S.C.C. File No. 35541

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC., MATRIX ASSET MANAGEMENT INC., GESTION FÉRIQUE, AND MONTRUSCO BOLTON INVESTMENTS INC.

Applicants

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, KAI KIT POON, DAVID J. HORSLEY, CREDIT SUISSE SECURITIES (CANADA) INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC), THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT, ROBERT WONG and PÖYRY (BEIJING) CONSULTING COMPANY LIMITED

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TAB

TAB 1

CITATION: Metcalfe & Mansfield Alternative Investments II Corp., (Re) , 2008 ONCA 587
DATE: 20080818
DOCKET: C48969 (M36489)

COURT OF APPEAL FOR ONTARIO

LASKIN, CRONK and BLAIR JJ.A.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING

METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP.,
4446372 CANADA INC. AND 6932819 CANADA INC.,
TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

BETWEEN:

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO,

Applicants (Respondents in Appeal)

and

METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP.,
4446372 CANADA INC. AND 6932819 CANADA INC.,
TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

Respondents (Respondents in Appeal)

and

AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC.,, DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC.SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC.

Respondents (Appellants)

See Schedule "A" – Counsel for the list of counsel

Heard: June 25 and 26, 2008

On appeal from the sanction order of Justice Colin L. Campbell of the Superior Court of Justice, dated June 5, 2008, with reasons reported at [2008] O.J. No. 2265.

BLAIR J.A.:

A. INTRODUCTION

[1] In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to

resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and – given the expedited time-table – the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Re Country Style Food Services* (2002), 158 O.A.C. 30, are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. FACTS

The Parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial

institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP – in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants – slightly over $1 billion – represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment – usually 30 to 90 days – typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers"

(banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes – partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors

became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze – the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement – known as the Montréal Protocol – the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's

words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper – which has been frozen and therefore effectively worthless for many months – into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

b) The Releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants – in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" – from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a

dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
b) Sponsors – who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information – give up their existing contracts;
c) The Canadian banks provide below-cost financing for the margin funding facility and,
d) Other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

[33] On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan – 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan – 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval – a majority of creditors representing two-thirds in value of the claims – required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" – an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing – this time involving the amended Plan (with the fraud carve-out) – was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. LAW AND ANALYSIS

[39] There are two principal questions for determination on this appeal:

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

[40] The standard of review on this first issue – whether, as a matter of law, a CCAA plan may contain third-party releases – is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;

b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;

d) the releases are invalid under Quebec rules of public order; and because

e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court

[1] Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.). As Farley J. noted in *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 at 111 (Ont. Gen. Div.), "[t]he history of CCAA law has been an evolution of judicial interpretation."

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools – statutory interpretation, gap-filling, discretion and inherent jurisdiction – it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally – and in the insolvency context particularly – that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell Expressvu Ltd. Partnership v. R.*, [2002] 2 S.C.R. 559 at para. 26.

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[2] Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes – particularly those like the CCAA that are skeletal in nature – is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles.

[50] The remedial purpose of the CCAA – as its title affirms – is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at 318 (B.C.C.A.), Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act :

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the

> company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

[51] The CCAA was enacted in 1933 and was necessary – as the then Secretary of State noted in introducing the Bill on First Reading—"because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Elan Corp. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.), *per* Doherty J.A. in dissent; *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.); *Re Anvil Range Mining Corp.* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra,* at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

Application of the Principles of Interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to

[3] Citing Gibbs J.A. in *Chef Ready Foods, supra,* at pp.319-320.

effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore – as the application judge found – in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he

stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

a) the skeletal nature of the CCAA;

b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in

c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may

> be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Re Refund of Dues under Timber Regulations*, [1935] A.C. 184 at 197 (P.C.), affirming S.C.C. [1933] S.C.R. 616. See also, *Re Guardian Assur. Co.*, [1917] 1 Ch. 431 at 448, 450; *Re T&N Ltd. and Others (No. 3)*, [2007] 1 All E.R. 851 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. Ltd. v. Ideal Petroleum* (1959) Ltd. [1978] 1 S.C.R. 230 at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 at para. 11 (C.A.). In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Re Air Canada* (2004), 2 C.B.R. (5th) 4 at para. 6 (Ont. S.C.J.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 at 518 (Gen. Div.).

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan – including the provision for releases – becomes binding on all creditors (including the dissenting minority).

[64] *Re T&N Ltd. and Others, supra,* is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA – including the concepts of compromise or arrangement.[4]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

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[4] The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard), supra.*

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence – cited earlier in these reasons – to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for

[5] See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.

all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

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[6] A majority in number representing two-thirds in value of the creditors (s. 6)

b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
c) The Plan cannot succeed without the releases;
d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then – as was the case in *T&N* – there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA – construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation – supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

[74] Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201, leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.* (2000), 266 A.R. 131 (C.A.), and [2001] 293 A.R. 351 (S.C.C.). In *Re Muscle Tech Research and Development Inc.* (2006), 25 C.B.R (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Re Canadian Airlines*, however, the releases in those restructurings – including *Muscle Tech* – were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

[76] In *Re Canadian Airlines* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

[77] Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Michaud v. Steinberg,*[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument – dealt with later in these reasons – that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

[78] Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these

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[7] *Steinberg* was originally reported in French: [1993] R.J.Q. 1684 (C.A.). All paragraph references to *Steinberg* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Michaud v. Steinberg*, *supra*; *NBD Bank, Canada v. Dofasco Inc.*, (1999), 46 O.R. (3d) 514 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C.S.C.); and *Re Stelco Inc.* (2005), 78 O.R. (3d) 241 (C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg* does not express a correct view of the law, and I decline to follow it.

[80] In *Pacific Coastal Airlines*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in *Pacific Coastal* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian – at a contractual level – may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor

company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this Court in the *NBD Bank* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process – in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
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> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto:

> Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release – as is the situation here. Thus, *NBD Bank* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

[86] The appellants also rely upon the decision of this Court in *Stelco I.* There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J.) at para. 7.

[87] This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Re Stelco Inc.*, (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) (*"Stelco II"*). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] – the classification case – the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... *[H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants – particularly those represented by Mr. Woods – rely heavily upon the decision of the Quebec Court of Appeal in *Michaud v. Steinberg, supra.* They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor

corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 – English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> ...
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> ...
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act – an awful mess – and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature – they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company – rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have

recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

[93] The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act – an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in *Steinberg* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases – as I have concluded it does – the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent *Steinberg* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg* considered the broad nature of the terms "compromise" and "arrangement" and the

jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

[96] *Steinberg* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> Exception
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (*a*) relate to contractual rights of one or more creditors; or
>
> (*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> Powers of court
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> Resignation or removal of directors
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically

permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:[8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra,* at 2-144, E§11A; *Le Royal Penfield Inc. (Syndic de)*, [2003] R.J.Q. 2157 at paras. 44-46 (C.S.).

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

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[8] Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights – including the right to bring an action – in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra,* at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re: Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659. As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Royal Bank of Canada v. Larue* [1928] A.C. 187, "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another

> aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

[104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action – normally a matter of provincial concern – or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Re Ravelston Corp. Ltd.* (2007), 31 C.B.R. (5th) 233 (Ont. C.A.).

[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties – including leading Canadian financial institutions – that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd.* (1998), 38 B.L.R. (2d) 251 at paras. 9 and 18 (B.C.S.C.). There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings – the claims here all being untested allegations of fraud – and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here – with two additional findings – because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
g) The releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they – as individual creditors – make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

[119] The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

[120] In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. DISPOSITION

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

"Robert A. Blair J.A."
"I agree J.I. Laskin J.A."
"I agree E.A. Cronk J.A."

