquidation, receivership proceedings provide a mechanism specifically designed for going concern sales. So what features are available under the CCAA that are lacking in receivership

17. CCAA, s. 6(3)-(8).
18. CCAA, s. 6(1), ss. 22-22.1.
19. *Royal Bank v. Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.).
20. Alfonso Nocilla, *supra*, footnote 5, at p. 394.
21. Alfonso Nocilla, "Asset Sales under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012), 52 C.B.L.J. 226, at pp. 243-247.
22. See *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 at para. 11 (Ont. S.C.J. [Commercial List]), affirmed (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), additional reasons (2002), 38 C.B.R. (4th) 5 (Ont. C.A.), leave to appeal refused (2003), 180 O.A.C. 399 (note) (S.C.C.), in which Farley J. states that the CCAA is available if the process "would maximize the value of the stakeholders' pie."

proceedings that makes the former a better means for maximizing sale proceeds?

The CCAA process is a court-supervised process. It permits a court to approve super-priority interim (DIP) financing to pay for the ongoing costs of the business. It uses a court-appointed monitor to assist the court and to provide information to the creditors. These features do not explain the preference for CCAA proceedings. These features are all available in respect of receivership proceedings in Canada. A court-appointed receivership is a court-supervised process. The court routinely authorizes super-priority charges in relation to administrative costs as well as borrowings.[23] The receiver is an officer of the court and is under an obligation to act in the interests of all the parties.[24] The use of Chapter 11 to effect liquidations in the United States is more understandable.[25] They have no equivalent to the court-appointed receiver, and therefore Chapter 11 is the only process available outside of bankruptcy proceedings. But in Canada, we have an insolvency regime that was specifically designed for going concern sales of insolvent businesses. The fact that courts in CCAA proceedings are applying receivership law when dealing with liquidating sales clearly brings home the point that the processes used in CCAA liquidations are mimicking those in receivership proceedings.[26]

There is one major difference between the CCAA process and a court-appointed receivership. Unlike receivership proceedings, the CCAA uses a debtor-in-control model (as opposed to the insolvency professional-in-control model that prevails in a bankruptcy or receivership). While this is clearly desirable in a scenario where the company survives in some restructured form, it is difficult to see why this is a useful feature in respect of a liquidation. In truth, the CCAA process seems less likely to produce efficient outcomes.

23. *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492, 21 C.B.R. (N.S.) 201 (Ont. C.A.). See also paragraphs 17 and 20 of the Ontario template receivership order (<http://www.ontariocourts.ca/scj/en/commerciallist/>) which creates a court ordered charge that secures the fees and costs of the receiver and another that secures the costs of borrowing and gives them priority over all other security interests.

24. *Ostrander v. Niagara Helicopters Ltd.* (1973), 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5 (Ont. H.C.).

25. See Stephanie Ben-Ishai and Stephen J. Lubben, "Sales or Plans: A Comparative Account of the 'New' Corporate Reorganization" (2011), 56 McGill L.J. 591.

26. The supervising judge in CCAA liquidations have routinely applied the principles developed in *Royal Bank v. Soundair Corp.* (1991), 83 D.L.R. (4th) 76, 7 C.B.R. (3d) 1 (Ont. C.A.). See, for example, *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 224 (Ont. S.C.J. [Commercial List]).

Although the monitor is an officer of the court, the monitor is also heavily involved in providing advice and direction to the debtor.[27] But if management of the debtor has changed, then the reality is that the senior creditor has obtained special access to the monitor — an advantage that is not available to any other creditor. By comparison, the duties that are imposed on a court-appointed receiver are better defined and more appropriate for a going concern sale. The court-appointed receiver has control over the management of the business and is bound to act in the interest of all the creditors.

