Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

BOOK OF AUTHORITIES OF THE QUEBEC CLASS ACTION PLAINTIFFS

(Re: JTIM, JTI-TM and RBH Objections to the Sanction Orders Returnable commencing January 29-31, 2025)

January 27, 2025

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TO: **THE COMMON SERVICE LIST**

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Ontario Supreme Court
Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re,
Date: 2000-09-14

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

In the Matter of a Plan of Compromise or Arrangement of the Canadian Red Cross Society/La Société Canadienne de la Croix Rouge, Applicant

Ontario Superior Court of Justice Blair J.

Heard: September 12, 2000

Judgment: September 14, 2000

Docket: 98-CL-002970

Benjamin Zarnett, Brian Empey and Jessica Kimmel, for Canadian Red Cross.

James H. Grout and Scott Bomhof, for Monitor, Ernest & Young.

David Harvey and Aubrey Kauffman, Representative Counsel for pre-1986/post 1990 Hepatitis C Claimants (non-B.C. and non-Quebec).

David Klein and Gary Smith, Representative Counsel for B.C. pre-1986/post 1990 Hepatitis C Claimants.

Dawna Ring, Representative Counsel for Secondarily Infected Spouses and Children.

Kenneth Arenson, for various HIV Directly Infected Claimants.

Michel Bélanger, for Quebec Class Action Claimants.

Paul Vickery, for Government of Canada.

William V. Sasso, for Provincial and Territorial Governments except Ontario.

Richard Horak, for Government of Ontario.

S. John Page, for Canadian Blood Services.

Michael Kainer, for Service Employees Union.

Neil Saxe, for Dominion of Canada General Insurance Company.

Michael Babcock, for Defendant, Hospitals.

Mary M. Thomson, for Certain Physicians.

Alex MacFarlane, for Connaught Laboratories Limited.

***Blair J.*:**

[1] After two years of intense and complex negotiations, the Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge applies for approval and sanction of its Plan of Compromise and Arrangement, as amended ("the Plan"). The application is made pursuant to section 6 of the *Companies' Creditors Arrangement Act* (the "CCAA"). The Plan was approved by an overwhelming majority of all classes of creditors on August 30, 2000.

Background

[2] All insolvency re-organizations involve unfortunate situations, both from personal and monetary perspectives. Many which make their way through the courts have implications beyond simply the resolution of the debt structure between corporate debtor and creditors. They touch the lives of employees. They have an impact on the continued success of others who do business with the debtor company. Occasionally, they affect the fabric of a community itself. None, however, has been characterized by the deep human and, indeed, institutional tragedy which has given rise to the restructuring of the Canadian Red Cross (the "Red Cross" or the "Society").

[3] The Canadian Red Cross has been an institutional icon in the lives of Canadians for many years. As the Court noted in its endorsement at the time of the original Order granting the Society the protection of the CCAA:

> Until recent years it would have been difficult to imagine a not-for-profit charitable organisation with a more highly regarded profile than the Canadian Red Cross Society. Who among us has not benefited in some way, does not know someone who has benefited in some way, or is at least unaware of the wide-ranging humanitarian services it provides, nationally and internationally? It aids victims of conflicts or disasters—providing assistance to refugees from the conflict in Rwanda, or programs for relief and health care and emergency training in places like Angola, Haiti, and Russia, and working with communities in Quebec and Manitoba in recent years as a result of flood disasters and ice storms, as but some examples. It furnishes water safety programs and first aid services, homemaker services and other community initiatives across Canada. And it has been responsible for the national blood program in Canada for the past 50 years,

recruiting donors and collecting, testing, processing, storing and distributing blood products for the collective Canadian need.

[4] Regrettably, however, that honourable tradition and the reputation which has accompanied it, have been badly sullied in recent years. Thousands of innocent Canadians have found themselves indicted with devastating disease—Hepatitis C, HIV, and Creutzfeld Jakob disease, principally—arising from the transfusion of contaminated blood or blood products, for the supply of which the Red Cross was responsible. I shall refer to these affected people, globally, as “the Transfusion Claimants. Many have died. Others are dying. The rest live in the shadow of death. As Ms. Dawna Ring, Representative Counsel for one group of Transfusion Claimants put it in argument, the well-known Red Cross symbol, for many unfortunately, has become “a symbol of death”. Nothing that the Court can do will take away these diseases or bring back to life those who have died.

[5] The tragedy of these events has been well chronicled in the Report of the Krever Commission Inquiry into problems with the Canadian Blood Supply, and in the numerous law suits which have proceeded through the courts. Measured from the perspective of that stark background, the legal regime which governs the disposition of these proceedings must seem quite inadequate to many. However, it has provided at least a mechanism whereby some order, some closure, and some measure of compensatory relief are offered to the Transfusion Claimants and to others in respect of the blood supply problems, while at the same time offering to the Red Cross the possibility of continuing to provide its other humanitarian services to the community.

[6] Recognizing that its potential liabilities far outstripped its assets and abilities to meet those liabilities, and hoping as well to save the important non-blood related aspects of its operations, the Red Cross applied to this Court for protection under the CCAA in July, 1998. The Federal, Provincial and Territorial Governments (the “FPT Governments”)—which also faced, and continue to face, liability in connection with these claims—had decided that it was imperative for the control and management of the Canadian Blood Supply to be transferred into new hands, Canadian Blood Services and Héma Québec. It was a condition of the Acquisition Agreement respecting that transfer that the Red Cross seek and obtain CCAA protection. The concept put forward by the Red Cross at the time was that the sale proceeds would be used to establish a fund to compensate the Transfusion Claimants (after payment of

secured and other creditors) and the Society would be permitted to continue to carry on its other non-blood related humanitarian activities.

The CCAA Process

[7] CCAA protection was granted, and a stay of proceedings against the Red Cross imposed, on July 20, 1998. The stay of proceedings has been extended by subsequent Orders of this Court—most recently to October 31st of this year—as the participants in the process have negotiated toward a mutually acceptable resolution of the particularly complex issues involved.

[8] The negotiations have been intense and lengthy. They have of necessity encompassed other outstanding proceedings involving the Red Cross and the FPT Governments, including a number of class actions in Ontario, Quebec and British Columbia, and the negotiation of a broader settlement between the Governments and Transfusion Claimants infected between 1986 and 1990. As a result of this latter settlement, the funds made available by the transfer of the Canadian Blood Supply to Canadian Blood Services and Héma Québec are primarily directed by the Red Cross Plan to meet the claims of the pre-1986/post 1990 Transfusion Claimants, who were not entitled to participate in the Government Settlement.

[9] The CCAA process itself involved numerous attendances before the Court in the exercise of the Court's supervisory role in cases of this nature. Orders were made—amongst others—appointing a Monitor, appointing Representative Counsel to advise each of the Transfusion Claimant groups and to assist the Court, dealing with funding for such counsel, establishing a Claims process (including notice, a disallowance/approval mechanism and the appointment of a Claims Officer), granting or refusing the lifting of the stay in certain individual cases, approving a mediation/arbitration process respecting certain pension issues, determining issues respecting appropriate classes of creditors for voting purposes, and providing for the holding of creditors' meetings to vote on approval of the Plan and for the mailing of notice of those meetings and the materials relating to the Plan to be considered. Over 7,000 copies of the Plan and related materials were mailed.

A Summary of the Plan

[10] I draw upon the Applicant's factum for a summary of the basics of the Plan. Under the Plan,

a) Ordinary Creditors with proven claims not exceeding $10,000 will receive 100% of their proven claim;

b) Ordinary Creditors with proven claims of more than $10,000 will receive 67% of their proven claim;

c) A Trust is established for Transfusion Claimants, on specific terms described in the Plan, funded with $79 million plus interest already accrued under the Plan, as follows:

(i) $600,000 for CJD claimants;

(ii) $1 million for claimants in a class action alleging infection with Hepatitis C from blood obtained from prisons in the United States;

(iii) $500,000 for claimants with other transfusion claims that are otherwise not provided for;

(iv) approximately $63 million for claimants in class actions alleging Hepatitis C infection before 1986 and after June 1990; and,

(v) approximately $13.7 million for settlement of HIV claims.

[11] The source of these funds are those which the Red Cross has been holding from the sale of the Blood Assets, and negotiated contributions from co-defendants in various actions, and insurers. The Plan establishes procedures whereby claimants may apply to a Referee (the Honourable R.E. Holland, in the case of the HIV Claimants, and the Honourable Peter Cory, in the case of the other Transfusion Claimants) for determination of the amount of their damages.

[12] Several other aspects of the Plan bear mention as well. They relate to implementation and to the effect of the Plan upon implementation. Included, of course, is the fact that once the compromises and arrangements to be effected by the Plan are approved, they will bind all creditors affected by the Plan. As well, provided the Red Cross carries out its part of the Plan, all obligations and agreements to which the Society is a party as at the Plan Implementation Date are to remain in force and are not subject to acceleration or termination by any other parties as a result of anything which occurred prior to that Date, including the fact that the society has sought CCAA protection and made the compromises and arrangements in

question. In addition, the Courts of each Province are to be asked to give recognition and assistance to the sanction order and to the implementation of the Plan. And the Red Cross is to be authorized to make payment in accordance with a specific settlement entered into with Service Employees' International Union with respect to a collective agreement and other issues involving the Society's homemaker employees. Finally, there are provisions respecting the discharge of the Monitor and the Claims Officers upon implementation.

[13] The Red Cross has now put forward its Plan, as most recently amended in the negotiation process. On August 30, 2000, all classes of creditors—including the classes of Transfusion claimants—voted overwhelmingly in favour of accepting the Plan. The society now applies for the Court's sanction and approval of it.

The Test

[14] Where a majority in number representing two-thirds in value of the creditors present and voting in person or by proxy approve a plan of arrangement, the plan may be sanctioned by the Court and, if sanctioned, will bind all the creditors (or classes of creditors, where there is more than one class) and the company: CCAA, s. 6.

[15] The principles to be applied in the exercise of the Court's discretion upon such an application are well established:

(1) There must be strict compliance with all statutory requirements;

(2) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and,

(3) The Plan must be fair and reasonable.

See: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506.

[16] Applying those principles to the circumstances of this case. I have no hesitation in concluding—as I do—that the Plan should be sanctioned and approved.

Compliance with Orders and Statutory Requirements

[17] The Court has already ruled that the Red Cross is a debtor corporation entitled to the protection of the CCAA, and I am satisfied that all of the statutory requirements of the Act have been complied with.

[18] I am also satisfied that the Applicant has complied with the substance of all Orders made in the course of these proceedings. To the extent that there has been a variance from the terms of the Orders, they have been the result of understandable logistical hurdles for the most part, and there has been no prejudice to anyone as a result. I am content to make the necessary corrective orders requested in that regard. Nothing has been done or purported to be done which is not authorized by the provisions of the CCAA.

[19] There was apparently some confusion at the time of voting which resulted in 8 members of the group of Secondarily Infected Spouses and Children with HIV not voting. The claims of 6 of those people have been disallowed for voting purposes. Ms. Ring, who is Representative Counsel for this group, advises, however, that even if all 8 claimants had voted, and opposed approval—which she believes is quite unlikely—her clients' group would still have strongly favoured sanctioning and approval of the Plan. I observe for the record, that what was at issue here related only to the right to vote at the Special Meeting held. It does not affect the rights of anyone to claim compensation from the Plan.

The Plan is Fair and Reasonable

[20] I conclude as well that the Plan is fair to all affected by it, and reasonable in the circumstances. It balances the various competing interests in an equitable fashion.

[21] The recitation of the background and process above confirms the complexity and difficult nature of these proceedings, and the scope of the negotiations involved. It is not necessary to repeat those facts here.

[22] To be "fair and reasonable" a proposed Plan does not have to be perfect. No Plan can be. They are by nature and definition "plans of compromise and arrangement". The Plan should be approved if it is inherently fair, inherently reasonable and inherently equitable: see, *Re Wandlyn Inns Ltd.* (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.) at p. 321; *Re Central Guaranty Trustco Ltd.* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) at p. 142. The Red Cross Plan meets those criteria, in my view.

[23] In the first place, the Plan has been overwhelmingly approved by each of the four classes of creditors—who turned out in significant numbers to vote at the Special Meetings held. I note that 99.3% of the votes cast by Ordinary Creditors, representing 99.9% of the value of those claims, approved. The FPT Governments—which cast their own votes as well as the assigned votes of the 1986-1990 Transfusion Claimants who have the benefit of the Government Settlement—voted 100% in favour. Of the remaining Transfusion Claimants, 91.0% of the votes cast by the pre-1986/post 1990 Hepatitis C class, representing 91.0% of the value of those claims support approval; the figures are 91.2% for the other Transfusion Claimants.

[24] Counsel filed with the Court letters from three individuals (of thousands) who dispute the sanctioning of the Plan. I read these letters carefully. They are poignant in the extreme and raise many points pertaining to the claims made and the process followed. There is no doubt something to be said for all of them. I am advised, however, that most of the issues raised were raised as well at the Special Meetings on August 30th and debated fully at that time. Ranked in opposition to those issues are all of the factors which militate in favour of acceptance of the Red Cross Plan. The huge majority of Transfusion Claimants opted to support the Plan, concluding that it represents the best possible outcome for them in the circumstances.