RELEASED: August 18, 2008

SCHEDULE "A" – CONDUITS

Apollo Trust
Apsley Trust
Aria Trust
Aurora Trust
Comet Trust
Encore Trust
Gemini Trust
Ironstone Trust
MMAI-I Trust
Newshore Canadian Trust
Opus Trust
Planet Trust
Rocket Trust
Selkirk Funding Trust
Silverstone Trust
Slate Trust
Structured Asset Trust
Structured Investment Trust III
Symphony Trust
Whitehall Trust

SCHEDULE "B" - APPLICANTS

ATB Financial
Caisse de dépôt et placement du Québec
Canaccord Capital Corporation
Canada Mortgage and Housing Corporation
Canada Post Corporation
Credit Union Central Alberta Limited
Credit Union Central of BC
Credit Union Central of Canada
Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank of Canada/National Bank Financial Inc.
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

SCHEDULE "A" - COUNSEL

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau

Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

TAB 2

Case Name:

Blue Note Caribou Mines Inc. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Application of Blue Note Caribou Mines Inc., a body corporate
AND IN THE MATTER OF the Application of Pricewaterhousecoopers Inc., Trustee in Bankruptcy of Blue Note Caribou Mines Inc.
AND IN THE MATTER OF an Application by Breakwater Resources Ltd. and Canzinco Ltd. for various orders relating to the Stay of Proceedings against Blue Note Caribou Mines Inc.
AND IN THE MATTER OF the Application By J.S. Redpath Limited (Court File No. N/C/69/08) and Longyear Canada, ULC and Boart Longyear Alberta Limited, doing business under the name and style of Boart Longyear Canada (Court File No. N/C/68/08), Lien Claimants, for an Order lifting the Stay Order and continuing the said Lien Claimants' Action
Between
Royal Bank of Canada and Certain Other Noteholders, pursuant to the Trust Indenture between Computershare Trust Company of Canada and Blue Note Mining Inc., dated May 4, 2007, Intended Appellants (Applicants), and
Pricewaterhousecoopers Inc., in its capacity as Monitor of Blue Note Caribou Mines Inc. and in its capacity as Trustee in Bankruptcy of Blue Note Caribou Mines Inc., Diorite Securities Limited in its capacity as Trustee of the Fern Trust, Breakwater Resources Ltd., Canzinco Ltd., J.S. Redpath Limited and Longyear Canada, ULC and Boart Longyear Alberta Limited, doing business under the name and style of Boart Longyear Canada, Provincial Holdings Limited, Computershare Trust Company of Canada, Intended Respondents (Respondents)
And between
Maple Minerals Corporation, Intended Appellant (Applicant), and
Pricewaterhousecoopers Inc., in its capacity as Monitor of Blue Note Caribou Mines Inc. and in its capacity as Trustee in Bankruptcy of Blue Note Caribou Mines Inc., Diorite Securities

Limited in its capacity as Trustee of the Fern Trust, Breakwater Resources Ltd., Canzinco Ltd., J.S. Redpath Limited and Longyear Canada, ULC and Boart Longyear Alberta Limited, doing business under the name and style of Boart Longyear Canada, Provincial Holdings Limited, Computershare Trust Company of Canada, Intended Respondents (Respondents)

[2010] N.B.J. No. 267

[2010] A.N.-B. no 267

360 N.B.R. (2d) 67

69 C.B.R. (5th) 298

2010 CarswellNB 388

File Nos. 41-10-CA and 42-10-CA

New Brunswick Court of Appeal

B.R. Bell J.A.

Heard: April 12, 2010.
Judgment: May 19, 2010.

(21 paras.)

Bankruptcy and insolvency law -- Proceedings -- Appeals and judicial review -- Leave to appeal -- Applications by Maple Minerals and others for leave to appeal from an order that Fern Trust's net profit interest remained in force as it was not affected by Blue Note Caribou Mines' bankruptcy, and that Breakwater Resources held a 20 per cent proprietary interest in the real property of Blue Note's mine dismissed -- The issues were not significant to the practice and the proposed appeals were not meritorious.

Civil litigation -- Civil procedure -- Appeals -- Leave to appeal -- Applications by Maple Minerals and others for leave to appeal from an order that Fern Trust's net profit interest remained in force as it was not affected by Blue Note Caribou Mines' bankruptcy, and that Breakwater Resources held a 20 per cent proprietary interest in the real property of Blue Note's mine dismissed -- The issues were not significant to the practice and the proposed appeals were not meritorious.

Applications by Maple Minerals and others for leave to appeal from an order that Fern Trust's net

B. *Standing -- RBC & other Note Holders*

9 All parties agree that the formal name of one of Blue Note's secured creditors is Computer Share Trust Company of Canada. However, all parties also acknowledge, and the evidence in the record demonstrates, that pursuant to a trust indenture Computer Share represents a number of secured creditors, RBC being one of them. Computer Share can only act upon the authorization of a fixed percentage of the secured creditors represented by it. Due to the limited time available to react in the present case, sufficient numbers of the secured creditors bound by the trust indenture were unable to collectively provide instructions to Computer Share on the leave application. For that reason, RBC & other Note Holders, all of whom are secured creditors affected by the motion judge's decision, seek leave to appeal. In my view, this Court would be putting form over substance in the event it were to conclude that RBC & other Note Holders should be denied standing because of the language of the trust indenture. I conclude they have standing to appeal the decision.

III. Merits of the leave application

10 The leave provisions under Rule 62.03(4) of the *Rules of Court* and the *CCAA* are set out below:

APPEALS
RULE 62
CIVIL APPEALS TO THE COURT OF APPEAL

62.03 Leave to Appeal

(4) In considering whether or not to grant leave to appeal, the judge hearing the motion may consider the following:

(a) whether there is a conflicting decision by another judge or court upon a question involved in the proposed appeal;
(b) whether he or she doubts the correctness of the order or decision in question; or
(c) whether he or she considers that the proposed appeal involves matters of sufficient importance.

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

Leave to appeal

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

R.S., 1985, c. C-36, s. 13; 2002, c. 7, s. 134.

Court of appeal

14.(1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

R.S., 1985, c. C-36, s. 14; 2002, c. 7, s. 135.

11 While there is no apparent conflict between the two enactments, courts do take a different approach to their interpretation. Given the very broad language of the New Brunswick codification of the test, I will limit my assessment to the *CCAA* jurisprudence. Generally, leave to appeal in *CCAA* proceedings is granted sparingly. In *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (C.A.) (QL), Blair J.A. discussed the criteria to be applied in determining whether to grant leave to appeal under the *CCAA*. He observed as follows:

> This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services Inc. (Re)* (2002), 158 O.A.C. 30; [2002] O.J. No. 1377 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test,

namely,

> (a) whether the point on appeal is of significance to the practice;
> (b) whether the point is of significance to the action;
> (c) whether the appeal is prima facie meritorious or frivolous;
> (d) whether the appeal will unduly hinder the progress of the action.

(para. 24)

12 Similar statements of the law are found in Manitoba, Alberta and British Columbia jurisprudence, as is evident in the following excerpt from the decision of Monnin J.A. in *Re Winnipeg Motor Express Inc.* (2008), 236 Man.R. (2d) 3, [2008] M.J. No. 392 (QL), 2008 MBCA 133:

> [...] the test to be applied on a leave application under the *CCAA* is a narrow one and, as will be demonstrated, it is to be applied selectively and sparingly. Wittmann J.A. of the Alberta Court of Appeal sets out the test in *Canadian Airlines Corp., Re*, 2000 ABCA 149, 80 Alta. L.R. (3d) 213, in these words (at paras. 6-7):
>
> > The criterion to be applied in an application for leave to appeal pursuant to the *CCAA* is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: *Multitech Warehouse Direct Inc., Re* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Smoky River Coal Ltd., Re* (1999), 237 A.R. 83 (Alta. C.A.); *Blue Range Resource Corp., Re* (1999), 244 A.R. 103 (Alta. C.A.); *Blue Range Resource Corp., Re* (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Blue Range Resource Corp., Re* (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).
>
> Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C.C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p. 397:
>
> > (1) whether the point on appeal is of significance to the practice;
> > (2) whether the point raised is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
(4) whether the appeal will unduly hinder the progress of the action.

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

It is also useful to consider what was said in *Smoky River Coal* with respect to the granting of leave to appeal. We find (at paras. 61-62):

> The fact that an appeal lies only with leave of an appellate court (s. 13, *CCAA*) suggests that Parliament, mindful that *CCAA* cases often require quick decision making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases. [paras. 14-15]

13 It is against that legal backdrop that one must consider the findings of fact and the analysis undertaken by the motion judge in relation to both Breakwater and Fern Trust.