The claim that the CCAA provides the better vehicle may ultimately rest on the vague assertion that CCAA provides for greater flexibility and that this is essential in proceedings that concern larger, more complex business entities. When the proponents of a liquidating CCAA claim that they need the greater flexibility of the CCAA process, a court should keep in mind that this so-called flexibility usually involves either a diminution of the private law rights of a third party[28] or the granting of a judicially authorized preference[29] usually in favour of commercially sophisticated and powerful creditors. These extraordinary powers were derived from the underlying public purpose of a statute which was based on the idea of rescuing a financially distressed firm. A much less compelling case for their use exists if the reality is that the CCAA process is being used by the senior creditor as a "unified foreclosure process" primarily for its own benefit.[30]

The supposed advantages of using the CCAA for liquidations must be weighed against other disadvantages. The CCAA was designed with the traditional restructuring in mind. Its substantive rules are geared towards the development of a plan of arrangement that will be presented before the creditors for acceptance or rejection. Many of these rules and processes are really not well suited for liquidation proceedings. Suppliers are given a reposses-

27. See John I. McLean and David P. Bowra, "Conflicts and the Modern CCAA Monitor" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2011* (Toronto, Carswell, 2012), p. 479.
28. The CCAA has been invoked in order to seek an order for the assignment of contracts that ordinarily would require the consent of the counterparty. See S. Fitzpatrick, "Liquidating CCAAS – Are We Praying to False Gods?" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2008* (Toronto, Carswell, 2009), p. 33.
29. For example, a creeping roll-up DIP permits the payment of pre-filing obligations out of the post-filing revenues of the debtor. See Ray C. Rutman *et al.*, "Creeping Roll-Up DIP" (2012), 1 J. Insol. Inst. Can. 161.
30. See Kuney, *supra*, footnote 12, at pp. 24-25.

sory right over recent deliveries (30-day goods) in bankruptcy and receivership. A similar right was not conferred in respect of restructuring proceedings because it was thought to interfere with the rescue objective. Unpaid employees are treated differently in restructuring proceedings. Unpaid employees may make an immediate claim against the Wage Earner Protection Program Act[31] (WEPPA) insurance scheme in the bankruptcy and receivership proceedings. In restructuring proceedings, they must wait.[32] The procedural aspects are similarly designed with the traditional restructuring in mind. The debtor company is required to periodically return to court to seek to have the stay of proceedings extended. This gives the court the ability to assess if the debtor has made sufficient progress towards the development of a viable plan, and allows the court to terminate restructuring proceedings if the creditors are materially prejudiced or if the plan is doomed to fail. It was in this context that the court's consideration of public interest was often invoked. None of this is particularly relevant or useful in liquidation mode.

III. CONCLUSION

It may be that the train has already left the station and that liquidating CCAAs are here to stay.[33] This will make the life of the supervising judge all the more difficult. They are the gate-keepers who must decide in each case if the CCAA process is appropriate as a vehicle for going concern liquidation of the business. One hopes that they will not too easily succumb to empty platitudes about lower costs and greater flexibility in CCAA proceedings. They should demand and receive a convincing explanation why, in the particular case, the applicants believe that the CCAA process will be less costly and superior to receivership proceedings. They should inquire if the extraordinary powers that they possess — powers that represent a major intrusion into the private law rights of third parties — should be exercised for the benefit of a senior secured creditor. They should be alert to the fact that a senior creditor may

31. S.C. 2005, c. 47.
32. Although payments of past amounts due to employees who continue to be employed by the debtor are typically authorized, the position of employees who are laid off as a result of downsizing is more precarious.
33. In Alberta, where *Fracmaster*, *supra*, footnote 19, had dampened the use of liquidating CCAAs, the initial indication is that s. 36 of the BIA is interpreted as authorizing sales of substantially all the assets without the need for a plan of arrangement. See *Fairmont Resort Properties Ltd., Re*, 2012 ABQB 39, at para. 26.

well be calling the shots, and that the apparatus of the CCAA that was designed for traditional restructurings may not be well suited for a liquidation. They should not be too quick to authorize a sale without the input of the creditors who rank below a senior secured creditor whose claim is expected to be fully satisfied from the sale proceeds.[34]

34. See *Fairmont*, *supra*, in which the court approved a liquidating CCAA without a plan or formal vote of creditors, but was influenced by the fact that the sale was supported by the undersecured affected creditors.