[25] Although the Transfusion Claimants are not the type of "business" creditors normally affected by a CCAA arrangement, they are the ones most touched by the events leading up to these proceedings and by the elements of the Plan. I see no reason why their voting support of the Plan should not receive the same—or more—deference as that normally granted to creditors by the Court in these cases. The fact that the Plan has received such a high level of support weighs very heavily in my consideration of approval. The Plan is the result of negotiations amongst all interested parties—leading to changes and amendments which were made and approved as late as the August 30th meetings. The various groups were all represented by legal and professional advisors, including the Transfusion Claimants who were advised and represented by Representative Counsel.

[26] I accept the submission that the Plan equitably balances the various competing interests and the available resources of the Red Cross. In regard to the latter, the evidence is

that creditors—including the Transfusion Claimants—would not receive a better distribution in the event of a liquidation of all of the assets of the Society.

[27] Moreover, with the exception of the three letters I have referred to, no one opposes the sanctioning of the Plan. Indeed, most strenuously support its approval. In addition, the Monitor has advised that it strongly recommends the Plan and its approval.

[28] Finally, it is significant, in my view, that the Plan if implemented will permit the Canadian Red Cross to continue to carry on its non-blood related humanitarian activities. There is a deep-seated anger and bitterness towards the Society amongst many of the victims of these terrible blood diseases. To them, it is not right that thousands of people have been poisoned by tainted blood yet the Society is able to continue on with the other facets of its business. These feelings are understandable. However, the Red Cross currently continues to employ approximately 7,000 Canadians in the other aspects of its work, and it makes valuable contributions to society through these humanitarian efforts. That it will be able to continue those works, if the Plan is implemented, is important.

Disposition

[29] For all of the foregoing reasons the Plan is sanctioned and approved. Two Orders are requested, one relating to the sanction and approval of the Plan, and the second making the logistical and minor corrections I referred to earlier in these Reasons. Orders will issue in terms of the draft Orders filed, on which I have placed my fiat.

[30] Before concluding, I would like to acknowledge the excellent work done by all counsel in this matter, and to thank them for their assistance to the Court and to their clients throughout. They have conducted themselves in the best tradition of the Bar in a difficult and sensitive case, and I commend them for their efforts.

Application granted.

TAB 2

See para. 144

Court of Queen's Bench of Alberta

Citation: Lutheran Church Canada (Re), 2016 ABQB 419

Date: 20160802
Docket: 1501 00955
Registry: Calgary

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

and

In the Matter of Lutheran Church - Canada, the Alberta - British Columbia District, Encharis Community Housing and Services, Encharis Management and Support Services, and Lutheran Church – Canada, The Alberta – British Columbia District Investments Ltd.

Corrected judgment: A corrigendum was issued on August 30, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decisions
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] This *CCAA* proceeding has been complicated by some unusual features. There are approximately 2,592 creditors of the Church extension fund with proven claims of approximately $95.7 million, plus 12 trade creditors with claims of approximately $957,000. There are 896 investors in the Church investment corporation with outstanding claims of $22.4 million. Many of these creditors and investors invested their funds at least in part because of their connection to the Lutheran Church. Many of them are elderly. Some of them are angry that what they thought

were safe vehicles for investment, given the involvement of their Church, have proven not to be immune to insolvency. Some of them invested their life savings at a time of life when such funds are their only security during retirement. Inevitably, there is bitterness, a lack of trust and a variety of different opinions about the outcome of this insolvency restructuring.

[2] A group of creditors have applied to replace the Monitor at a time when the last two plans of arrangement and compromise in these proceedings had been approved by the requisite double majority of creditors. I dismiss the application to replace the Monitor on the basis that there is no reason arising from conflict or breach of duty to do so. I find that the proposed plans are within my jurisdiction to sanction are fair and reasonable in the circumstances and should be sanctioned. These are my reasons.

II. Factual Overview

A. Background

[3] On January 23, 2015, the Lutheran Church – Canada, the Alberta – British Columbia District (the "District"), Encharis Community Housing and Services ("ECHS"), Encharis Management and Support Services ("EMSS") and Lutheran Church – Canada, the Alberta – British Columbia District Investment Ltd. ("DIL", collectively the "District Group") obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. Deloitte Restructuring Inc. was appointed as Monitor and a CRO was appointed for the District and DIL.

[4] The District is a registered charity that includes the Church Extension Fund ("CEF"), which was created to allow District members to lend money to what are characterized as faith-based developments. Through the CEF, the District borrowed approximately $96 million from corporation, churches and individuals. These funds were invested by the District in a variety of ways, including loans and mortgages available to congregations to build or renovate churches and schools, real estate investments, and a mortgage on a real estate development known as the Prince of Peace Development.

[5] CEF was managed by the District's Department of Stewardship and Financial Ministries and was not created as a separate legal entity. As such, District members who loaned funds to CEF are creditors of the District (the "District Depositors").

[6] ECHS owned land and buildings within the Prince of Peace Development, including the Manor and the Harbour, senior care facilities managed by EMSS. EMSS operated the Manor and Harbour for the purpose of providing integrated supportive living services at the Manor and the Harbour to seniors.

[7] The Prince of Peace Development also included a church, a school, condominiums, lands known as the Chestermere lands and other development lands.

[8] DIL is a not-for-profit company that acted as a trust agent and investment manager of registered retirement savings plans, registered retirement income plans and tax-free savings accounts for annuitants. Concentra Trust acted as the trustee with respect to these investments. Depositors to DIL are referred to as the "DIL Investors". The District Depositors and the DIL Investors will collectively be referred to as the "Depositors".

[9] Soon after the initial order, the District and the Monitor received feedback that the District Depositors and the DIL Investors wanted to have a voice in the *CCAA* process. Thus, on February 13, 2015, Jones, J granted an order creating creditors' committees for the District (the "District Creditors' Committee") and DIL (the "DIL Creditors' Committee"), tasked with representing the interests of the District Depositors and DIL Investors. The members of the committees were elected from among the Depositors. By the order that created them, they must act in a fiduciary capacity with respect to their respective groups of creditors. The committees were authorized to engage legal counsel, who have represented them throughout the *CCAA* process, and the committees and their counsel have been active participants in the process.

[10] ECHS and EMSS prepared plans of compromise and arrangement that were approved by creditors and sanctioned by the Court in January 2016. Pursuant to those plans, ECHS' interest in the condominiums was transferred to a new corporation that is to be incorporated under the District Plan ("NewCo"). The Chestermere lands were sold. The remainder of the lands and buildings (the "Prince of Peace properties") are dealt with in the District Plan.

[11] On 22nd and 23rd of February, 2016, a Depositor and an agent of a Depositor commenced proceedings against Lutheran Church – Canada, Lutheran Church – Canada Financial Ministries, Francis Taman, Bishop & McKenzie LLP, John Williams, Roland Chowne, Prowse Chowne LLP, Concentra Trust, and Shepherd's Village Ministries Ltd., all defendants with involvement in the District Group's affairs, pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 (Alberta). Two other Depositors issued a Notice of Civil Claim in the Supreme Court of British Columbia pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c.50 (British Columbia) against the same defendants (together with the Alberta proceeding, the "class action proceedings").

[12] On March 3, 2016, DIL submitted a plan of arrangement that had been approved by creditors for sanction by the Court. I deferred the decision on whether to sanction the DIL plan until the District plan had been finalized, presented to District creditors, and, if approved, submitted for sanctioning. At the same time, I stayed the class action proceedings. The DIL and District plans contain similar provisions that are subject to controversy among some Depositors. There is considerable overlap among the DIL Investors and the District Depositors.

[13] On July 15, 2016, the District applied for an order sanctioning the District plan. On the same day, the Depositors who commenced the class action proceedings applied for an order replacing the Monitor.

B. The District Plan

[14] The District plan has one class of creditors. Pursuant to the claims process, there were 2,638 District Depositors. An emergency fund was implemented prior to the filing date and approved by the Court as part of the initial order, to ensure that District Depositors, many of whom are seniors, would have sufficient funds to cover their basic necessities. Taking into account those payments, District Depositors had proven claims of approximately $96.2 million as at December 31, 2015.

[15] Under the plan, each eligible affected creditor will be paid the lesser of $5,000 or the total amount of their claim (the "Convenience Payment(s)") upon the date that the District plan takes effect. This will result in 1,640 District Depositors (approximately 62%) and 10 trades creditors (approximately 77%) being paid in full. The Convenience Payments are estimated to total $6.3 million.

[16] The District plan contemplates the liquidation of certain non-core assets. Each time the quantum of funds held in trust from the liquidation of these assets, net of the "Restructuring Holdback" and the "Representative Action Holdback" referred to later in this decision, reaches $3 million, funds will be distributed on a pro-rata basis to creditors.

[17] If the District plan is approved, a private Alberta corporation ("NewCo") will be formed following the effective date of the plan. NewCo will purchase the Prince of Peace properties from ECHS in exchange for the NewCo shares. The value of the NewCo shares would be based on the following:

a) the forced sale value of the Harbour and Manor seniors' care facilities based on an independent appraisal dated November 30, 2015;
b) the forced sale value of the remaining Peace of Peace properties, based on an independent appraisal dated October 15, 2015;
c) the estimated value of the assets held by ECHS that would be transferred to NewCo pursuant to the ECHS plan; and
d) the estimated value of the assets held by EMSS that would be transferred to NewCo pursuant to the EMSS plan.

[18] ECHS will then transfer the NewCo shares to the District in partial satisfaction of the District – ECHS mortgage. The NewCo shares will be distributed to eligible affected creditors of the District on a pro-rata basis. The Monitor currently estimates that creditors remaining unpaid after the Convenience Payment will receive NewCo shares valued at between 53% and 60% of their remaining proven claims. The cash payments arising from liquidation of non-core assets and the distribution of shares are anticipated by the Monitor to provide creditors who are not paid in full by the Convenience Payments with distributions valued at between 68% and 80% of their remaining proven claims, after deducting the Convenience Payments. Non-resident creditors (8 in total) will receive only cash.

[19] Distributions to creditors will be subject to two holdbacks:

a) the "Restructuring Holdback", to satisfy reasonable fees and expenses of the Monitor, the Monitor's legal counsel, the CRO, the District Group's legal counsel and legal counsel for the District Creditors' Committee, the amount of which will be determined prior to the date of each distribution based on the estimated professional fees required to complete the administration of the *CCAA* proceedings; and
b) the "Representative Holdback", an amount sufficient to fund the out-of-pocket costs associated with the "Representative Action" process described later in this decision, and to indemnify any District Depositor who may be appointed as a representative plaintiff in the Representative Action for any costs award against him or her. The Representative Action Holdback will be determined prior to any distribution based on guidance from a Subcommittee appointed to pursue the Representative Action and retain representative counsel.

[20] The District will continue to operate but the District's bylaws and handbook will be amended such that the District would no longer be able to raise or administer funds through any type of investment vehicle. NewCo will continue to operate the Harbour and Manor seniors' care facilities.

[21] NewCo's bylaws will include a clause requiring that 50% of the board of directors must be comprised of District Depositors or their nominees. Although NewCo is being created with the object of placing the NewCo assets in the hands of a professional management team with appropriate business and real estate expertise, the District Creditors' Committee wanted to ensure that affected Creditors will have representation equal to that of the professional management team on the NewCo board. The members of the NewCo board may change prior to NewCo being formed, subject to District Creditors' Committee approval. Subsequent changes to the NewCo board would be voted on at future shareholder meetings.

[22] The articles of incorporation for NewCo will be created to include the following provisions, which are intended to provide additional protection for affected creditors:

a) NewCo assets may only be pledged as collateral for up to 10% of their fair market value, subject to an amendment by a special resolution of the shareholders of NewCo;
b) a redemption of a portion of the NewCo shares would be allowed upon the sale of any portion of the NewCo assets that generates net sale proceeds of over $5 million;
c) NewCo would establish a mechanism to join those NewCo shareholders who wished to purchase NewCo shares with those NewCo shareholders who wished to sell them;
d) a general meeting of the NewCo shareholders will be called no later than six months following the effective date of the plan for the purpose of having NewCo shareholders vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation or all or a portion of the NewCo assets or a joint venture to further develop the NewCo assets; and
e) to provide dissent rights to minority NewCo shareholders.

The Representative Action

[23] The District plan establishes a Representative Action process whereby a future legal action or actions, which may be undertaken as a class proceeding, can be undertaken for the benefit of those District Depositors who elect or are deemed to elect to participate. The Representative Action would include only claims by District Depositors who are not fully paid under the District plan and specifically includes the following:

a) claims related to a contractual right of one or more of the District Depositors;
b) claims bases on allegations of misrepresentation or wrongful or oppressive conduct;
c) claims for breach of any legal, equitable , contractual or other duty;
d) claims pursuant to which the District has coverage under directors' and officers' liability insurance; and
e) claims to be pursued in the District's name, including any derivative action or any claims that could be assigned to a creditor pursuant to Section 38 of the *Bankruptcy and Insolvency Act*, if such legislation were applicable.

[24] District Depositors may opt-out of the Representative Action process, in which case they would be barred from further participation. Evidently, some Depositors are precluded by their religious beliefs from participating in this type of litigation.

[25] The District Depositors who elect to participate in the Representative Action process will have a portion of their cash distributions from the sale of assets withheld to fund the Representative Action Holdback. It will only be possible to estimate the value of the

Representative Action Holdback once representative counsel has been retained. At that point, the Monitor will send correspondence to the participating Depositors with additional information, including the name of the legal counsel chosen, the estimated amount of the Representative Action Holdback, the commencement date of the representative action, the deadline for opting out of the Representative Action and instructions on how to opt out of the Representative Action should they choose to do so.