IV. Breakwater's 20% Interest in the mines

14 The motion judge concluded that Blue Note, as part of its consideration for acquiring the mines, issued to Breakwater an Unsecured Subordinated Convertible Debenture in the amount of $15 million CDN. The parties (Blue Note and Breakwater) also entered into a Marketing Agency Agreement and a Net Smelter Royalty Agreement. The debenture granted to Breakwater an option to convert the debenture into a 20% interest in the mines. On August 29, 2008 Breakwater exercised its conversion option. On September 3, 2008 Blue Note issued a press release entitled "Blue Note's Caribou has a new partner". In the press release Blue Note stated:

> Montreal, QC -- September 3, 2008 -- Blue Note Mining is pleased to report that Breakwater Resources has exercised its right pursuant to the terms of the Unsecured Subordinated Convertible Debenture issued by Blue Note dated August 1st, 2006 to convert the Debenture in exchange for a twenty percent (20%) interest in the mineral properties and mine facilities which comprise the Carbibou and Restigouche mines in New Brunswick now owned by Blue Note's subsidiary, Blue Note Caribou Mines Inc.
>
> Having the Debenture surrendered by Breakwater, Blue Note Caribou Mines and Breakwater are now contractually obligated to enter into a joint venture

TAB 3

DATE: 20011010
DOCKET: M27743

COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., FINLAYSON and AUSTIN JJ.A.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CONSUMERS PACKAGING INC., CONSUMERS INTERNATIONAL INC. and 164489 CANADA INC.

) Peter F.C. Howard, Patrick O'Kelly and
) Craig Martin, for Ardagh PLC
)
) Robert S. Harrison and Carole J. Hunter,
) for the *Ad Hoc* Noteholders Committee
)
) Daniel V. MacDonald and Paul G.
) Macdonald for Consumers Packaging
) Inc., Consumers International Inc. and
) 164489 Canada Inc.
)
) L. Joseph Latham and Elizabeth Moore,
) for the Toronto-Dominion Bank
) Syndicate
)
) Lily I. Harmer, for the United
) Steelworkers of America
)
) Marc Lavigne, for Anchor Glass
) Container Corp.
)
) Dale Denis, for Owens-Illinois, Inc.
)
) Terrence J. O'Sullivan, for KPMG Inc.
) (Court-appointed monitor)
)

) Heard: September 27, 2001

On appeal from the order of Justice James M. Farley dated August 31, 2001.

BY THE COURT:

[1] Ardagh PLC ("Ardagh"), seeks leave to appeal and if leave is granted appeals the Order of The Honourable Mr. Justice Farley dated August 31, 2001 which approved a sale of certain assets of Consumers Packaging Inc. and Consumers International Inc. and 164489 Canada Inc. (hereinafter collectively "Consumers") to Owens-Illinois, Inc. ("Owens-Illinois").

[2] Consumers had filed for protection under the *Companies' Creditors Arrangement Act* (the "CCAA") on May 23, 2001 and Farley J. made an initial order on that date approving an amendment and forbearance agreement between Consumers and its institutional lenders and arranging interim credit. KPMG Inc. was appointed Monitor under s. 11.7 of the CCAA. On June 18, 2001 Farley J. authorized Consumers through an Independent Restructuring Committee and its Chief Restructuring Officer to fix a date upon which interested third parties were to submit firm, fully financed offers to purchase all or any part of Consumers' business. Both Ardagh and Owens-Illinois participated in the bid process. The Independent Restructuring Committee, the Chief Restructuring Officer and the Monitor agreed on behalf of Consumers that Owens-Illinois was the preferred bid. On the sale approval motion heard August 31, 2001, Farley J. found as a fact that Consumers was "quite sick" and "financially fragile" and that there "exists a material risk that [Consumers] will be destabilized by a withdrawal of funding by the [consortium of lenders] which have been continuously adamant about a September 2001 deadline for pay out."

[3] On the evidence before us, the Owens-Illinois bid approved by Farley J. on August 31, 2001 was the result of a fair and open process developed by Consumers and its professional advisors and carried out, after May 23, 2001, under the supervision of the court and with the participation of Ardagh. The Owens-Illinois bid provides more cash to Consumers' creditors than a proposal from Ardagh, has the least completion risk, is not conditional on financing, is likely to close in a reasonable period of time, is made by a credible purchaser (the largest glass bottle manufacturing company in the world) and will result in the continuation of Consumers' Canadian business, the retention of a vast majority of Consumers' 2,400 Canadian employees and the assumption by the purchaser of significant obligations under Consumers' employee pension plan. It is supported by all parties before this court with the exception of Ardagh.

[4] The respondents on this motion submit that the restructuring proposals put forward by Ardagh were not backed by financing commitments, required further due diligence by Ardagh and its lenders, could not be completed in a timely way, offered less by way of recovery to Consumers' creditors and were no more than proposals to negotiate. It appears to have been the unanimous view of the Monitor, Consumers' Independent Restructuring Committee and Consumers' Chief Restructuring Officer that Ardagh's proposals were not viable and would, if pursued, result in the liquidation of Consumers, resulting in lower return to creditors, loss of jobs and cessation of business operations. This view was accepted by Farley J. who stated in his endorsement approving the Owens-Illinois bid that it was the "only presently viable option better than a liquidation with substantially reduced realization of value".

[5] In our opinion, leave to appeal should not be granted. The authorities are clear that, due to the nature of CCAA proceedings, leave to appeal from orders made in the course of such proceedings should be granted sparingly: see *Algoma Steel Inc. (Re)*, a judgment of the Ontario Court of Appeal, delivered May 25, 2001, [2001] O.J. No. 1943 at p. 3. Leave to appeal should not be granted where, as in the present case, granting leave would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders as a whole, and hence would be contrary to the spirit and objectives of the CCAA. The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA. There is a real and substantial risk that granting leave to appeal in the present case will result in significant prejudice to Consumers and its stakeholders, in light of the significant time and financial constraints currently faced by Consumers. Both Farley J. and KPMG Inc., the court-appointed Monitor in the CCAA proceedings, have concluded that the Owens-Illinois bid represents the only presently viable option available to Consumers, which would be better than a liquidation.

[6] The transactions contemplated by the Owens-Illinois bid are expected to close on September 28, 2001. If the Owens-Illinois bid does not close before the end of September, 2001, it is uncertain if, and for how long, Consumers would be able to continue its operations. The financial institutions that are prepared to finance these transactions have appeared before this court and have advised, both before and throughout the CCAA proceedings, that they will not fund the operations of Consumers beyond the end of September, the time at which Consumers' credit requirements seasonally increase on an annual basis. There is no evidence on the record, and certainly none from Ardagh, as to the manner in which the operations of Consumers would be funded until the Ardagh proposal contained in its bid, if successful, could be implemented.

[7] Further, despite its protestations to the contrary, it is evident that Ardagh is a disappointed bidder that obtained its security interest in the assets of Consumers in order to participate in their restructuring and obtain a controlling equity position in the restructured entity. There is authority from this court that an unsuccessful bidder has no standing to appeal or to seek leave to appeal. As a general rule, unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder (or to appeal from an order approving the sale) because the unsuccessful bidders "have no legal or proprietary right as technically they are not affected by the order": see the statement of Farley J., dealing with a receiver's motion to approve a sale, that is quoted with approval by O'Connor J.A. of this court in *Skyepharma plc v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 at 238 (C.A.). O'Connor J.A. went on to say at p. 242:

> There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands [of] a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

[8] The position of Ardagh is not advanced by the fact that it did not challenge the order of Farley J. of June 18, 2001 which set out the parameters for the bidding. Instead it participated in the bidding process which it now attacks as being *ultra vires* the CCAA.

[9] Finally, while we do not propose to become involved in the merits of the appeal, we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose and flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered.

[10] Accordingly, leave to appeal is refused with costs.

Released: OCT 10 2001
RRM

Signed: "R.R. McMurtry C.J.O."

TAB 4

1. DATE: 20020416
DOCKET: M28458

COURT OF APPEAL FOR ONTARIO

IN CHAMBERS

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

AND IN THE MATTER OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C.c.-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF COUNTRY STYLE FOOD SERVICES INC., COUNTRY STYLE FOOD SEVICES HOLDINGS INC., COUNTRY STYLE REALTY LIMITED, MELODY FARMS SPECIALTY FOODS AND EQUIPMENT LIMITED, BUNS MASTER BAKERY SYSTEMS INC. and BUNS MASTER BAKERY REALTY INC.

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

COUNSEL: Craig R. Colraine and Mitchell D. Goldberg for Tozeng Limited, 1124019 Ontario Ltd. and 665371 Ontario Ltd. (applicants)

Joanna Board for 1304271 Ontario Limited and 995804 Ontario Inc. (supporting the applicants)

Patrick J. O'Kelly and Ashley J. Taylor for Country Style (respondent)
Frank J.C. Newbould Q.C. for the Bank of Nova Scotia (respondent)
Mahesh Uttamchandani for CAI, DIP Lender (respondent)

HEARD: April 15, 2002

FELDMAN J.A.:

9. [8] The one issue which is not fully detailed in the Tarragon material is the national advertising fund issue. However, the information relied on in respect of the fund is contained in an affidavit of Catherine Mauro dated March 25, 2002 and filed on this application. She is the former director of marketing and product development who was terminated by Country Style on February 4, 2002. Ms Mauro also provided one of the affidavits which is included in the Tarragon material. Again, therefore, it appears that the applicants could have discovered further information from Ms. Mauro prior to the March 7 hearing had they acted with due diligence in speaking with her.

10. [9] Even more significant, however, is the fact that in his affidavit filed in connection with the original material seeking court protection, Mr. Gibbons, the President of Country Style, disclosed as part of his description of the financial status of the debtor companies that one of the historical responses by management when a franchisee developed financial difficulties was "deferring or accepting reduced royalty, advertising and/or sign rental payments for a period of time" (affidavit para. 37). This information was also included in the Management proxy circular which was sent out to all creditors, of which Mr. English was one.

11. [10] The applicants' position is that until they talked to Catherine Mauro after the sanction hearing, they did not know that some franchisees were not paying the full 3.5% of monthly gross sales to the national advertising fund, and that the 13 corporate stores, taken over from failed franchisees, paid nothing into the fund. The applicants also take the position that the company and the monitor made it impossible for the franchisees to learn of this by failing to disclose it to the franchisees. Their evidence is that representations were made to franchisees by senior management that all franchisees paid the same percentage of their sales into the national advertising fund.

12. [11] However, it appears that there was disclosure of the differential treatment of franchisees in respect of the advertising fund in Mr. Gibbons' affidavit and the Management circular. Counsel also pointed out that franchisees could ask to be added to the service list for all of the documentation and that some were added, including Ms. Board's clients who have been represented by her here in support of the application.

13. [12] I conclude, based on the material currently before the court, that it cannot be said that there was non-disclosure of the differential treatment of franchisees in respect of the contribution to the national advertising fund, or that the applicants could not have

discovered this evidence if they had exercised due diligence. Although it appears that the potential significance of the different contributions as a possible claim against Country Style based on unjust enrichment, may not have been considered by the applicants until after the sanction motion, a failure to appreciate the significance of information does not meet the due diligence test.

14. [13] Finally, the respondents point to the fact that Mr. English has deposed that in May 2000, he sought and obtained differential treatment in respect of the royalty fees he was paying and that he has been trying to retain the so-called "tiered store" status for his stores which allows them to pay lower fees. Therefore, Mr. English was aware of differentiation among franchisees in respect of some of the amounts payable to the franchiser and wanted to preserve that differentiation when it benefited him. The respondents say this shows that the new evidence should not be accepted and that furthermore, there is no merit to the suggestion that the franchisees have any claim against the debtor company based on alleged overpayments. As a result, they argue that the new evidence would not have affected the outcome of the sanction hearing had it been available at that hearing.

15. [14] I am satisfied that I need not deal with this part of the submission on this motion, as the due diligence criterion is not met.

16. [15] Even if the fresh evidence met the test for admission, which it does not on the due diligence criterion, the court must be satisfied that this is a case where leave to appeal ought to be granted. The jurisprudence in this area dictates that leave to appeal in *CCAA* proceedings should be granted sparingly: *Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 at 199 (Ont. C.A.); *Re Blue Range Resources Corp.* (1999), 12 C.B.R. 186 at 190 (Alta. C.A.). In order to grant leave the court must be satisfied that there are "serious and arguable grounds that are of real and significant interest to the parties": *Re Multitech Warehouse Direct Inc.* (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.). This is determined in accordance with a four-pronged test as follows:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is *prima facie* meritorious or frivolous;

(d) whether the appeal will unduly hinder the progress of the action.

17. See *Blue Range Resource Corp.*, *supra* at 190; *Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 201 at 202 (Ont. C.A.)

18. [16] As I understand it, the main issue on appeal is the submission that the applicant franchisees and other franchisees, some of whom have filed affidavits in support, over-contributed to the national advertising fund in relation to other franchisees and the company in connection with its corporate stores. This overcontribution entitled them to make a claim against the company for unjust enrichment. However, because they did not know about this potential claim until after the sanction hearing, they did not file claims in the process; they therefore did not have the right to participate as unsecured creditors, and they did not have the right to vote for or against the Plan.

19. [17] Counsel for the applicants concedes that there is no evidence in the record to demonstrate that had the affected franchisees made claims and voted, the Plan would have been defeated or amended in any way.

20. [18] Counsel also concedes that no alternative plan has been proferred at any stage. He suggests, however, that because of the circumstances set out, the Plan cannot be considered fair and reasonable. The Monitor has made it clear in its reports that the only alternative to the Plan is bankruptcy or receivership, whereunder there would be nothing for the unsecured creditors. Counsel suggested in argument that his clients would be prepared to see the debtor company go bankrupt rather than proceed with the sanctioned Plan. There is no affidavit evidence to this effect, and I frankly find it hard to accept that franchisees with viable operations would prefer to see the corporate entity with which they are associated be liquidated in a bankruptcy or receivership.

21. [19] Based on the record, there is nothing to suggest that the Plan as sanctioned and approved by the court is not "fair and reasonable." If leave to appeal is granted, the progress of the action will clearly be hindered and the restructuring may not go ahead at all. If the appeal were to be successful and the process reopened, the applicants do not propose any alternative to the plan, so that the significance to the action appears to be procedural but not substantive.

22. [20] For all of these reasons, the applicants have not satisfied the test for the court to exercise its discretion to grant leave to appeal.

23. [21] During argument, counsel for the applicants suggested that one of the problems facing his clients is that they owe money to the debtor company, but are not able to make a claim against the company in respect of the overpayment into the advertising fund because of the orders made in the *CCAA* process. In response, counsel for Country Style took the position that s. 18.1 of the *CCAA* preserves the applicants' ability to assert a right of set-off against the company in respect of their claims against any monies which they may owe to the company. In other words, their claims against the company are not necessarily barred.

24. [22] As this was not an issue for resolution on this leave to appeal motion, I make no comment on (1) the effect of s. 18.1 of the *CCAA* on post- Plan claims by or against the debtor company; or (2) on the effect of the claims bar order in respect of claims by people who were not listed or served as creditors in the proceeding, or people who did not know that they had claims against the company.

25. [23] Finally, I note that the franchisees as a group were not considered to be people to be officially served with and included in the *CCAA* process. I was advised by a representative of the Monitor who was present in court for this appeal, that Mr. Gibbons did send a letter to all franchisees enclosing the original stay order and advising them of the Monitor's website where much of the *CCAA* material would be posted. Although the process under the Act contemplates the participation and protection of creditors, the debtor company, and possibly the shareholders, in cases where the debtor company is a franchisor, the franchisees may have an interest in the ultimate structure of the franchise operation as proposed by the Plan process. It may therefore be appropriate where a franchisor seeks *CCAA* protection, to consider whether the franchisees ought to be given notice of the proceedings and the opportunity to request the ability to participate on an appropriate basis.

CONCLUSION

26. [24] Leave to appeal is denied.

Signed: "K. Feldman J.A."

TAB 5

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Houweling Nurseries Ltd. v. Amethyst Greenhouses et al,*** 2003 BCCA 347

Date: 20030516

Docket: CA030795

Between:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

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

And

IN THE MATTER OF *THE COMPANY ACT*, R.S.B.C.