[26] A Subcommittee will be established to choose legal counsel to represent the participating District Depositors. The Subcommittee will include between three and five individuals and all members of the Subcommittee will be appointed by the District Creditors' Committee. The Subcommittee is not anticipated to include a member of the District Committee.

[27] The duties and responsibilities of the Subcommittee will include the following:

a) reviewing the qualifications of at least three lawyers and selecting one lawyer to act as counsel;
b) with the assistance of counsel, identifying a party(ies) willing to act as the Representative Plaintiff;
c) remaining in place throughout the Representative Action with its mandate to include:
    (i) assisting in maximizing the amount available for distribution;
    (ii) consulting with and instructing counsel including communicating with the participating District Depositors at reasonable intervals and settling all or a portion of the Representative Action;
    (iii) replacing counsel;
    (iv) serving in a fiduciary capacity on behalf of the participating District Depositors;
    (v) establishing the amount of Representative Action Holdback and directing that payments be made to counsel from the Representative Action Holdback; and
    (vi) bringing any matter before the Court by way of an application for advice and direction.

[28] The Representative Action process will be the sole recourse available to District Depositors with respect to the Representative Action claims.

[29] The District plan releases:

a) the Monitor, the Monitor's legal counsel, the District Group's legal counsel, the CRO, the legal counsel for the District Committee and the District Committee members, except to the extent that any liability arises out of any fraud, gross negligence or willful misconduct on the part of the released representatives, to the extent that any actions or omissions of the released representatives are directly or indirectly related to the *CCAA* proceedings or their commencement; and
b) the District, the other *CCAA* applicants, the present and former directors, officers and employees of the District, parties covered under the D&O Insurance and any independent contractors of the District who were employed three days or more on a regular basis, from claims that are largely limited to statutory filing obligations.

[30] The following claims are specifically excluded from being released by the District plan:

a) claims against directors that relate to contractual rights of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors as set out in Section 5.1(2) of the *CCAA*;

b) claims prosecuted by the Alberta Securities Commission or the British Columbia Securities Commission arising from compliance requirements of the *Securities Act* of Alberta and the *Financial Institutions Act* of British Columbia;
c) claims made by the Superintendent of Financial Institutions arising from the compliance requirements of the *Loan and Trust Corporations Acts* of Alberta and British Columbia; and
d) any Representative Action claims, whether or not they are insured under the District's directors and officers liability insurance, that are advanced solely as part of the Representative Action.

C. The District Meeting

[31] On March 21, 2016, I granted an order authorizing the District to file the District plan of compromise and arrangement and present it to the creditors. A draft version of the Monitor's Report to District Creditors was provided to both the Court and counsel for the class action plaintiffs ahead of the District meeting order being granted. Neither class action counsel voiced specific concerns with the disclosure provided therein.

[32] The first meeting of District creditors was held on May 14, 2016. Counsel for the BC and Alberta class action plaintiffs were in attendance and able to make submissions to the meeting and to question the Monitor. A number of attendees made submissions and asked questions. Certain documents that had been referenced in a Monitor's FAQ report on the issue of future potential development of the Prince of Peace properties (described later in this decision) were discussed in detail and questions with respect to these documents were answered by the Monitor. The meeting lasted approximately six hours. It was adjourned at the request of the representative of a Depositor who wanted more time to consider the Prince of Peace development disclosure and obtain further instructions from his congregation.

[33] After making inquiries and being satisfied that congregations who wished further consultation had time to do so, the Monitor posted a notice on its website on May 20, 2016 that the reconvened meeting was to be held on June 10, 2016. The notice was sent by email to those creditors who are congregations on May 20, 2016 and sent by regular mail to all creditors on May 24, 2016. The notice advised creditors that they had additional time to change their vote on the District plan, should they choose to do so. Four congregations asked the Monitor for further information before the reconvened meeting.

[34] The Monitor received a total of 1,294 votes on the District plan from eligible affected creditors with claims totalling approximately $85.1 million. Of these votes, 1,239 were received by way of election letters and 55 were received by way of written ballots submitted in person or by proxy at the District meeting. In total, 50% of eligible affected creditors voted and the claims of those creditors who voted represented 88% of the total proven claims of eligible affected creditors.

[35] Of the creditors who voted, 1,076 or approximately 83% voted in favour of the District plan and 218 or approximately 17% voted against the District plan. Those creditors who voted in favour of the plan held claims totalling approximately $65 million, or approximately 76% in value of the voting claims, and those creditors who voted against the plan held claims totalling approximately $20.1 million or approximately 24% in value of the voting claims. Therefore, the District plan was approved by the required majority, being two-thirds in dollar value and a majority in number of voting eligible affected creditors.

D. The DIL Plan

[36] The DIL plan includes only one class of affected creditors consisting of DIL Investors. The DIL Investors reside in eight provinces and territories in Canada and in three U.S. states. Most of the accounts held by DIL Investors are RRSP and RRIF accounts.

[37] Following the release of the original DIL package of meeting materials, based on discussions with DIL Investors, the Monitor prepared two documents entitled "Answers to frequently asked questions" (the "FAQs"), one of which was dated December 24, 2015 and the other dated January 18, and amended January 20, 2015.

[38] The DIL plan contains provisions for the orderly transition of the registered accounts from Concentra to a replacement trustee and administrator. As part of this transition, the cash and short-term investments held by DIL will be transferred, net of holdbacks outlines in the DIL plan, to the replacement fund manager. The mortgages held by Concentra and administered by DIL will be converted to cash over time and paid to the fund manager.

[39] Pursuant to previous order, DIL was authorized to distribute up to $15 million to the DIL Investors. For those DIL Investors who held registered retirement savings plan, tax free savings accounts or locked-in retirement accounts with DIL, their pro-rate share of the first DIL Distribution was transferred into accounts that had been established with the replacement fund manager. For those DIL Investors who held RRIFs or LIFs, their pro-rate share of the first DIL distribution was transferred upon their request, to an alternate registered account of their choosing. A second distribution of up to $7.5 million was made in April, 2016.

[40] In addition to this these interim distribution, statutory annual minimum payment to RRIF holders were made for 2015. Selected DIL Investors also received payments pursuant to the emergency fund. Taking into account these payments, pre-filing distributions to DIL Investors totalled approximately $15.6 million, 41% of their original investment without taking into account any estimated write-downs on the value of the assets held by DIL.

[41] The DIL plan contains substantially the same provisions with respect to limited releases and a Representative Action process as the District plan.

[42] The Monitor estimates that, prior to any recovery under the Representation Action, DIL Investors will recover between 77% and 83% of their original investment as of the filing date.

E. The DIL Meeting

[43] The DIL meeting of creditors was held on January 23, 2016.

[44] There were 87 attendees at the DIL meeting. The Monitor received a total of 472 votes from DIL Investors with claims totalling approximately $14.5 million. In total, 53% of DIL Investors voted and the claims of those DIL Investors who voted represented 65% of the total proven claims of DIL Investors.

[45] Of the 472 DIL Investors who voted, 434, or approximately 92%, voted in favour of the DIL plan and 38 DIL Investors, or approximately 8%, voted against the DIL plan. Those DIL Investors who voted in favour of the DIL plan had claims totalling approximately $12.7 million, or approximately 87% of the claims, and those DIL Investors who voted against the DIL plan had claims totalling approximately $1.8 million, or approximately 13% of the claims and a majority in number of voting DIL Investors. Therefore, the DIL plan was approved by the required double majority.

III. The Applications

A. Application to Remove the Monitor

[46] The Depositors who commenced the British Columbia class action proceedings, Elvira Kroeger and Randall Kellen, apply:

a) to remove the Monitor and replace it with Ernst & Young LLP; or alternatively
b) to appoint Ernst & Young as a "Limited Purpose Monitor" to review the Representative Action provisions of the District plan and render its opinion to the Court with respect to whether the plan is fair and reasonable to the District Depositors;
c) to authorize Ernst & Young to retain legal counsel to assist it in rendering its opinion to the Court if it considers it reasonable and necessary to do so; and
d) to secure Ernst & Young's fees and those of its counsel to a maximum amount of $150,000.00 plus applicable taxes under the current Administration Charge or under a second Administration Charge to rank *pari passu* with the current Administration Charge.

[47] They are supported in their application by the Alberta class action plaintiffs, collectively the "opposing Depositors". The opposing Depositors submit that the Monitor is unable by reason of conflict of interest to provide the Court with a neutral and objective opinion with respect to the Representative Action provisions of the District plan. They also submit that the Monitor has breached its fiduciary duty to the Court and to the District creditors by failing to disclose certain municipal planning documents relating to the Prince of Peace Development.

1. Overview

[48] It is trite law that the Monitor in *CCAA* proceedings is an officer of the Court and that its duty is to act in the best interests of all stakeholders. Monitors are required to act honestly and fairly and to provide independent observation and oversight of the debtor company.

[49] The Monitor is expected and required to report regularly to the Court, creditors and other stakeholders, and has a statutory obligation to advise the Court on the reasonableness and fairness of any plan of arrangement proposed between the debtor and its creditors: section 23(1) of the *CCAA*. Courts accord a high level of deference to decisions and opinions of the Monitor.

[50] The opposing Depositors submit that the Monitor is acting as an advocate of the debtor, without a sufficient degree of neutrality. They submit, by implication, that I should give the Monitor's recommendations on the plans little or no deference for that reason.

[51] An attack on the Monitor is an attack on the integrity of the *CCAA* process, and must be taken seriously.

2. Conflict of Interest

[52] The opposing Depositors allege that the Monitor has a conflict of interest on the following bases:

a) In its Pre-Filing Report to the Court, the Monitor disclosed that it had provided consulting services to the District between February 6, 2014 and the date of the initial order, including:

(i) on February 6, 2014; to provide an independent evaluation of the potential options relating to the Prince of Peace Development and to create a plan for executing the option that was ultimately chosen;

(ii) on June 30, 2014; to provide an evaluation of the debt structure of the CEF as it related to the District, the members of the District, ECHS, EMSS and the Prince of Peace Development; and

(iii) on July 25, 2014; to act as a consultant regarding the informal or formal restructuring of the District Group.

b) In its Fourth Report dated June 24, 2015, the Monitor advised that it had recently determined that a related professional accounting firm, Deloitte & Touche (now Deloitte LLP) had acted as auditor for the District from 1990 to 1998 or 1999. While the Monitor had performed a conflicts check prior to agreeing to act as Monitor, this check failed to flag the previous audit engagement. The Monitor further stated that, while its former role as auditor to District did not preclude it from acting as Monitor in these proceedings, it might be precluded from conducting a preliminary review of the District's expenditures in relation to the Prince of Peace development for the period during which it had acted as auditor. However, as the District had been unable to produce supporting documentation with respect to funds expended on the Prince of Peace development prior to 2006, and Deloitte did not act as auditor subsequent to 1999, the Monitor took the position that "it was not conflicted from completing the Review to the extent that they can for the period for which documentation is available".

c) On March 8, 2016, the Monitor advised the Court and the parties that Deloitte & Touche had completed the DIL audit for the years ended January 31, 1998 and January 31, 1999, the first two years during which DIL operated the registered fund. Again, the reason for the late disclosure appears to be that the engagements were recorded under different names those now used by the District.

[53] These previous services do not, on their face, disqualify the Monitor from acting as Monitor. With respect to the audit services, it is not a conflict of interest for the auditor of a debtor company to act as Monitor in *CCAA* proceedings. In this case, the sister company of the Monitor has not been the auditor of either the District or DIL for over 16 years, The Monitor does not suffer from any of the restrictions placed on who may be a Monitor by Section 11.7(2) of the *Act*. While the late disclosure of the historical audits was unfortunate, audits performed more than 16 years ago by a sister corporation raise no reasonable apprehension of bias, either real or perceived.

[54] It is also not a conflict of interest, nor is it unusual, for a proposed Monitor to be involved with the debtor companies for a period of time prior to a *CCAA* filing. The Monitor made full disclosure of that involvement prior to being appointed, more than a year before this application was brought.

[55] This is not a case where a Monitor was involved in or required to give advice to the Court on the essential issue before it, such as a pre-filing sales process. The issues with respect to the plans before the Court arise from details of the plans that have been the subject of negotiation and consultation among the District Group, the Creditors' Committees and the Monitor post-filing.

[56] The opposing Depositors, however, point to certain representations that were made by the District in letters to some of Depositors in the months prior to the *CCAA* filing, which they say were untrue and misleading. They submit that the Monitor must have known about these letters, and thus condoned, if not participated in, misrepresentations made to the Depositors.

[57] The Monitor responds that it did not act in a management capacity with respect to the District nor did it prepare or issue communications pre-filing. It did not control the District Group.

[58] There is no realistic indication of conflict arising from these allegations. The attempt to taint the Monitor with knowledge of letters sent by the District to the Depositors is speculation unsupported by any evidence.

[59] The opposing Depositors also submit that the prior audit engagements create a potential conflict for the Monitor in the event that the Subcommittees of the Creditors' Committees decide to bring a claim against Deloitte & Touche as former auditor of the District or DIL. In that respect, Ms. Kroeger and Mr. Kellen have by letter dated March 4, 2016 demanded that the District commence legal proceedings against the District's auditors, including Deloitte & Touche. Given the stay, the District took no action, and the opposing Depositors concede that they did not expect the District to act during the *CCAA* proceedings.