1996, C. 62

And

IN THE MATTER OF HOUWELING NURSERIES LTD.
And
HNL HOLDINGS

Respondents

(Petitioners)

And

Amethyst Greenhouses Ltd. and Paul Houweling

Appellants

(Respondents)

Before: The Honourable Chief Justice Finch
(In Chambers)

Oral Reasons for Judgment

Appellant P. Houweling
appearing in person

R.A. Millar
Place and Date:

Counsel for the Respondent
Vancouver, British Columbia
May 16, 2003

[1] **FINCH, C.J.B.C.**: This is an application by Amethyst Greenhouses Ltd. and by Mr. Paul Houweling for directions. As I understand the material put before me and the submissions made by Mr. Houweling on his own behalf and on behalf of Amethyst and the submissions of counsel for the petitioners, what is really sought is an order for leave to appeal orders that were made in these proceedings under the ***Company's Creditors Arrangement Act***. The order of 13 March 2003 approves a plan presented by the petitioners under the provisions of that ***Act***. The Plan presented had the required agreements or consents of the creditors.

[2] The petitioners sought an order at the time the plan was presented declaring that the proof of claim filed by Amethyst be declared invalid for voting and distribution purposes.

[3] The order which he seeks to appeal is this:

> THIS COURT FURTHER DECLARES that:
>
> (a) the Plan has been agreed to by the requisite percentages of General Creditors in the General Creditors Class created under the Plan in conformity with section 6 of the CCAA;
>
> (b) the amendment to the Plan set forth in Schedule "B" is approved; and
> (c) The Proof of Claim filed by Amethyst Greenhouses Ltd. in the sum of $32,500,000 is null and void both for voting and distribution purposes under the Plan.

[4] Today, in addition to the claim of Amethyst in the sum of $32 million, rejected by the order, Mr. Houweling also presents a personal claim which he says is in the amount of $1.4 million.

[5] I do not think it will be useful to attempt to record the full history of proceedings that led to this Plan being presented for approval. Two subsequent orders were made; one on 4 April 2003 amending the plan of arrangement by amending the definition of "effective date" from April 4,

2003 to April 30, 2003. A further order was made by the learned chambers judge on 16 April 2003 in these terms:

> THIS COURT ORDERS that:
>
> 1. the appeal of Paul Houweling from the disallowance of his Proof of Claim filed herein be and hereby is dismissed.

[6] I had some difficulty in telling from Mr. Houweling's submission which of these various orders leave is sought to appeal against, but for the purposes of these reasons I will treat the applicant's request as one for an order granting leave to appeal in respect of all three of the orders to which I have referred. The petitioner opposes the leave application on the basis that the application is out of time with respect to the first two orders, and that there is no merit to the proposed appeal against the third order.

[7] Section 14(2) of the ***Companies Creditors Arrangement Act*** provides that:

> …no appeal shall be entertained unless within 21 days after the rendering of the order or decision being appealed or within such further time as to the court appealed from… allows, the appellant has taken proceedings therein to perfect his appeal…

[8] This provision has been construed to mean not that the leave application must be heard within 21 days but that the appellant must have taken some proceedings to have such an application heard: see ***Re Westar Mining Ltd.*** (1993), 75 B.C.L.R. (2d) 16 (C.A.). In this case, Mr. Houweling's and Amethyst Greenhouse's notice of appeal, which for these purposes I treat as a notice of application for leave to appeal, was filed on 5 May 2003, the same day on which they filed their notice of motion for "directions".

[9] It appears, therefore, that the provisions of s. 14(2) of the ***Act*** have not been complied with in respect of the orders made on 13 March 2003 and 4 April 2003. The application in respect of those two orders must therefore

be dismissed on the basis that it is not brought within the time provided under the ***Act***.

[10] With respect to the order of 16 April 2003 one must keep in mind that leave to appeal in ***C.C.A.*** proceedings is granted sparingly. For leave to be granted, the Court must be satisfied that there are serious and arguable grounds that are of real and significant interest to the parties, and that any appeal proceedings will not unduly delay the balance of the proceedings: see ***Re Quinsam Coal Corp*** (2000), 20 C.B.R. (4th) 145 (B.C.C.A.).

[11] The factors to consider on the issue of whether there is sufficient merit include whether the point on appeal is of significance to the practice, whether the point on appeal is of significance to the action, whether there is *prima facia* merit to the appeal, and whether the appeal will unduly hinder the progress of the action.

[12] In general, a higher threshold must be met before leave to appeal is granted in ***C.C.A.*** proceedings than in other cases, in order to justify the delay and other prejudicial effects on the proposed arrangements that would result from the commencement of an appeal. For that reason this Court is reluctant to alter the balance of interests that the chambers judge has attempted to address in making an order to meet the objectives of the ***Act***.

[13] I must say that I have been unable to detect or identify any error of law or of principle or any misapprehension of fact or any issue which would give rise to an arguable appeal on behalf of either Mr. Houweling or Amethyst.

[14] In my respectful view, there is no merit to the appeal sought to be launched against the order of April 16. I may say as well that I can see no merit to any appeal against the earlier two orders, even if the application in respect of those orders had been brought within the time limited. In addition, it is clear to me that an appeal against any of these orders would hinder unduly the progress of proceedings under the C.C.R.A. plan.

[15] For those reasons the application for leave to appeal is dismissed.

TAB 6

Indexed as:

MacDonald v. Montreal (City)

Duncan Cross MacDonald, appellant;
and
City of Montreal, respondent;
and
The Attorney General of Canada, the Attorney General of Quebec, the Société franco-manitobaine and Alliance-Quebec, Alliance for Language Communities in Quebec, interveners.

[1986] 1 S.C.R. 460

[1986] S.C.J. No. 28

File No.: 17528.

Supreme Court of Canada

1984: December 18, 19 / 1986: May 1.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Appeal -- Jurisdiction of Supreme Court of Canada -- Leave to appeal refused by Court of Appeal -- Whether leave to appeal to Supreme Court of Canada may be granted by the Supreme Court -- Supreme Court of Canada Act, R.S.C. 1970, c. S-19, s. 41(1).

Constitutional law -- Language rights -- Court proceedings -- English-speaking person in Quebec given summons for traffic violation in French only -- Whether summonses emanating from Quebec courts constitutionally valid if issued in one or other of the official languages -- Constitution Act, 1867, s. 133.

Appearing before the Municipal Court of the City of Montréal to answer a charge of violating a

139 The threshold issue the Court must confront on this appeal is the Court's capacity to review the decision of a provincial appellate court not to grant leave to appeal from a judgment at trial. In Ernewein v. Minister of Employment and Immigration, [1980] 1 S.C.R. 639, the majority of this Court held that the Supreme Court of Canada has no power under s. 31(3) of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, to review a decision of the Federal Court of Appeal denying leave to appeal from a decision of the Immigration Appeal Board. Laskin C.J.C. interpreted the stipulation in s. 31(3) that "[a]n appeal lies to the Supreme Court from a final or other judgment or determination of the Federal Court of Appeal" as restricting the Supreme Court of Canada's jurisdiction to entertain appeals to cases in which the Federal Court of Appeal either pronounced on the merits of the appeal or, at a minimum, rendered judgment in an interlocutory matter. Such a restriction would, in Laskin C.J.'s view, imbue the words "final or other judgment or determination" in s. 31(3) with a meaningful subject-matter "without including cases in which the intermediate appellate court has refused to entertain an appeal altogether by refusing required leave" [page507] (p. 646). Having so concluded, he then went on to add that this reasoning was equally applicable under s. 41(1) of the Supreme Court Act, R.S.C. 1970, c. S-19, to cases in which a provincial court of appeal had refused to grant required leave. And, indeed, the reasoning in Ernewein was in fact applied under s. 41(1) in Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1981] 1 S.C.R. 92.

140 If taken literally, the interpretation put upon s. 41(1) of the Supreme Court Act in Ernewein and Nicholson provides a complete answer to the present appeal; that is to say, the appeal would have to be dismissed as this Court would have no jurisdiction either to entertain the merits of the case or to review the Quebec Court of Appeal's exercise of discretion in refusing to grant leave. I cannot accept that interpretation of s. 41(1). This is not to say that Laskin C.J.'s reasoning in Ernewein was not based upon sound principles of deference to judicial decisions rendered in exercise of a discretionary power. It clearly was. Where an appellate court is provided with the statutory authority to control its own docket through the leave granting process and its discretion is exercised in a judicial manner, an attitude of deference towards its decisions is entirely appropriate. As Laskin C.J. stated at pp. 646-47:

> There are so many considerations that enter into a refusal to give leave as to make the matter one peculiarly for the experienced judgment of the Court from which leave is sought.
>
> . . .
>
> It is my view that considerations of judicial comity should operate in this respect, and I do not think they should depend on whether or not reasons are given for refusing to hear an appeal.

It is, however, a quantum leap to go from a posture of deference and "judicial comity" to an absolute abrogation of this Court's jurisdiction to exercise its general supervisory power over the

[page508] courts below. Such an interpretation takes a sound legislative policy and well-founded principles of judicial review and stretches them to an extreme which is, in my view, impossible to support in view of the statutory language in issue.

141 Under s. 41(1) of the Supreme Court Act this Court retains the discretionary power to interfere with any final or other judgment of the intermediate appellate courts which raises an issue of national importance. This discretion is itself broadly phrased so as to include any case with respect to which "... the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it ...". While a certain amount of deference to the undoubted competence of intermediate appellate courts to control their own leave granting process is called for, it is equally evident that this Court's jurisdiction to exercise its own discretion in intervening in such decisions is not statutorily confined.

142 The proposition that under s. 41(1) the Court has jurisdiction to intervene even in the case of discretionary decisions of intermediate appellate courts is supported by other provisions of the Supreme Court Act. Section 44, for example, provides that the Court has no power to hear an appeal from a judgment or order made in the exercise of judicial discretion except where leave to appeal is granted by this Court pursuant to s. 41 of the Act. The section 44 restriction on the Court's power would clearly apply to appeals arising under s. 38 of the Act, i.e., where a provincial court of appeal had granted leave to appeal to the Supreme Court of Canada. It would also apply to appeals arising under s. 39 of the Act, i.e., where the parties have agreed to appeal a judgment of a lower court directly to the Supreme Court of Canada instead of to the Provincial Court of Appeal. Accordingly, in the less usual situations in which leave to appeal to this Court is not granted by a panel of this Court, the statutory [page509] jurisdiction excludes appeals from the exercise of judicial discretion. On the other hand, the explicit exception of s. 41 from the s. 44 restriction serves to indicate that where the route to this Court is the more usual one, i.e., where leave to appeal is granted by this Court itself, its jurisdiction is not restricted to non-discretionary decisions. Rather, under s. 41 of the Act the Court's jurisdiction is confined only by its own exercise of discretion in determining which decisions of an intermediate appellate court are of sufficient national importance to warrant a grant of leave.

143 It was stated in R. v. Gardiner, [1982] 2 S.C.R. 368, that while there are many instances in which this Court is justifiably reluctant to intervene in decisions of the courts below, it is incorrect to confuse this attitude of reluctance with lack of jurisdiction. Dickson J. (as he then was) came to his conclusion as to the broad ambit of the Court's jurisdiction after a thorough survey of its history and a consequent appreciation of its expanded role and increased significance since the days when most appeals were as of right and the Supreme Court of Canada was itself an intermediate appellate court. Given this expansion, the broadly phrased statutory language in which the Court's jurisdiction was framed, and the role of the Court as the ultimate appellate tribunal, he concluded that in the absence of any irrefutable indication to the contrary, the Court's jurisdiction should not be

restrictively construed. He said at p. 397:

> The function of this Court is ... to settle questions of law of national importance in the interests of promoting uniformity in the application of the law across the country, especially with respect to matters of federal competence. To decline jurisdiction is to renounce the paramount responsibility of an ultimate appellate court with national authority.

[page510]

144 This line of reasoning is, of course, all the more pertinent where the issue at stake is one of constitutional law. To quote from the reasons of Pigeon J. in dissent in Ernewein at p. 668:

> In my view it is important for this Court in the discharge of its general duty of ultimate supervision over the application of the law throughout Canada, to avoid putting any important question of law beyond any possibility of review.

145 Section 133 of the Constitution Act, 1867 is a provision of the utmost significance to members of the minority language group in Quebec and elsewhere in Canada. It has an impact not only on the rights of individuals when they confront the judicial branch of the state but also on the status generally of Canada's two official languages. The national importance of such an issue would be hard to gainsay as would also the appropriateness of this issue's being considered in the nation's highest court. Indeed, given the recently expanded role of the Court in constitutional review under the Constitution Act, 1982, a broad view of the Court's jurisdiction would seem to be essential. Accordingly, s. 41(1) of the Supreme Court Act (and its cognate in s. 31(3) of the Federal Court Act), in its conferring of jurisdiction on the Court to review "any final or other judgment" of a court below, must be given a large and liberal interpretation. While the Court should maintain an attitude of deference to the exercise of judicial discretion by intermediate appellate courts, it undoubtedly has the jurisdiction and should not hesitate to interfere with discretionary decisions on those rare occasions when it perceives legal principles of national, and more particularly constitutional, significance to be at stake. To the extent that the Court's earlier decisions in Ernewein and Nicholson are inconsistent with this view, I would respectfully suggest that they should not be followed.

146 It is important to note that the right of appeal from the decision of any court on a summary conviction offence, such as the one with which we are concerned on this appeal, is statutory. Likewise, [page511] the corollary power of the appellate court to grant or deny leave as it sees fit: see R. v. Joseph (1900), 6 C.C.C. 144 (Que. Q.B.). In the present case the appellant's application for leave to appeal to the Quebec Court of Appeal was brought under s. 108 of the Summary Convictions Act, R.S.Q. 1977, c. P-15, which provides:

> 108. An appeal lies to the Court of Appeal, with leave of that court or of a judge of that court, from any judgment of the Superior Court rendered under the authority of this act, if the party making the application shows a sufficient interest to warrant decision on a question of law only.

It is this statutory provision which establishes and delineates the scope of the Quebec Court of Appeal's power to grant or deny leave to appeal. Once the applicant establishes that he has a sufficient interest in the case and is raising a question of law alone, the court's discretion is triggered and it is unfettered by any statutory restrictions. It is quite evident that the appellant, as an accused person in a summary conviction offence, can meet the first requirement. Moreover, he admits all the facts alleged against him. Accordingly, his constitutional challenge to Quebec's unilingual court summons arises as a question of law alone. While no reasons were given for rejecting the application (it not being the practice to give reasons) it may be safely assumed that the Court was of the view that it had already taken a position on the issue raised by the proposed appeal in rejecting an application for leave to appeal in Walsh v. Ville de Montréal, C.A. Mtl., November 10, 1980 (unreported). Montgomery J.A. endorsed the record on the Walsh application as follows:

> [TRANSLATION] Application dismissed with costs fixed at $50.00, the whole for the reasons given by Hugessen C.J.

Little would have been achieved therefore by the Quebec Court of Appeal's granting leave in the instant case. It had already adopted the reasons of Hugessen A.C.J. in Walsh, supra.

[page512]

147 It is of some interest to note that the Quebec Court of Appeal, in disposing of the application in Walsh, elected to dismiss the application for leave for the reasons given by Hugessen A.C.J. rather than granting the application and dismissing the appeal for the reasons given by the Associate Chief Justice. The latter method of procedure avoids the Ernewein problem entirely and is, in my view, to be preferred where in denying leave the Court has in fact considered the substantive issue and it is its decision on the substantive issue which has caused it to dismiss the application.

148 Given then that McCarthy J.A. acted within the bounds of his discretion in denying leave in this case, the Court is squarely confronted with the tension which unquestionably exists between the Ernewein principle and the Court's very broad jurisdiction under the Supreme Court Act. Section 41(1) requires the Court to function in an ultimate supervisory capacity with respect to questions of national public importance while Ernewein contemplates an attitude of deference toward judicial decisions validly taken by the court below in exercise of a statutory discretion. The broad terms in which the Court's role is expressed in s. 41(1), however, serve to indicate that the principle of deference underlying Ernewein should not be seen as requiring the Court to abdicate its supervisory role by denying itself jurisdiction in a case of major constitutional importance such as the one

TAB 7

Case Name:

Muscletech Research and Development Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. c-36, as amended AND IN THE MATTER OF Muscletech Research and Development Inc. and those entities listed on Schedule "A" to the Notice of Appeal

[2006] O.J. No. 4583

Docket: M34242-C46020

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, S.T. Goudge and R.J. Sharpe JJ.A.

Heard: October 24, 2006.
Oral judgment: October 24, 2006.

(12 paras.)

Civil procedure -- Parties -- Class or representative actions -- Representative plaintiff -- Application by proposed representative plaintiffs for leave to appeal from order in proceedings under Companies' Creditors Arrangement Act dismissed -- Forum of future class action, lack of individual claims, and failure to meet claims bar date were relevant considerations for motions judge in coming to decision on order.