[60] It is not appropriate for this Court to determine or to speculate on whether the Depositors have a realistic cause of action against an auditor sixteen years after the final audit engagement, but assuming that the Representative Action provisions of the plans could result in an action against a sister corporation of the Monitor, the proposed ongoing role of the Monitor in those proceedings should be examined to determine whether such role could give rise to a real or perceived conflict of interest.

[61] As the Monitor points out, its role with respect to the Representative Action is limited to assisting in the formation of the Subcommittees (although it has no role in deciding who will serve on the Subcommittees), facilitating the review of qualifications of legal counsel who wish to act in the Representative Action (although the Monitor will not participate in the selection of the representative counsel), and communicating with Depositors based on instructions given by the Subcommittees with respect to the names of the members of the Subcommittees, the name of the representative counsel, the estimated amount of the Representative Action Holdback, the commencement date of the Representative Action, the deadline for opting out of the Representative Action, and instructions on how to opt-out of the Representative Action should Depositors choose to do so. The Monitor's involvement will be directed by the Subcommittees and is anticipated to be limited to these tasks. The Monitor notes that, should it or the Subcommittees determine that the Monitor has a conflict of interest in respect of completing any of these tasks, the Monitor would recuse itself. It submits however, that it is appropriate that it be involved in order to ensure that the Subcommittees are able to undertake these duties in a manner that complies with the requirements of the plans and does not prejudice the rights of Depositors under the plans.

[62] The Monitor will aid in making distributions under the plans, including with respect to the release of any unused portion of the Representative Action Holdback, which it anticipates will be determined on a global basis and communicated by the Subcommittees to the Monitor on a global basis. The Monitor will have no knowledge of the considerations or calculations that so into establishing the Representative Action Holdback. Further, the Monitor does not need to be,

and will not under any circumstances be, privy to any information regarding the strategy that the representative counsel chooses to communicate to Depositors, including the parties to be named in the Representative Action.

[63] In the circumstances, the Monitor is the most appropriate party to be involved in communication with Depositors in the early stages of the Representative Action process, as it has the information and experience necessary to ensure that such communication is done quickly, effectively, and at the lowest possible expense.

[64] The mere possibility of a decision to proceed against the Monitor's sister corporation does not justify the expense and disruption of bringing in a new Monitor to perform these administrative tasks. If the Subcommittees determine that an action can be commenced against the historical auditors that is not barred by limitations considerations, the issue of a real, rather than a speculative conflict, can be raised before the Court for advice and direction in accordance with the plans. The possibility that the Subcommittees may decide not to proceed against the historical auditors does not imply undue influence from the Monitor. The members of the Subcommittees will be fiduciaries, bound to act in the best interests of the remaining creditors.

[65] There is no persuasive argument nor any evidence that they would act other than in those best interests.

[66] The opposing Depositors' submission that the Monitor cannot with any degree of neutrality or objectivity advise the Court on the reasonableness and fairness of the Representative Action provisions of the plans ignores the fact that the Monitor is not released from liability for any damages arising from its pre-CCAA conduct as auditor to the District by the plans.

[67] The opposing Depositors submit that there are "substantive and procedural benefits" from its continuing position that the Monitor may take advantage of. On closer examination, those alleged advantages are insignificant.

[68] In summary, I find that there is no actual or perceived conflict of interest that would warrant the replacement of the Monitor, particularly at this late state of the *CCAA* proceedings. The Monitor made full disclosure of the historical audit relationship of its sister corporation to the District and DIL and its own pre-filing relationship to the District Group. Neither the Monitor nor Deloitte & Touche benefit from any releases as part of the plans. The Monitors' continuing involvement in the Representative Action process is limited, administrative in nature, and would take place pre-litigation.

3. Breach of Fiduciary Duty

[69] A more serious charge against the Monitor than conflict of interest is the opposing Depositors' allegation that the Monitor breached its fiduciary duty to the Court and to District Depositors by failing to disclose certain municipal planning documents.

[70] The documents at issue are:

a) a master-site development plan (the "MSDP") that was prepared for the District by an architectural firm in December, 2012 and was subsequently approved by the Municipal District of Rocky View County. This plan includes site information, layout and analysis of activities, facilities, maintenance and operations and a context for land use and the associated population density; and

b) an approved area structure plan for the Hamlet of Conrich (the "Conrich ASP"), which was put forward by the MD of Rocky View and which includes reference to the Prince of Peace properties.

[71] The MSDP identifies several prerequisites to development of the Prince of Peace properties, including a connection to the municipal water supply, the upgrading of the sanitary sewer lift station and work on a storm water management infrastructure. The Monitor notes the MSDP was prepared specifically for the development contemplated by EHSS in 2012, being medium density residential and additional assisted living capacity, ground floor retail and a parkade structure. As such, it is likely outdated and may not align with future development. A more recent appraisal of the properties in 2015 assumed low density development. The 2015 appraisal of the properties takes into account the work that would need to be undertaken by any third party who wished to further develop the Prince of Peace properties.

[72] The opposing Depositors submit that the infrastructure projects identified by the MSDP would be costly and would likely pose barriers to development. They presented hearsay evidence of a conversation Mr. Kellen had with a Rocky View official that is of limited relevance apart from its hearsay nature, because future development would likely be different from what was contemplated in 2012.

[73] The Conrich ASP stipulates that no development may occur within the Hamlet of Conrich until the kinds of infrastructure requirements identified in the MSDP are met. The ASP is being appealed by the City of Chestermere.

[74] The Monitor became aware of these documents during its pre-filing services to the District Group. When a Depositor raised a question about these reports on April 28, 2016 at an information meeting, the Monitor prepared a QFA document dated April 29, 2016 regarding the future subdivision and development of the Prince of Peace properties and referencing the documents. This QFA was posted on the Monitor's website on April 29, 2016 and mailed to all affected creditors with claims over $5,000 on May 3, 2016, more than a month before the meeting at which the District plan was approved.

[75] The issue is whether the Monitor breached its duty to the Court and creditors by failing to disclose these reports earlier. The answer to this question must take into account the context of the District plan and the nature of the Monitor's recommendations.

[76] The District plan does not contemplate that any further development of the Prince of Peace properties would occur pursuant to the *CCAA* proceedings. The possibility that NewCo shareholders would pursue further development is one of the options available to NewCo or to a third party purchaser of the Prince of Peace properties if NewCo shareholders decide to sell the properties, as recognized in the plan materials. The plan gives NewCo shareholders the opportunity to consider their options.

[77] As the Monitor notes, a vote on the District plan is not a vote in favour of any particular mandate for NewCo. The District plan contemplates that a NewCo shareholders' meeting will be held within six months of the District plan taking effect, at which time the NewCo shareholders will vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation of all or a portion of the assets held by NewCo, a joint venture to further develop the Prince of Peace properties or

other options. These options will need to be investigated and reported on by NewCo's management team ahead of the NewCo shareholders' meeting.

[78] It was in this context that the Monitor considered the content of its reports to Depositors on the District plan and did not disclose the two plans, which in any event may be dated and of little relevance to a future development. I do not accept the opposing Depositors' allegation that the Monitor "concealed" this information.

[79] In that regard, I note that, although Mr. Kellen in a sworn affidavit deposed that he became aware of the MSDP and Conrich ASP on or about April, 2016, he appears to have posted a link to the Conrich ASP in the CEF Forum website on February 24, 2015. It also appears that the MSDP document was discussed in the CEF Forum in January, 2016, with a link posted for participants in the forum. Mr. Kellen filed a supplementary affidavit after the Monitor noted these facts in its Twenty-First Report. He says that he now recalls reviewing the Conrich ASP, which references the MSDP, in February, 2015, but does not recall reading it in any great detail, that he did not appreciate the significance of the documents and simply forgot about them. This is hard to reconcile with Mr. Kellen's present insistence that the documents are highly relevant.

[80] A further issue is whether the Monitor's recommendation of the District plan gave rise to a duty to disclose these documents. The opposing Depositors submit that the Monitor endorsed the plan on the basis of potential upside opportunities available through development. This submission appears to refer to a sentence in the Monitor's March 28, 2016 report to creditors, as follows:

> The issuance of NewCo Shares pursuant to the District Plan allows District Depositors to benefit from the ability to liquidate the Prince of Peace Properties at a time when market conditions are more favourable or the ability to benefit from potential upside opportunities that may be available such as through the further expansion of the Harbour and Manor seniors' care facilities, through a joint venture to further develop the Prince of Peace Properties or through other options (emphasis added).

[81] Clearly, the Monitor in its report referenced further development as only one of the options available to NewCo shareholders at the time of their first shareholders' meeting. It is incorrect to say that the Monitor's endorsement of the District plan was based solely on the option of development by NewCo acting alone. The Monitor did not recommend any particular mandate for NewCo in its various reports.

[82] The Monitor decided that disclosure of the two documents at issue was not necessary in the context of a plan that put decisions with respect to the various options available to the new corporate owner of the property in the hands of the shareholders at a future date.

[83] The opposing Depositors submit, however, that the District Depositors had the right to this information relating the pros and cons of development before deciding whether to become NewCo shareholders in the first place.

[84] As it happened, they did have such access through the Monitor's April 29, 2016 QFA document, and also, it appears, through information posted on the CEF Forum and from information communicated during the information meetings for Depositors. There is no evidence that any Depositor failed to receive the Monitor's QFA document prior to the June 10, 2016 District meeting date.

[85] The opposing Depositors are critical of the Monitor's QFA disclosure. The problem appears to be that the Monitor does not agree that the issues disclosed in the MSDP and the Conrich ASP are as dire as the opposing Depositors describe.

[86] The opposing Depositors also fault the Monitor for not referencing a website where the documents could be found, but I note that the QFA provides a telephone numbers and email address for any inquiries.

[87] They fault the Monitor for not discussing in the QFA the requirement to upgrade the sanitary sewer lift station and to provide for the disposal of storm water. As noted by the Monitor, those issues are typical of what would be encountered by any developer in considering a new development. The QFA refers to the development risks as follows:

> All development activities have risk associated with them, however, the Monitor is not aware of any known issues related to the PoP Development which would suggest that the future subdivision or development of Prince of Peace Properties would not be feasible other than the risks that are typically associated with real estate development generally.

[88] A difference of opinion between the opposing Depositors and the Monitor with respect to the significance of these development requirements does not constitute concealment, bad faith or breach of duty by the Monitor.

[89] The opposing Depositors also fault the Monitor for failing to provide Depositors with new election letters and forms of proxy in its May 20, 2016 notice of adjournment of the District meeting. The notice clearly sets out the procedure to be followed if a Depositor wishes to change his or her vote or proxy. It invites Depositors to contact the Monitor by telephone or email if they have any additional questions. The Monitor notes that it sent out three election forms with its initial mail-out to Depositors, and received no requests for a new election form. It received at least one change of vote after sending out this notice.

[90] One of the Alberta class action plaintiffs alleges that the Monitor impeded them from distributing material at the information meetings. The Monitor reports that the Alberta plaintiffs were present at the Sherwood Park meeting, handing out material and requesting contact information from other attendees. Some of the attendees expressed confusion as to who had authored the material being handed out by the two Alberta plaintiffs and who was requesting their contact information. The Monitor requested that the Alberta plaintiffs hand-out material at a reasonable distance from the meeting room entrance and communicate clearly to attendees that the material they were handing out was not authored, endorsed or being circulated by the Monitor and that they were not requesting contact information on behalf of the Monitor.

[91] The Monitor wrote to class action counsel as follows:

> The Monitor recognizes that your clients have expressed views thus far which are in opposition to the District's plan. Of course it is up to each depositor, including your clients, to decide how to vote. We also recognize that any party, including your clients, are entitled to voice their support or opposition to the District's plan. However, in the interest of ensuring an efficient meeting that respects the *CCAA* process and the interests of other depositors in attendance, the Monitor is implementing the below referenced rules and procedures. These rules and procedures are intended to provide your clients with the ability to convey their

> opinions in a fashion which does not impede the meeting and respects the rights of other parties in attendance.

[92] The Monitor had a table established for the use of the class action representatives within reasonable proximity to the entrance to the room in which the meetings were held. The class action representatives were entitled to circulate written information to attendees within the reasonable vicinity of that table, but not permitted to disseminate any written material within the room or in the doorway entering the room in which the meetings were held.

[93] The rules provided that any written communication circulated by the class action representatives was to include a prominently displayed disclaimer that such materials were not authored, endorsed or being circulated by the Monitor. A sign identifying the class action representatives was to be prepared by them and displayed at the table established for their use.

[94] These are reasonable rules, designed to avoid confusion, and they did not impede the class action plaintiffs from voicing their views.

[95] The opposing Depositors submit that the Monitor instructed attendees at information meetings to cast their votes immediately, without waiting for the District meeting. The Monitor denies encouraging creditors one way or the other with respect to when to vote. It communicated to attendees the options available to creditors for voting on the District plan and the deadlines associated with each option. It also communicated at meetings that creditors who wished to do so could provide the Monitor with any paperwork they had brought with them. It is a stretch to impute any kind of bad faith to the Monitor in conveying this information.

[96] The class action plaintiffs and their counsel had the ability to attend all of the information meetings. They were in attendance and actively participated in the information meeting in Langley, BC, at the Sherwood Park Meeting, the Red Deer Meeting and the District Meeting. Both counsel were in attendance and participated in the District Meeting. The Monitor notes that it is aware of at least two emails that were widely circulated by a relative of one of the class action plaintiffs outlining the views of the class action plaintiffs on the District Plan. I am satisfied that the opposing Depositors had a more than adequate opportunity to communicate their views to other Depositors and to attempt to garner support for their opposition, and that they were not impeded by the Monitor.