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Application by proposed representative plaintiffs for leave to appeal from order in proceedings under Companies' Creditors Arrangement Act dismissed -- Failure to meet claims bar date was a relevant consideration for motions judge in coming to decision on order.

International law and conflict of laws -- Jurisdiction -- Forum conveniens -- Application by proposed representative plaintiffs for leave to appeal from order in proceedings under Companies' Creditors Arrangement Act dismissed -- Forum of future class action valid consideration for motions judge in coming to decision on order.

Application by proposed representative plaintiffs for leave to appeal from a motion judge's order in proceedings under the Companies' Creditors Arrangement Act. The motions judge found it was not an appropriate case to exercise her discretion to certify a proposed class action proceeding. She took into account the fact that any motion to certify the proceedings would have to take place in the United States, not in Canada, in refusing the applicants the relief they requested. The judge also considered the absence of any individual claims from those whom the applicants sought to represent. The judge noted the applicants' failure to apply for the order before the claims bar date.

HELD: Application dismissed. The forum in which any future class certification proceedings might occur was a relevant consideration in the broader assessment of the nature and extent to which the ongoing proceedings under the Act could be delayed or lengthened. The lack of individual claims and the failure to meet the claims bar date were also relevant considerations.

Statutes, Regulations and Rules Cited:

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

Counsel:

Kevin McElcheran for the applicants/appellants

Fred Myers and David Bish for the respondent Muscletech

Alan Mark for the respondent Iovate Companies

Sean Campbell for the respondent Richter (Monitor)

ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):-- This is an application for leave to appeal and if leave is granted, an appeal from an order made by the motion judge in ongoing proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). The motion for leave and the appeal itself were ordered heard together by Borins J.A.

2 It is well established that leave to appeal from orders made in ongoing *CCAA* proceedings will be granted "sparingly". This is particularly true where the order under attack is a discretionary order: see *Re Stelco Inc.* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.).

3 Counsel for the applicants/appellants accepts, correctly in our view, that the order under appeal was made in the exercise of the motion judge's discretion under the *CCAA*. Counsel argues that the motion judge erred in the exercise of her discretion by taking into account two irrelevant considerations and by giving undue weight to a relevant consideration.

4 The respondents concede that the relief sought by the applicants/appellants before the motion judge was available under the *CCAA* and that in an appropriate case, the order sought could have been made. They argue that the motion judge found that this was not an appropriate case for the order sought and that there is no reason to doubt the exercise of that discretion.

5 The arguments advanced by counsel demonstrate the very fact-specific nature of the motion judge's exercise of her discretion. Her order is very much a product of her assessment of the fact situation before her. It does not purport to determine any legal issues of significance outside of the factual corners of this proceeding.

6 The applicants/appellants argue that the motion judge should not have taken into consideration the fact that any motion to certify the proposed class action proceedings would have to take place in the United States and not in Canada. Counsel submits that the location of the proceeding is irrelevant. In our view, the forum in which any future class certification proceedings might occur was relevant as one factor in the broader assessment of the nature and extent to which the ongoing *CCAA* proceedings could be delayed or lengthened were the applicants/appellants allowed leave to file a representative claim on behalf of the as yet uncertified classes. The impact of the requested order on the *CCAA* proceedings is clearly a relevant consideration.

7 The applicants/appellants next submit that the motion judge was wrong to take into consideration the absence of any individual claims in the *CCAA* proceedings by those individuals who are part of the groups on whose behalf the applicants/appellants seek to advance a representative claim. Given the nature of the individual claims underlying the proposed class action, we think that it was open to the motion judge to view the absence of any individual claims as suggesting that these claims were neither strong nor financially significant. The nature of the proposed claims is clearly a relevant consideration in the exercise of the motion judge's discretion.

8 Finally, the applicants/appellants submit that the motion judge gave undue weight to the applicant/appellant's failure to apply for the order before the claims bar date set out in the earlier order of Farley J. The essence of the motion judge's reasoning is found at paras. 42-44 of her reasons:

> [H]ere, a structure was established by court order, on notice to the very parties who now wish to alter the process fundamentally, after all stakeholders have relied on the structure that was established.
>
> [43] Changing and increasing the landscape of claimants after the settlement of

TAB 8

DATE OF RELEASE:
November 4, 1992

No. CA016047
Vancouver Registry

COURT OF APPEAL FOR BRITISH COLUMBIA

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE
MR. JUSTICE MACFARLANE
IN CHAMBERS

Vancouver, B.C.

October 22, 1992

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

AND:

IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1979, C.59

AND:

IN THE MATTER OF PACIFIC NATIONAL LEASE HOLDING CORPORATION, PACIFIC NATIONAL FINANCIAL CORPORATION, PACIFIC NATIONAL LEASING CORPORATION, PACIFIC NATIONAL VEHICLE LEASING CORPORATION, SOUTHBOROUGH HOLDINGS INC. and PAC NAT EQUITIES CORPORATION

PETITIONERS

H.C. Ritchie Clark and
D.D. Nugent
W.E.J. Skelly
M.P. Carroll
W.C. Kaplan
H.W. Veenstra

counsel for the petitioners (appellants)
Sun Life Trust Company
Mutual Life Assurance Company of Canada
Commcorp Financial Services Inc.
and National Trust
National Bank of Canada

26 It appears to me that an order which treats creditors alike is in accord with the purpose of the C.C.A.A. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the C.C.A.A. is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a re-organization is being attempted.

27 So far as the directors and officers are concerned, they were personally liable for potential claims under the ***Employment Standards Act*** before July 22. Nothing has changed. No authority has been cited to show that the directors and officers have a preferred right over other potential creditors.

28 This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in ***Chef Ready Foods Ltd.*** Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served.

29 In this case Mr. Justice Brenner reviewed the evidence and made certain findings of fact. He concluded that it would be an unacceptable alteration of the status quo for the petitioners to make statutory severance payments or to authorize a fund out of the companies' operating revenues for that purpose. He also found that there was no evidence before him that the petitioners' operation will be impaired if terminated employees do not receive severance pay and instead become creditors of the company. He said that there was no evidence that the directors and officers will resign and be unavailable to assist the company in its organization plans.

30 Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

31 A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than

a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

32 Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

33 In all the circumstances I would refuse leave to appeal.

"A.B.M. JA"

October 28, 1992
Victoria, B.C.

TAB 9

** Preliminary Version **

Case Name:

R. v. Shea

Her Majesty The Queen, Applicant;
v.
Thomas Robert Shea, Respondent.

[2010] S.C.J. No. 26

[2010] A.C.S. no 26

2010 SCC 26

[2010] 2 S.C.R. 17

[2010] 2 R.C.S. 17

403 N.R. 372

EYB 2010-176709

257 C.C.C. (3d) 287

321 D.L.R. (4th) 610

2011EXP-133

J.E. 2011-64

File No.: 33466.

Supreme Court of Canada

Judgment: July 15, 2010.

Present: LeBel, Deschamps and Cromwell JJ.

> Any doubt on the issue of jurisdiction is, in my view, resolved by MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, where, as here, the Court of Appeal refused to grant leave to appeal. Although dissenting on the constitutional issue involved, Wilson J. spoke on the issue of jurisdiction at p. 508:
>
> > Under s. 41(1) of the Supreme Court Act [now s. 40(1)] this Court retains the discretionary power to interfere with any final or other judgment of the intermediate appellate courts which raises an issue of national importance. This discretion is itself broadly phrased so as to include any case with respect to which "... the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it ... ." While a certain amount of deference to the undoubted competence of intermediate appellate courts to control their own leave granting process is called for, it is equally evident that this Court's jurisdiction to exercise its own discretion in intervening in such decisions is not statutorily confined. [Emphasis added.]