[97] I must address one more disturbing allegation. Two opposing Depositors submit that the Monitor's non-disclosure of the MSDP and the Conrich ASP in the context of what they allege is the Depositor's false and misleading communications with CEF Depositors might lead a reasonable and informed person to believe that "the Monitor is prepared to condone and facilitate the District's dishonest conduct". This is a disingenuous attack on the Monitor's professional reputation, made without evidence or any reasonable foundation. There is no air of reality to this allegation. There is no evidence that the Monitor was aware of misleading statements, if any, made by the District or its employees or agents before or during the *CCAA* proceedings.

[98] The Monitor has prepared 22 regular reports during the approximately 18 months of these proceedings, plus five confidential supplements and three special reports providing creditors with specific information relating to their respective plans of compromise and arrangement. The Monitor also prepared hand-outs tailored to provided information to specific groups of creditors, and five QFAs with information on multiple topics, including NewCo, the potential outcomes of

the *CCAA* proceedings, estates, trust accounts, the assignment of NewCo shares by creditors and the potential future subdivision of the Prince of Peace properties.

[99] The Monitor attended five regional information meetings in Alberta and British Columbia between April 19 and April 28, 2016 to review the contents of the District plan and respond to any inquiries by District Depositors related to the plan. The Information Meetings were each between approximately two and a half and four hours long. It is clear that the information provided to creditors during these CCAA proceedings was far more extensive than that which would normally be provided.

[100] Monitors, being under a duty to the Court as the Court officer and to the parties involved in a *CCAA* proceeding under statute, must sometimes make recommendations that are unpopular with some creditors. The Court expects a Monitor's honest and candid advice, and relies on it. The Monitor in this case went to great lengths to inform the great number of Depositors of ongoing proceedings, and to give its well-reasoned and measured opinion on the myriad of issues in this complex proceeding. In retrospect, it may have been prudent for the Monitor to reference the MSDP and Conrich ASP earlier, in substantially the way it was later referenced in the Monitor's QFA on development, but that is a hindsight observation, and unlikely to resolve other than one of the opposing Depositors' many complaints in support of their application.

4. Cost and Delay

[101] The Monitor and the District Group submit that the timing of this application to remove the Monitor is suspect: that the alleged conflicts complained of have been disclosed for months. The opposing Depositors say that they were awaiting the outcome of the District vote, and that it was not until the May 14, 2016 District meeting that they knew that the Monitor knew about and had failed to disclose the MSDP and the Cornich ASP.

[102] It is clear that the timing of the application is strategic: a clear majority of the DIL and District creditors have voted in favour of the plans despite the efforts of the relatively few opposing Depositors to convince others to join in their opposition. They must now rely on other grounds to frustrate, delay or defeat the Court's sanction of the plans. That is their prerogative as creditors who oppose the plan, and the Court must, and does, consider their objections seriously, whatever the underlying motivation. However, relief on a motion of this kind should only be granted where the evidence indicates "a genuine concern with respect to the merits of the alleged conflict": *Moffatt v Wetstein*, [1996] O.J. No. 1966 at para 131.

[103] While the timing of this application to replace the Monitor does not preclude the opposing Depositors from bringing the application, the Court must balance the potential risk to creditors and the District Group arising from the alleged potential conflict of interest against the prejudice to creditors and the District Group arising from the inevitable delay, duplication of effort and high costs involved with replacing the Monitor at this very late stage of the proceedings.

[104] I have found that the Monitor does not have any legitimate conflict of interest, real or perceived, and that it has not breached any fiduciary duty. Even if I am wrong in this determination, the damage caused by such conflict or breach of duty has been mitigated by full disclosure of potential conflicts and disclosure of the information that the opposing Depositors submit should have been disclosed prior to the vote on the District Plan.

[105] Compared to this, appointing a replacement Monitor would involve costs in excess of $150,000, taking into account that the replacement Monitor would need to retain counsel. The process would cause substantial delay in already lengthy proceedings while the replacement Monitor reviews the events of the last eighteen months.

[106] I also take into account that the key issue that the opposing Depositors want a replacement Monitor to review is whether the Representative Action provisions of the plans are within the jurisdiction of a *CCAA* court to sanction. This is a question of law, on which a replacement Monitor would have to rely on counsel.

[107] At this point in the proceedings, in addition to being reviewed by the Monitor's legal counsel, the provisions of the plans related to the Representative Action have been reviewed by the creditors' committees for the District and DIL, who act in a fiduciary capacity with respect to the creditors of those respective entities and by each committee's independent legal counsel. The jurisdictional issue related to the Representative Action provisions is a legal matter rather than a business issue. As such, this Court is qualified to opine on it independently, without the assistance of a new Monitor.

[108] I note that the creditors' committees who represent the majority of Depositors are strongly opposed to a replacement Monitor. They pointed out that the plans have been approved by the requisite majorities, and delay and additional cost does not serve the interests of the general body of creditors, particularly without what they consider to be any justifiable reason.

[109] The assistance of a further limited purpose Monitor would likely be of little to no further assistance to the Court and would result in increased professional costs to the detriment of creditors as a whole. This is the tail-end of a lengthy process. The introduction of another Monitor without any clear, ascertainable benefit to the body of creditors, leading to uncertainty, costs and delay, is unwarranted.

5. Conclusion

[110] The anger and frustration expressed in these proceedings by a small minority of Depositors, while perhaps understandable given their losses and the trust they placed in their Church, is misplaced when it is directed against the Monitor.

[111] There is no reason arising from conflict of interest or breach of fiduciary duty to replace the Monitor.

[112] I therefore dismiss the application.

B. Sanctioning of the DIL and District Plans

1. Overview

[113] As provided in section 6(1) of the *CCAA*, the Court has the discretion to sanction a plan of compromise or arrangement where, as here, the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the debtor company and its creditors.

[114] The general requirements for court approval of a *CCAA* plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done that is not authorized by the *CCAA;* and
(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd v Royal Trust Co (1993), 17 CBR (3d) 1(Ont Ct J(Gen Div)) at para 17; *Re Canadian Airlines Corp* , 2000 ABQB 442 at para 60, leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal refused [2001] SCCA No 60; *Re Canwest Global Communications Corp,* 2010 ONSC 4209 at para 14.

[115] It is clear that there has been strict compliance with all statutory requirements with respect to both the DIL and the District plans, assuming jurisdiction as a different issue. The opposing Depositors attack the plans on the basis of the second and third requirements.

[116] They submit:

(a) the plans contain provisions that are not within the scheme and purpose of the *CCAA*;
(b) the plans compromise third party claims;
(c) the plans provide no benefit to Depositors within the purpose of the CCAA;
(d) the plans contravene section 5.1(2) of the *CCAA*;
(e) the plans have not been advanced in good faith, with due diligence and full disclosure; and
(f) the plans are not fair and reasonable.

1. Do the plans contain provisions that are not within the scheme and purpose of the *CCAA*?

[117] The opposing Depositors submit that the Representative Action provisions of the plans do not advance the District Group's restructuring goals.

[118] The District and the Creditors' Committees respond that the Representative Action provisions follow the "one proceeding" model that underpins the *CCAA* and will prevent maneuvering among Depositors for better positions in subsequent litigation, which, they say, has already commenced with the stayed class action proceedings. They submit that the provisions provide certainty to Depositors and allow the District to continue its core function without the distraction of a myriad of claims, consuming its limited resources and having the potential to compromise its insurance coverage.

[119] The opposing Depositors submit that procedural rules can be used to limit proceedings in the absence of the Representative Action provisions, and that if more than one class proceeding is brought within a jurisdiction, carriage motions can be brought to determine which action can proceed to certification. Thus, they argue, there is little likelihood that the District will be overwhelmed by litigation in the event that the plans are not approved. Rather, there will be one class proceeding in each of British Columbia and Alberta, and potentially a number of independent claims advanced by those who choose to opt out of those actions or whose claims are of an individual nature not suited to determination in a class proceeding. It is open to the District to apply to have those individual claims consolidated if is appropriate to do so.

[120] This argument contains its own contradictions. It anticipates multiple actions that may have to resolved through court application and carriage motions, the very multiplicity of actions that the Representative Action provisions are proposed to alleviate.

[121] The opposing Depositors cite *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 240 OAC 245, 2008 ONCA 587 (CanLii); leave dismissed [2008] SCC No. 32765 for the proposition that the Court does not have the jurisdiction to approve a plan that contains terms that fall outside the purpose, objects and scheme of the *CCAA*. The *Metcalfe* decision dealt with a unique situation involving the Court's jurisdiction to approve a plan that involved wide-ranging releases. In the result, the Court approved the plan including the releases. The DIL and District plans do not involve third-party releases except in a limited sense that is not at issue. It is true that Blair, J.A. noted in the *Metcalfe* decision that there must a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of a third party release. However, he also noted at para 51 that, since its enactment:

> Courts have recognized that the [*CCAA*] has a broader dimension than simply the direct relations between the debtor company and creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected.

[122] The opposing creditors in *Metcalfe* raised many of the same arguments that the opposing Depositors raise in this case, and the Court noted that they "reflect a view of the purpose and objects of the *CCAA* that is too narrow": para 55.

[123] The opposing Depositors also argue that any provision of a plan that may benefit the District is improper. They submit that the District's arguments "anticipate that it will be the beneficiary of [the Subcommittee's] goodwill", and that this betrays the District's improper motive. There is nothing improper or contrary to the scheme and purpose of the *CCAA* for a debtor company to attempt to be able to continue its business more efficiently and effectively post-*CCAA.* That is the very core and purpose of the *Act*. This argument assumes that the Subcommittees would betray their fiduciary duty to act in the best interests of the creditors they will represent by favouring DIL or the District. There is no evidence that this would happen; on the contrary, the Creditors' Committees have ably represented the interests of creditors as a whole in this restructuring, and there is no reason that the Subcommittees would do otherwise.

[124] Finally, the opposing Depositors submit, referencing the results of a survey conducted by the Lutheran Church – Canada, that there is little likelihood of the District remaining in operation in the future without being subsumed into a single administrative structure. At this point, this is only a possibility that would not be implemented for more than a year, if it is implemented at all.

[125] There is a nexus between the Representative Action provisions of the plans and the restructuring in that these provisions are designed to allow the District to continue in the operation of its core function without the distraction of multiple litigation, while preserving the rights of Depositors to assert actions against third parties involved in the events that led to this insolvency. This Court does not lack jurisdiction to sanction the plans for this reason.

2. Do the Representative Action provisions of the plans compromise third party claims?

[126] The basis for this submission is that the Subcommittees will have absolute discretion to commence and compromise third party claims (including derivative claims), to instruct counsel, and to determine the litigation budget to be shouldered by the Depositors. Under the terms of the plans, a Depositor whose third-party claim is denied by the Subcommittee has no right to proceed independently.

[127] The plans impose fiduciary duties on the Subcommittee members to act in the best interest of Depositors who do not opt-out. No claims are *prima facie* released, other than the partial releases that are unopposed. Thus, it must be assumed that a claim against a third party will not be advanced by a Subcommittee only if not doing so is consistent with its fiduciary duties for whatever reason (for example, advice from representative counsel that a claim has no basis for success).

[128] The opposing Depositors put forward a hypothetical situation in which an individual may have a meritorious claim that he or she wishes to pursue, but the Subcommittee doesn't wish to proceed due to lack of funding. The District and the Monitor point out, and I accept, that the definition of Representative Action permits more than one action. There is no provision of the plans that prevents this hypothetical individual from funding the Subcommittee to pursue such an action on his or her behalf as a Representative Plaintiff. The individual would become part of the Subcommittee and the action would be advanced by the Subcommittee using representative counsel. The hypothetical action would be treated like any other representative action claim under the plans. The Subcommittee would have carriage and control of such litigation, subject to its fiduciary obligations.

[129] If any issues arose from such a hypothetical situation, the advice and direction of the Court is available.

[130] It is important to note that the Representative Action provisions of the plans do not deprive any Depositors of the right to pursue claims as described against third-parties. They merely funnel the process through independent Subcommittees of creditors chosen from among the Depositors who have claims remaining after the Convenience Payments and who will have the fiduciary duty to act in the best interests of the body of such creditors to maximize recovery of their investments.

[131] While third-party claims could be pursued in another fashion, through uncoordinated action by individual Depositors, that does not mean that the Representative Action provisions constitute a compromise of such claims. There is no jurisdictional impediment to sanction arising from this inaccurate characterization of the plan provisions.

3. Do the Representative Action provisions provide any benefit to Depositors within the purpose of the CCAA?

[132] The Monitor identified the benefits of the Representative Action provisions in its reports to Depositors as follows:

(a) they provide a streamlined process for the establishment of the Representative Action class and the funding of the Representative Action;
(b) they prevent a situation where Depositors are being contacted by multiple groups seeking to represent them in a class action or otherwise;

(c) they may result in increased recoveries through settlement of the Representative Action claims on a group basis; and
(d) as certain Depositors have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs, the Representative Action process allows them to opt-out before litigation is even commenced, should that be their preference.

[133] The opposing Depositors suggest that none of these benefits fall within the "express purposes" of the *CCAA.* As noted by the Supreme Court in *Century Services Inc v Canada (Attorney General),* 2010 SCC 60, the *CCAA* has a broad remedial purpose, and permits a company to continue its business through various methods, with a view to becoming viable once again, including compromises or arrangements between an insolvent company and its creditors, and a going-forward strategy.

[134] The *Act* is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the debtor to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. I accept that this is what the District Group is attempting to do with the plans, including the Representative Action provisions. While these provisions are of benefit to the District in allowing it to deal with claims affecting its officers, directors and employees from a single source, they also have a rationale and reasonable purpose in protecting the community of mostly older Depositors that the District will continue to serve in a religious capacity, and in attempting to maximize recovery through the possibility of focused negotiations with a limited number of parties. This does not mean that these types of provisions will always be an appropriate way to deal with third party claims, but, in the circumstances of this rather unique restructuring, the benefits are reasonable, rationale and connected with the overall restructuring.

[135] The DIL and District plans are part of a four component conceptual plan of arrangement and compromise that is designed to permit the District to continue to carry out its core operations as a church entity without the CEF and DIL functions that it has previously carried out and without the senior's care ministry component it had carried out through ECHS and EMSS. The opposing Depositors take an overly narrow view of the *CCAA's* purpose, and ignore the real benefits identified by the Monitor to the large group of Depositors who are interested in recovering as much of their investment as possible. This Court does not lack jurisdiction to sanction the plans on this ground.

4. Do the plans contravene section 5.1(2) of the *CCAA*?

[136] Claims that may be included in the Representative Action provisions include claims that cannot be compromised pursuant to section 5.1(2) of the *CCAA* as they are claims against directors that relate to a contractual right of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by a director.

[137] As noted previously, the plans do not release or compromise any claims that can be pursued in the Representative Action. Accordingly, the plans permit the directors to be pursued in a Representative Action in accordance with s. 5.1(2) of the *CCAA*.

5. Have the plans been advanced in good faith, with diligence and full disclosure?

[138] As noted with respect to the application to replace the Monitor, it was not necessary for the District to disclose the MSDP and the Conrich ASP in the context of the District plan. However, these documents were disclosed to Depositors before the reconvened District meeting, and Depositors had the ability to change their vote on the District plan with this information in hand. The District was not guilty of bad faith arising from these circumstances.

[139] The opposing Depositors also submit that counsel for the District Group, by acting as counsel and advancing the plans, has "intentionally sought to misuse the *CCAA* proceedings to shield himself and his law firm from liability". First, neither counsel nor his firm is released by the plans from any liability, other than the limited release provisions that are not contentious. The opposing creditors have made a number of allegations against counsel and his firm; none of these allegations have been tested or established and undoubtedly the Subcommittees will have to consider whether to bring proceedings against these parties for advice that may have been provided to the District Group prior to the *CCAA* filing. This situation does not give rise to bad faith by the District Group.

[140] The opposing Depositors also allege that counsel for the District Group has been unjustly enriched as a result of the legal fees they have been paid while acting as counsel in these proceedings. Counsel has not been able to respond to this allegation of dubious merit. Again, this is irrelevant to the issue of the District Group's good faith.

[141] Similar allegations have been made about the Monitor, which have been addressed in the decision relating to the replacement of Monitor.

6. Are the Plans Fair and Reasonable?

a. Overview

[142] Farley, J. in *Re: Sammi Atlas Inc*, [1998] O.J. No. 1089 at para 4 provided a useful description of the Court's duty in determining whether a proposed plan is fair and reasonable:

> … is the Plan fair and reasonable? A Plan under the *CCAA* is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights. It is recognized that the *CCAA* contemplates that a minority of creditors is bound by the Plan which a majority have approved – subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509.

In an earlier case, he commented:

> In the give and take of a *CCAA* plan negotiation, it is clear that equitable treatment need not necessarily involve equal treatment. There is some give and some get in trying to come up with an overall plan which Blair J. in *Olympia & York* likened to a sharing of the pain. Simply put, any *CCAA* arrangement will

> involve pain – if for nothing else than the realization that one has made a bad investment/loan: *Re: Central Guarantee Trust Ltd.*, [1993] O.J. No. 1479.

[143] The objection of the opposing Depositors to these plans focus mainly on whether the different treatment of some creditors results in inequitable treatment, whether the plans are flawed is any respect and how much weight I should accord to the approval of the majority.

b. Deference to the Majority

[144] Dealing with the important factor of the approval of the plans by the requisite double majority of creditors, the Court in *Re Muscletech Research & Development Inc.*, [2007] O.J. No. 695 at para 18 commented:

> It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the Applicants if the plan is not approved. An important factor to be considered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.

[145] The opposing Depositors, however, invite me to do just that. They refer to a remark by McLachlen, J. (as she then was), in *Re Gold Texas Resources* [1989] B.C.J. No. 167 at page 4, to the effect that the court should determine whether "there is not within an apparent majority some undisclosed or unwarranted coercion of the minority…. (i)t must be satisfied that the majority is acting *bona fide* and in good faith".

[146] The opposing Depositors submit that, in considering the voting results, I should keep in mind that the many of the Depositors "are not businessmen" and that 60% of them are senior citizens over 60 years of age. I note that some of the opposing creditors are also "not businessmen" and are over 60, but the Court is not asked to discount their opposing votes for that reason.

[147] I have read the considerable disclosure about the plans prepared and distributed by the Monitor, and note the extraordinary efforts of the Monitor and the District Group to ensure that Depositors had the opportunity to ask questions at the information meetings. The Depositors have had months to inform themselves of the plans. Even if the disputed development disclosure had been necessary, there were roughly 1 ½ months from the Monitor's disclosure of the documents to the vote on the District Plan. It would be patronizing for the Court to assume anything other than the Depositors were capable of reading the materials, asking relevant questions and exercising judgment in their own best interest. Business sophistication is not a necessity in making an informed choice.

[148] The opposing Depositors also submit that there is evidence of efforts by Church officials to influence the outcome of the vote in favour of the plans. This evidence consists of affidavits from the opposing Depositors or their supporters that accuse various Church pastors of efforts to intimidate or silence those who oppose the plans. These allegations have been made against individuals who are not direct parties in these proceedings, at such a time and in such circumstances that it was not possible for them to respond.

[149] As seen from the allegations against the Monitor, to which the Monitor had an opportunity to respond, there may be very different perceptions about what actually occurred during the incidents described in the allegations. I appreciate that it must be uncomfortable to be at odds with your religious community on an important issue. However, these allegations would bear greater weight if the terms of the plans were prejudicial to the Depositors as a whole, or the allegations were supported by the Creditor's Committees but they are not. It is not unreasonable or irrational for Depositors to have voted in favour of the plans.

[150] I am unable to accept on the evidence before me that the Depositors who voted in favour of the plans did so because they were coerced by church officials. This does a disservice to those who exercised their right to vote and to have an opinion on the plans, no matter what their level of sophistication, their age or their religious persuasion.

c. The Convenience Payments

[151] The opposing Depositors also submit that the votes in favour of the District plan were unfairly skewed by the fact that creditors with claims of less than $5,000 are to be paid in full (the "Convenience Creditors"). The Monitor reports that, of the 1,616 Convenience Creditors, 500 or 31% in number holding 54% in value of total claims under $5,000 voted on the District plan.

[152] Of the 500 Convenience Creditors who voted on the District plan, 450 or 90% voted in favour of the District plan and 50 or 10% voted against the District plan. The Convenience Creditors who voted in favour of the District plan had claims of approximately $641,300 (91% of the total claims of voting Convenience Creditors), and the Convenience Creditors who voted against the District plan had claims of approximately $66,500 (9% of the total claims of voting Convenience Creditors).

[153] Approximately 1,294 Eligible Affected Creditors with total claims of approximately $85.1 million voted on the District plan. The Convenience Creditors therefore represented approximately 39% in number and approximately 1% in dollar value of the total eligible affected creditors. In order for the District plan to be approved, both a majority in number and two-thirds in dollar value of voting creditors must have voted in favour of the plan. As such, while the Convenience Payments increased the likelihood that a majority in number of Creditors would vote in favour of the plan, they had little impact on the likelihood that two-thirds in dollar value of voting creditors would vote in favour of the plan.

[154] Excluding the Convenience Creditors, a total of 794 creditors voted on the District plan, of which 626, or approximately 79% voted in favour and 168 voted against. Therefore the plan still would have passed by a majority in number of voting creditors had the Convenience Creditors not voted.

[155] The District Group and the Monitor note that the Convenience Creditor payments have the effect of limiting the number of NewCo shareholders to about 1,000, rather than 2,600, thus creating a more manageable corporate governance structure for NewCo and ensuring that only Depositors with a significant financial interest in NewCo will be shareholders. This is a reasonable and persuasive rationale for paying out the Convenience Creditors. While each case must be reviewed in its unique circumstances, this type of payout of creditors with smaller claims is not uncommon in *CCAA* restructurings: *Contact Enterprises Inc, Re* 2015 BCSC 129;

Target Canada Co., Re 2016 CarswellOnt 8815; *Nelson Financial Group Ltd., Re* 2011 ONSC 2750.

[156] As noted previously, equitable treatment is not necessary equal treatment, and the elimination of potential shareholders with little financial interest from NewCo is a benefit to remaining Depositors in the context of the District plan. They may not have had any significant financial influence in the corporation, but their interests would have had to be taken into account in deciding on the future of NewCo.

d. The NewCo provisions

[157] The opposing Depositors submit that, as the future of the Prince of Peace properties cannot be known until after the first meeting of NewCo shareholders six months after the effective date of the plan, the plan deprives the Court of the ability to ensure the plan is fair and reasonable and therefore appropriate to impose on the minority.

[158] This is incorrect. What is relevant to the Court in reviewing the plan is the value of the shares of NewCo that are part of the consideration that will be distributed to some of the District Depositors. As noted in *Century Services* at para 77:

> Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation.

[159] The Monitor notes that the value of the NewCo shares is intended to be based principally on the independent appraisals, which reflect a range of forced sale values. The Monitor has consulted with the Deloitte' Valuations Group, which has indicated that in valuing shares such as those of NewCo, it would be more common to value assets such as the Prince of Peace properties based on appraised market values as opposed to forced sale values. The Monitor reports that it has attempted to balance this consideration against other practical considerations, such as that fact that, depending on the mandate that is chosen for NewCo, the Prince of Peace properties may still be liquidated in the near-term, and that therefore, there is the need to accurately reflect the shortfall to some of the Depositors, which will represent the amount they would ultimately be able to pursue in the Representative Action. I accept the Monitor's opinion that it is unlikely that the values attributed to the Prince of Peace properties in calculating the value of the NewCo shares will reflect the lowest forced sale values reflected in the appraisals.

[160] The District Plan contemplates a debt-to equity conversion, which is common in *CCAA* proceedings. The Court does not have to make a determination of the value of the equity offered, as long as it is satisfied, as I am, that the value of the package to be distributed to the Depositors will likely exceed a current forced-sale liquidation recovery in this depressed real estate market, which is the alternative proposed by the opposing Depositors. The plan provides the NewCo shareholders with flexibility to optimize recovery at the time of the first shareholder's meeting, with the advantage of recommendations from an experienced management team. While there is no guarantee that the market will improve, it is a realistic possibility. At any rate, the sale of the Prince of Peace properties will not be the only option available to NewCo shareholders. Again, I must take into account that this appears to be the view of the Depositors who voted in favour of the plan.

[161] The opposing Depositors submit that the NewCo shares are not a suitable investment for District Depositors over the age of 70. It is unrealistic to believe that any *CCAA* plan of

compromise and arrangement would be supported by all of a debtor company's creditors or that the compromise effected would be ideally suited to every creditor's personal situation. The NewCo articles attempt to address the concerns of those who don't want to hold shares by building in provisions that would allow the possibility that shareholders are able to sell to other shareholders or have their shares redeemed.

[162] This is not a perfect solution, but plans do not have to be perfect to be found to be fair and reasonable. I find that the NewCo provisions of the District plan, in the context of the plan, as a whole, are fair and reasonable.

e. The Representative Action provisions

[163] In addition to submissions previously discussed with respect to these provisions, the opposing Depositors submit that "(n)o honest and intelligent District Depositors acting in their own best interests would give up these fundamental rights of [full and unfettered access to the courts] where the law already provides perfectly satisfactory processes for advancing legal claims against third parties on a class basis. These provisions are neither fair nor reasonable, and accordingly must not receive the sanction of this Court".

[164] The short answer to this is that a majority of the honest and intelligent Depositors have voted in favour of the plans, including the Representative Action provisions. It is not the place of this Court to second guess their decision without good and persuasive reasons: *Central Guaranty* at paras 3&4; *Muscletech* at para 18.

[165] The opposing Depositors also submit that the Representative Action provisions of the plans are flawed in that they do not provide for information about causes of action the Subcommittee intends to advance, and against whom prior to the opt-out deadline.

[166] However, Depositors are able to opt-out at any time prior to the last business day preceeding the date of commencement of the Representative Action. It is not unreasonable to anticipate that Depositors will have further information with respect to the proposed Representative Actions prior to their commencement.

[167] It is also true that participating Depositors will not know their own proportionate share of the Representative Action Holdback until after the opt-out deadline has passed and the size of the Representative Action class is known. However, the Monitor has committed to provide a range of what individual shares may be.