10 In 1995, the Court considered R. v. Hinse, [1995] 4 S.C.R. 597. In that case, the Court of Appeal set aside the appellant's conviction but rather than ordering a new trial, it entered a stay of proceedings. Unhappy with the lack of finality and statement of innocence, the appellant wished to appeal the order of stay of proceedings to this Court. Initially, this Court refused leave to appeal but reconsidered its decision and in doing so, discussed the jurisdiction of the Court as found in s. 40(1). The Court noted the concern that an appellate court, in making an order pursuant to s. 686(8) of the Criminal Code, could overstep its own jurisdiction and make an order in direct contradiction of the underlying judgment. It expressed the need for a broad and liberal interpretation of s. 40(1), stating at paras. 34-35:

> Given this troubling concern, I am inclined to adopt a more generous interpretation of s. 40(1) (and a correspondingly more narrow interpretation of s. 40(3)) which would facilitate this Court's supervisory role in ensuring the underlying consistency of appellate court orders rendered under the procedural regime of the Criminal Code.
>
> For all the foregoing reasons, I am persuaded that an accused or the Crown ought to be permitted to independently seek leave to appeal the legality of an order rendered under s. 686(8) as a "final or other judgment ... of the highest

> court of final resort in a province" under this Court's general jurisdiction under s. 40(1) of the Supreme Court Act.

11 I conclude my review of the cases with R. v. Mentuck, 2001 SCC 76, [2001] 3 S.C.R. 442. Although this case involved a publication ban, the Court made a general comment regarding its jurisdiction under s. 40(1) at para. 20:

> The Supreme Court Act was passed to allow this Court to serve as a "general court of appeal for Canada", and s. 40 must be read in light of the purpose of the Court's enabling legislation. Unless the Court is specifically prohibited from entertaining appeals by s. 40(3) of the Act, it may grant leave to hear any appeal from the decision of any "court of final resort" in Canada. Parliament has seen fit to provide generally for rational routes of appeal in criminal cases. In these cases, we cannot take jurisdiction, nor would we wish to. But a purposive approach to s. 40 requires the Court to take jurisdiction where no other appellate court can do so, unless an explicit provision bars all appeals. Section 40(1) ensures that even though specific legislative provisions on jurisdiction are lacking, this Court may fill the void until Parliament devises a satisfactory solution. [Emphasis added.]

12 I conclude that under s. 40(1) of the Act, the Court has jurisdiction to grant leave to appeal from an order "of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case" refusing or granting an extension of time to an appellant in an indictable appeal and that the order from which leave to appeal is sought is such an order. However, I would emphasize that the existence of this jurisdiction does not in any way alter the test applicable under s. 40(1), namely that the question "is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reasons, of such a nature or significance as to warrant decision by it". It seems to me that only in very rare circumstances would a proposed appeal from an order granting an extension of time for appealing meet this test.

13 While I would affirm the Court's jurisdiction to grant leave, I would dismiss the application for leave to appeal without costs.

cp/e/qlecl/qlcal/qlced/qlcas/qlhcs/qlhcs/qlhcs

TAB 10

Citation: Totalline Transport Inc. v. Winnipeg Motor Express Inc. et al., 2008 MBCA 133

Date: 20081121
Docket: AI08-30-07003

IN THE COURT OF APPEAL OF MANITOBA

	J. S. Kennedy *and*
	S. A. Zinchuk
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED	*for Totalline Transport Inc.*
	G. B. Taylor
	for Winnipeg Motor Express Inc.
	H. G. Chaiton
	for Heller Financial Canada Holding Company
AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD., AND 5273634 MANITOBA LTD.	***D. G. Ward, Q.C.*** *for Business Development Bank of Canada*
	Chambers motion heard: ***October 30, 2008***
	Decision pronounced: ***November 21, 2008***

MONNIN J.A.

1 This is an application seeking leave to appeal from an order made under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the *CCAA*).

2 Winnipeg Motor Express Inc. (WME) and its related companies, as set out in the style of cause, operated a truck transportation business out of Winnipeg. On May 15, 2008, WME came under the protection of the

> Agreement, properly the property of W.M.E. and thus is a matter within the scope of these proceedings. It must be paid by Totalline, and I am making an order to that effect.

12 Totalline now seeks to appeal the decision of the motions judge, alleging that she made two errors in disposing of the matter. Firstly, Totalline argues that the motions judge lacked jurisdiction to hear the motion because it was not a matter involving the company under *CCAA* protection –WME – but a dispute between two creditors – Totalline and Heller –unrelated to any *CCAA* plan of reorganization. Secondly, if the motions judge had jurisdiction to hear the matter, Totalline argues that she erred in the proper application of summary judgment principles.

13 Prior to dealing with the merits of the leave application itself, it is useful to briefly review the underlying principles of the *CCAA*. Such guidance can be found in the Alberta Court of Appeal decision of *Smoky River Coal Ltd. (Re)*, 1999 ABCA 179, 175 D.L.R. (4th) 703. Writing for the court, Hunt J.A. said (at paras. 51-53):

> This interpretation is supported by the legislative objectives underlying the *CCAA*. The purpose of the *CCAA* and the proper approach to its interpretation have been described as follows:
>
> > The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order [*sic*] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. [*Per* Farley J. in *Lehndorff General*

> *Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Ct. (Gen. Div.)) at 31.]
>
> As has been noted often, the *CCAA* was enacted by Parliament in 1933 during the height of the Depression. At that time, corporate insolvency led almost inevitably to liquidation because that was the only option available under legislation such as the *Bankruptcy Act*, R.S.C. 1927, c. 11, and the *Winding-Up Act*, R.S.C. 1927, c. 213. In the result, shareholder equity was destroyed, creditors received very little, and the social evil of unemployment was exacerbated. The *CCAA* was intended to provide a means of enabling the insolvent company to remain in business: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.); *Quintette Coal*, [(1991), 7 C.B.R. (3d) 165 (B.C.S.C.)].
>
> The courts have underscored that the *CCAA* requires account to be taken of a number of diverse societal interests. Obviously, the *CCAA* is designed to "provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both": *Lehndorff General Partner Ltd. (Re)*, *supra*, at 31. It is intended to "prevent any manoeuvers for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed": *Meridian*, [(1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.)], at 114. But the *CCAA* also serves the interests of a broad constituency of investors, creditors and employees: *Chef Ready*, *supra*, at 320; *Quintette Coal*, *supra*, at 314. These statements about the goals and operation of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

14 Within the general context just described, the test to be applied on a leave application under the *CCAA* is a narrow one and, as will be demonstrated, it is to be applied selectively and sparingly. Wittmann J.A. of the Alberta Court of Appeal sets out the test in *Canadian Airlines Corp., Re*, 2000 ABCA 149, 80 Alta. L.R. (3d) 213, in these words (at paras. 6-7):

> The criterion to be applied in an application for leave to appeal pursuant to the *CCAA* is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: *Multitech Warehouse Direct Inc., Re* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Smoky River Coal*

Ltd., Re (1999), 237 A.R. 83 (Alta. C.A.); *Blue Range Resource Corp., Re* (1999), 244 A.R. 103 (Alta. C.A.); *Blue Range Resource Corp., Re* (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Blue Range Resource Corp., Re* (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).

Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C.C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p. 397:

> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

15 It is also useful to consider what was said in *Smoky River Coal* with respect to the granting of leave to appeal. We find (at paras. 61-62):

The fact that an appeal lies only with leave of an appellate court (s. 13, *CCAA*) suggests that Parliament, mindful that *CCAA* cases often require quick decision making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

A similar opinion was expressed by Macfarlane J.A. in *Pacific National Lease Holding Corp. (Re)* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.). In considering whether to grant leave to appeal, he observed at 272:

> ... I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made.

. . . . .

> Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A.

16 As set out earlier in these reasons, Totalline argues that the motions judge lacked jurisdiction to grant the order that she did because, in doing so, she exceeded the jurisdiction that the *CCAA* provided. Totalline argues that the matter in dispute is unrelated to the *CCAA* proceedings with respect to WME and is in fact a separate application between two creditors.

17 In order to be successful on its application, Totalline must convince me that in fact the two parties to the motion, namely Heller and Totalline, are unrelated to the *CCAA* proceedings and that what the motions judge found to be receivables were not the property of WME, but of Heller as the assignee of WME's book debts. This Totalline was not able to achieve.

18 Based on the consents of both the Monitor and WME, I have little difficulty in disposing of the argument that the Totalline advances were an issue of dispute between two creditors. To the contrary, it is clear and unarguable that Heller was proceeding on behalf of WME and was standing in its stead. In reality, the application dealt with a dispute between WME and Totalline. There is little merit to this argument; if permitted to be argued on appeal it would add very little of significance to the practice in *CCAA* proceedings.

19 I reach the same conclusion with respect to the ownership of the receivables. Heller had a security interest in those receivables, but never