[168] The opposing Depositors submit that in the absence of reliable information about the extent of their financial commitment to the Representative Action, it can reasonably be expected that many District Depositors will be content to receive their distribution under the plan and forgo the balance of their claims by electing to opt out the Representative Action. This is not a reasonable assumption. Representative counsel will likely be retained on a contingency fee basis, and therefore Depositors will be unlikely to be at risk for a substantial retainer to advance the Representative Action.

[169] Finally, on this issue, the opposing Depositors submit there is an irreconcilable conflict of interest between the Subcommittee and a Representative Plaintiff that can be expected to mar the Representative Action. Unlike the Subcommittee tasked with instructing counsel, the Representative Plaintiff bears the sole financial responsibility for paying an adverse costs award. The opposing Depositors submit that it is reasonable to expect that there may be a divergence of

views between the Subcommittee and the Representative Plaintiff as to the conduct of the Representative Action.

[170] As would be the case in class action proceedings when the interests of representative plaintiffs come into conflicts with the interests of the class, advice and direction can be sought from the Court in the event that this situation materializes.

[171] The opposing Depositors submit that the Representative Action provisions interfere with a citizen's constitutional right of access to the courts. These provisions do not deprive the Depositors from their right to take action against third parties; they are able to do so through a Subcommittee chosen from their members with fiduciary duties to the whole. This issue was considered in the context of third-party releases, which do eliminate the right to pursue an action against third parties, in *Metcalfe*, and Blair, J.A. commented at para 104 as follows:

> 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.

7. Conclusion

[172] As noted at para 18 of *Metcalfe*:

> 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 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.

[173] In this case, the requisite double majority, after significant disclosure and opportunities to review and question the plans, have voted in favour of the plans. The Creditors' Committees of DIL and the District, who have the duty to act in the best interests of the body of creditors, support the plans.

[174] The Monitor supports the plans, and there is no reason in this case to give the Monitor's opinion less than the usual deference and weight.

[175] Measuring the plans against available commercial alternatives leads me to the conclusion that they provide greater benefits to Depositors and other creditors than a forced liquidation in a depressed real estate market.

[176] The plans preserve the District's core operations. I accept that the Representative Action provisions are appropriate and reasonable in the circumstances of this restructuring, that, in addition to the benefits identified by the Monitor of stream-lined proceedings, the avoidance of multiple communications and the potential of increased recovery, Depositors will benefit from the oversight of the Subcommittees and the Representative Action process will be able to incorporate cause of action, such as derivative actions, that are normally outside the scope of class actions.

[177] The insolvency of the District Group has caused heartbreak and hardship for many people, as is the case in any insolvency. In the end, the majority of affected creditors have accepted plans that resolve their collective problems to the extent possible in difficult circumstances. As noted in *Metcalfe* " in insolvency restructuring proceedings almost everyone loses something": para 117. That is certainly the case here, and the best that can be done is to try to ensure that the plans are a reasonable "balancing of prejudices". It is not possible to please all stakeholders.

[178] The balance of interests clearly favours approval. I am satisfied that the DIL and District plans are fair and reasonable and should be sanctioned.

Heard on the 15th day of July, 2016.
Dated at the City of Calgary, Alberta this 2nd day of August, 2016.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Francis N.J. Taman and Ksena J. Court
for the District Group

Jeffrey L. Oliver and Frank Lamie
for the Monitor

Chris D. Simard and Alexis E. Teasdale
for the District Creditors' Committee

Douglas S. Nishimura
for the DIL Creditors' Committee

Errin A. Poyner
for Elvira Kroeger and Randall Kellen

Allan a. Garber
for Marilyn Huber and Sharon Sherman

Dean Hutchison
for Concentra Trust

Christa Nicholson
for Francis Taman and Bishop and McKenzie LLP

Corrigendum of the Reasons for Decisions
of
The Honourable Madam Justice B.E. Romaine

On page 30 - Ms. Nicholson is counsel only for Francis Taman and Bishop and McKenzie LLP.

TAB 3

See paras. 34-37

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **SEPTEMBER 23, 2010**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

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

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
THE OTHER PETITIONERS LISTED ON SCHEDULES "A", "B" AND "C"
Debtors

And
ERNST & YOUNG INC.
Monitor

REASONS FOR JUDGMENT ON SANCTION ORDER (#733)

INTRODUCTION

[1] This judgment deals with the sanction and approval of a plan of arrangement under the *CCAA*[1]. The sole issue to resolve is the fair and reasonable character of the plan. While the debtor company, the monitor and an overwhelming majority of stakeholders strongly support this sanction and approval, three dissenting voices raise limited objections. The Court provides these reasons in support of the Sanction Order it considers appropriate and justified to issue under the circumstances.

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

THE RELEVANT BACKGROUND

[2] On April 17, 2009, the Court issued an Initial Order pursuant to the *CCAA* with respect to the Abitibi Petitioners (listed in Schedule A), the Bowater Petitioners (listed in Schedule B) and the Partnerships (listed in Schedule C).

[3] On the day before, April 16, 2009, AbitibiBowater Inc., Bowater Inc. and certain of their U.S. and Canadian Subsidiaries (the "**U.S. Debtors**") had, similarly, filed Voluntary Petitions for Relief under Chapter 11 of the U.S. Bankruptcy Code.

[4] Since the Initial Order, the Abitibi Petitioners, the Bowater Petitioners and the Partnerships (collectively, "**Abitibi**") have, under the protection of the Court, undertaken a huge and complex restructuring of their insolvent business.

[5] The restructuring of Abitibi's imposing debt of several billion dollars was a cross-border undertaking that affected tens of thousands of stakeholders, from employees, pensioners, suppliers, unions, creditors and lenders to government authorities.

[6] The process has required huge efforts on the part of many, including important sacrifices from most of the stakeholders involved. To name just a few, these restructuring efforts have included the closure of certain facilities, the sale of assets, contracts repudiations, the renegotiation of collective agreements and several costs saving initiatives[2].

[7] In a span of less than 18 months, more than 740 entries have been docketed in the Court record that now comprises in excess of 12 boxes of documents. The Court has, so far, rendered over 100 different judgments and orders. The Stay Period has been extended seven times. It presently expires on September 30, 2010.

[8] Abitibi is now nearing emergence from this *CCAA* restructuring process.

[9] In May 2010, after an extensive review of the available alternatives, and pursuant to lengthy negotiations and consultations with creditors' groups, regulators and stakeholders, Abitibi filed its Plan of Reorganization and Compromise in the *CCAA* restructuring process (the "***CCAA* Plan**[3]"). A joint Plan of Reorganization was also filed at the same time in the U.S. Bankruptcy Court process (the "**U.S. Plan**").

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[2] See Monitor's Fifty-Seventh Report dated September 7, 2010, and Monitor's Fifty-Ninth Report dated September 17, 2010.

[3] This Plan of Reorganisation and Compromise (as modified, amended or supplemented by *CCAA* Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, *CCAA* Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) (collectively, the "***CCAA* Plan**") is included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

[10] In essence, the Plans provided for the payment in full, on the Implementation Date and consummation of the U.S. Plan, of all of Abitibi's and U.S. Debtors' secured debt obligations.

[11] As for their unsecured debt obligations, save for few exceptions, the Plans contemplated their conversion to equity of the post emergence reorganized Abitibi. If the Plans are implemented, the net value would likely translate into a recovery under the *CCAA* Plan corresponding to the following approximate rates for the various Affected Unsecured Creditors Classes:

(a) 3.4% for the ACI Affected Unsecured Creditor Class;

(b) 17.1% for the ACCC Affected Unsecured Creditor Class;

(c) 4.2% for the Saguenay Forest Products Affected Unsecured Creditor Class;

(d) 36.5% for the BCFPI Affected Unsecured Creditor Class;

(e) 20.8% for the Bowater Maritimes Affected Unsecured Creditor Class; and

(f) 43% for the ACNSI Affected Unsecured Creditor Class.

[12] With respect to the remaining Petitioners, the illustrative recoveries under the *CCAA* Plan would be nil, as these entities have nominal assets.

[13] As an alternative to this debt to equity swap, the basic structure of the *CCAA* Plan included as well the possibility of smaller unsecured creditors receiving a cash distribution of 50% of the face amount of their Proven Claim if such was less than $6,073, or if they opted to reduce their claim to that amount.

[14] In short, the purpose of the *CCAA* Plan was to provide for a coordinated restructuring and compromise of Abitibi's debt obligations, while at the same time reorganizing and simplifying its corporate and capital structure.

[15] On September 14, 2010, Abitibi's Creditors' Meeting to vote on the *CCAA* Plan was convened, held and conducted. The resolution approving the *CCAA* Plan was overwhelmingly approved by the Affected Unsecured Creditors of Abitibi, save for the Creditors of one the twenty Classes involved, namely, the BCFC Affected Unsecured Creditors Class.

[16] Majorities well in excess of the statutorily required simple majority in number and two-third majority in value of the Affected Unsecured Claims held by the Affected Unsecured Creditors were attained. On a combined basis, the percentages were 97.07% in number and 93.47% in value.

[17] Of the 5,793 votes cast by creditors holding claims totalling some 8,9 billion dollars, over 8,3 billion dollars worth of claims voted in favour of approving the *CCAA* Plan.

THE MOTION[4] AT ISSUE

[18] Today, as required by Section 6 of the *CCAA*, the Court is asked to sanction and approve the *CCAA* Plan. The effect of the Court's approval is to bind Abitibi and its Affected Unsecured Creditors to the terms of the *CCAA* Plan.

[19] The exercise of the Court's authority to sanction a compromise or arrangement under the *CCAA* is a matter of judicial discretion. In that exercise, the general requirements to be met are well established. In summary, before doing so, the Court must be satisfied that[5]:

a) There has been strict compliance with all statutory requirements;

b) Nothing has been done or purported to be done that was not authorized by the *CCAA*; and

c) The Plan is fair and reasonable.

[20] Only the third condition is truly at stake here. Despite Abitibi's creditors' huge support of the fairness and the reasonableness of the *CCAA* Plan, some dissenting voices have raised objections.

[21] They include:

a) The BCFC Noteholders' Objection;

b) The Contestations of the Provinces of Ontario and British Columbia; and

c) The Contestation of NPower Cogen Limited.

[22] For the reasons that follow, the Court is satisfied that the *CCAA* Plan is fair and reasonable. The Contestations of the Provinces of Ontario and British Columbia and of NPower Cogen Limited have now been satisfactorily resolved by adding to the Sanction Order sought limited "carve-out" provisions in that regard. As for the only other objection that remains, namely that of some of the BCFC Noteholders, the Court considers that it should be discarded.

[23] It is thus appropriate to immediately approve the *CCAA* Plan and issue the Sanction Order sought, albeit with some minor modifications to the wording of specific conclusions that the Court deems necessary.

[24] In the Court's view, it is important to allow Abitibi to move forthwith towards emergence from the *CCAA* restructuring process it undertook eighteen month ago.

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4 *Motion for an Order Sanctioning the Plan of Reorganization and Compromise and Other Relief* (the "**Motion**"), pursuant to Sections 6, 9 and 10 of the *CCAA* and Section 191 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "***CBCA***").

5 *Boutiques San Francisco Inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185, B.E. 2004BE-775 (S.C.); *Cable Satisfaction International Inc. (Arrangement relatif à),* J.E. 2004-907 (S.C.).

[25] No one seriously disputes that there is risk associated with delaying the sanction of the *CCAA* Plan. This risk includes the fact that part of the exit financing sought by Abitibi is dependent upon the capital markets being receptive to the high yield notes or term debt being offered, in a context where such markets are volatile. There is, undoubtedly, continuing uncertainty with respect to the strength of the economic recovery and the effect this could have on the financial markets.

[26] Moreover, there are numerous arrangements that Abitibi and their key stakeholders have agreed to or are in the process of settling that are key to the successful implementation of the *CCAA* Plan, including collective bargaining agreements with employees and pension funding arrangements with regulators. Any undue delay with implementation of the *CCAA* Plan increases the risk that these arrangements may require alterations or amendments.

[27] Finally, at hearing, Mr. Robertson, the Chief Restructuring Officer, testified that the monthly cost of any delay in Abitibi's emergence from this *CCAA* process is the neighbourhood of 30 million dollars. That includes the direct professional costs and financing costs of the restructuring itself, as well as the savings that the labour cost reductions and the exit financing negotiated by Abitibi will generate as of the Implementation Date.

[28] The Court cannot ignore this reality in dealing rapidly with the objections raised to the sanction and approval of the *CCAA* Plan.

ANALYSIS

1. The Court's approval of the *CCAA* Plan

[29] As already indicated, the first and second general requirements set out previously dealing with the statutory requirements and the absence of unauthorized conduct are not at issue.

[30] On the one hand, the Monitor has reached the conclusion that Abitibi is and has been in strict compliance with all statutory requirements. Nobody suggests that this is not the case.

[31] On the other hand, all materials filed and procedures taken by Abitibi were authorized by the *CCAA* and the orders of this Court. The numerous reports of the Monitor (well over sixty to date) make no reference to any act or conduct by Abitibi that was not authorized by the *CCAA*; rather, the Monitor is of the view that Abitibi has not done or purported to do anything that was not authorized by the *CCAA*[6].

[32] In fact, in connection with each request for an extension of the stay of proceedings, the Monitor has reported that Abitibi was acting in good faith and with due

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6 See Monitor's Fifty-Eight Report dated September 16, 2010.

diligence. The Court has not made any contrary finding during the course of these proceedings.

[33] Turning to the fairness and reasonableness of a *CCAA* Plan requirement, its assessment requires the Court to consider the relative degrees of prejudice that would flow from granting or refusing the relief sought. To that end, in reviewing the fairness and reasonableness of a given plan, the Court does not and should not require perfection[7].

[34] Considering that a plan is, first and foremost, a compromise and arrangement reached, between a debtor company and its creditors, there is, indeed, a heavy onus on parties seeking to upset a plan where the required majorities have overwhelmingly supported it. From that standpoint, a court should not lightly second-guess the business decisions reached by the creditors as a body[8].

[35] In that regard, courts in this country have held that the level of approval by the creditors is a significant factor in determining whether a *CCAA* Plan is fair and reasonable[9]. Here, the majorities in favour of the *CCAA* Plan, both in number and in value, are very high. This indicates a significant and very strong support of the *CCAA* Plan by the Affected Unsecured Creditors of Abitibi.

[36] Likewise, in its Fifty-Seventh Report, the Monitor advised the creditors that their approval of the *CCAA* Plan would be a reasonable decision. He recommended that they approve the *CCAA* Plan then. In its Fifty-Eighth Report, the Monitor reaffirmed its view that the *CCAA* Plan was fair and reasonable. The recommendation was for the Court to sanction and approve the *CCAA* Plan.

[37] In a matter such as this one, where the Monitor has worked through out the restructuring with professionalism, objectivity and competence, such a recommendation carries a lot of weight.

[38] The Court considers that the *CCAA* Plan represents a truly successful compromise and restructuring, fully in line with the objectives of the *CCAA*. Despite its weaknesses and imperfections, and notwithstanding the huge sacrifices and losses it imposes upon numerous stakeholders, the *CCAA* Plan remains a practical, reasonable and responsible solution to Abitibi's insolvency.

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7 *Re T. Eaton Co.,* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]); *Sammi Atlas Inc. (Re),* (1998), 3 C.B.R. (4th) 171 (Ont.S.C.J. [Commercial List]); *PSINet Lt. (Re)*, [2002] O.J. No. 1156 (Ont. S.C.J.) (QL).

8 *Uniforêt inc. (Arrangement relatif à)*, J.E. 2003-1408; *T.Q.S. inc.* (*Arrangement relatif à*), 2008 QCCS 2448, B.E. 2008BE-834; *PSINet Ltd. (Re)*, [2002] O.J. No. 1156 (Ont. S.C.J.) (QL); *Olympia & York Developments Ltd. (Re)*, (1993) 12 O.R. (3d) 500 (Gen. Div.).

9 *Olympia & York Developments Ltd. (Re)*, (1993) 12 O.R. (3d) 500 (Gen. Div.); *Boutiques San Francisco inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185 , B.E. 2004BE-775; *PSINet Ltd. (Re)*, [2002] O.J. No. 1156 (Ont. S.C.J.) (QL); *Northland Properties Ltd. (Re)*, (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.).

[39] Its implementation will preserve significant social and economic benefits to the Canadian economy, including enabling about 11,900 employees (as of March 31, 2010) to retain their employment, and allowing hundreds of municipalities, suppliers and contractors in several regions of Ontario and Quebec to continue deriving benefits from a stronger and more competitive important player in the forest products industry.

[40] In addition, the business of Abitibi will continue to operate, pension plans will not be terminated, and the Affected Unsecured Creditors will receive distributions (including payment in full to small creditors).

[41] Moreover, simply no alternative to the *CCAA* Plan has been offered to the creditors of Abitibi. To the contrary, it appears obvious that in the event the Court does not sanction the *CCAA* Plan, the considerable advantages that it creates will be most likely lost, such that Abitibi may well be placed into bankruptcy.

[42] If that were to be the case, no one seriously disputes that most of the creditors would end up being in a more disadvantageous position than with the approval of the *CCAA* Plan. As outlined in the Monitor's 57th Report, the alternative scenario, a liquidation of Abitibi's business, will not prove to be as advantageous for its creditors, let alone its stakeholders as a whole.

[43] All in all, the economic and business interests of those directly concerned with the end result have spoken vigorously pursuant to a well-conducted democratic process. This is certainly not a case where the Court should override the express and strong wishes of the debtor company and its creditors and the Monitor's objective analysis that supports it.

[44] Bearing these comments in mind, the Court notes as well that none of the objections raised support the conclusion that the *CCAA* Plan is unfair or unreasonable.

2. The BCFC Noteholders' objections

[45] In the end, only Aurelius Capital Management LP and Contrarian Capital Management LLC (the "**Noteholders**") oppose the sanction of the *CCAA* Plan[10].

[46] These Noteholders, through their managed funds entities, hold about one-third of some six hundred million US dollars of Unsecured Notes issued by Bowater Canada Finance Company ("**BCFC**") and which are guaranteed by Bowater Incorporated. These notes are BCFC's only material liabilities.

[47] BCFC was a Petitioner under the *CCAA* proceedings and a Debtor in the parallel proceedings under Chapter 11 of the U.S. Bankruptcy Code. However, its creditors voted to reject the *CCAA* Plan: while 76.8% of the Class of Affected Unsecured Creditors of BCFC approved the *CCAA* Plan in number, only 48% thereof voted in favour in dollar value. The required majorities of the *CCAA* were therefore not met.

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[10] The Indenture Trustee acting under the Unsecured Notes supports the Noteholders in their objections.

[48] As a result of this no vote occurrence, the Affected Unsecured Creditors of BCFC, including the Noteholders, are Unaffected Creditors under the *CCAA* Plan: they will not receive the distribution contemplated by the plan. As for BCFC itself, this outcome entails that it is not an "Applicant" for the purpose of this Sanction Order.

[49] Still, the terms of the *CCAA* Plan specifically provide for the compromise and release of any claims BCFC may have against the other Petitioners pursuant, for instance, to any inter company transactions. Similarly, the *CCAA* Plan specifies that BCFC's equity interests in any other Petitioner can be exchanged, cancelled, redeemed or otherwise dealt with for nil consideration.

[50] In their objections to the sanction of the *CCAA* Plan, the Noteholders raise, in essence, three arguments:

(a) They maintain that BCFC did not have an opportunity to vote on the *CCAA* Plan and that no process has been established to provide for BCFC to receive distribution as a creditor of the other Petitioners;

(b) They criticize the overly broad and inappropriate character of the release provisions of the *CCAA* Plan;

(c) They contend that the NAFTA Settlement Funds have not been appropriately allocated.

[51] With respect, the Court considers that these objections are ill founded.

[52] First, given the vote by the creditors of BCFC that rejected the *CCAA* Plan and its specific terms in the event of such a situation, the initial ground of contestation is moot for all intents and purposes.

[53] In addition, pursuant to a hearing held on September 16 and 17, 2010, on an Abitibi's *Motion for Advice and Directions*, Mayrand J. already concluded that BCFC had simply no claims against the other Petitioners, save with respect to the Contribution Claim referred to in that motion and that is not affected by the *CCAA* Plan in any event.

[54] There is no need to now review or reconsider this issue that has been heard, argued and decided, mostly in a context where the Noteholders had ample opportunity to then present fully their arguments.

[55] In her reasons for judgment filed earlier today in the Court record, Mayrand J. notably ruled that the alleged Inter Company Claims of BCFC had no merit pursuant to a detailed analysis of what took place.

[56] For one, the Monitor, in its Amended 49th Report, had made a thorough review of the transactions at issue and concluded that they did not appear to give rise to any inter company debt owing to BCFC.

[57] On top of that, Mayrand J. noted as well that the Independent Advisors, who were appointed in the Chapter 11 U.S. Proceedings to investigate the Inter Company Transactions that were the subject of the Inter Company Claims, had completed their report in this regard. As explained in its 58th Report, the Monitor understands that they were of the view that BCFC had no other claims to file against any other Petitioner. In her reasons, Mayrand J. concluded that this was the only reasonable inference to draw from the evidence she heard.

[58] As highlighted by Mayrand J. in these reasons, despite having received this report of the Independent Advisors, the Noteholders have not agreed to release its content. Conversely, they have not invoked any of its findings in support of their position either.

[59] That is not all. In her reasons for judgment, Mayrand J. indicated that a detailed presentation of the Independent Advisors report was made to BCFC's Board of Directors on September 7, 2010. This notwithstanding, BCFC elected not to do anything in that regard since then.

[60] As a matter of fact, at no point in time did BCFC ever file, in the context of the current *CCAA* Proceedings, any claim against any other Petitioner. None of its creditors, including the Noteholders, have either purported to do so for and/or on behalf of BCFC. This is quite telling. After all, the transactions at issue date back many years and this restructuring process has been going on for close to eighteen months.

[61] To sum up, short of making allegations that no facts or analysis appear to support or claiming an insufficiency of process because the independent and objective ones followed so far did not lead to the result they wanted, the Noteholders simply have nothing of substance to put forward.

[62] Contrary to what they contend, there is no need for yet again another additional process to deal with this question. To so conclude would be tantamount to allowing the Noteholders to take hostage the *CCAA* restructuring process and derail Abitibi's emergence for no valid reason.

[63] The other argument of the Noteholders to the effect that BCFC would have had a claim as the holder of preferred shares of BCHI leads to similar comments. It is, again, hardly supported by anything. In any event, assuming the restructuring transactions contemplated under the *CCAA* Plan entail their cancellation for nil consideration, which is apparently not necessarily the case for the time being, there would be nothing unusual in having the equity holders of insolvent companies not receive anything in a compromise and plan of arrangement approved in a *CCAA* restructuring process.

[64] In such a context, the Court disagrees with the Noteholders' assertion that BCFC did not have an opportunity to vote on the *CCAA* Plan or that no process was established to provide the latter to receive distribution as a potential creditor of the other Petitioners.

[65] To argue that the *CCAA* Plan is not fair and reasonable on the basis of these alleged claims of BCFC against the other Petitioners has no support based on the relevant facts and Mayrand J.'s analysis of that specific point.

[66] Second, given these findings, the issue of the breadth and appropriateness of the releases provided under the *CCAA* Plan simply does not concern the Noteholders.

[67] As stated by Abitibi's Counsel at hearing, BCFC is neither an "Applicant" under the terms of the releases of the *CCAA* Plan nor pursuant to the Sanction Order. As such, BCFC does not give or get releases as a result of the Sanction Order. The *CCAA* Plan does not release BCFC nor its directors or officers acting as such.

[68] As it is not included as an "Applicant", there is no need to provide any type of convoluted "carve-out" provision as the Noteholders requested. As properly suggested by Abitibi, it will rather suffice to include a mere clarification at paragraph 15 of the Sanction Order to reaffirm that in the context of the releases and the Sanction Order, "Applicant" does not include BCFC.

[69] As for the Noteholders themselves, they are Unaffected Creditors under the *CCAA* Plan as a result of the no vote of their Class.

[70] In essence, the main concern of the Noteholders as to the scope of the releases contemplated by the *CCAA* Plan and the Sanction Order is a mere issue of clarity. In the Court's opinion, this is sufficiently dealt with by the addition made to the wording of paragraph 15 of the Sanction Order.

[71] Besides that, as explained earlier, any complaint by the Noteholders that the alleged inter company claims of BCFC are improperly compromised by the *CCAA* Plan has no merit. If their true objective is to indirectly protect their contentions to that end by challenging the wording of the releases, it is unjustified and without basis. The Court already said so.

[72] Save for these arguments raised by the Noteholders that the Court rejects, it is worth noting that none of the stakeholders of Abitibi object to the scope of the releases of the *CCAA* Plan or their appropriateness given the global compromise reached through the debt to equity swap and the reorganization contemplated by the plan.

[73] The *CCAA* permits the inclusion of releases (even ones involving third parties) in a plan of compromise or arrangement when there is a reasonable connection between the claims being released and compromised and the restructuring achieved by the plan. Amongst others, the broad nature of the terms "compromise or arrangement", the binding nature of a plan that has received creditors' approval, and the principles that parties should be able to put in a plan what could lawfully be incorporated into any other contract support the authority of the Court to approve these kind of releases[11]. In

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[11] See, in this respect, *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] ONCA 587; *Charles-Auguste Fortier inc. (Arrangement relatif à)*, J.E. 2009-9, 2008 QCCS 5388 (S.C.); *Hy Bloom inc.* v. *Banque Nationale du Canada*, [2010] R.J.Q. 912 (S.C.).

accordance with these principles, the Quebec Superior Court has, in the past, sanctioned plans that included releases of parties making significant contribution to a restructuring[12].

[74] The additional argument raised by the Noteholders with respect to the difference between the releases that could be approved by this Court as compared to those that the U.S. Bankruptcy Court may issue in respect of the Chapter 11 Plan is not convincing.

[75] The fact that under the Chapter 11 Plan, creditors may elect not to provide releases to directors and officers of applicable entities does not render similar kind of releases granted under the *CCAA* Plan invalid or improper. That the result may be different in a jurisdiction as opposed to the other does not make the *CCAA* Plan unfair and unreasonable simply for that reason.

[76] Third, the last objection of the Noteholders to the effect that the NAFTA Settlement Funds have not been properly allocated is simply a red herring. It is aimed at provoking a useless debate with respect to which the Noteholders have, in essence, no standing.

[77] The Monitor testified that the NAFTA Settlement has no impact whatsoever upon BCFC. If it is at all relevant, all the assets involved in this settlement belonged to another of the Petitioners, ACCC, with respect to whom the Noteholders are not a creditor.

[78] In addition, this apparent contestation of the allocation of the NAFTA Settlement Funds is a collateral attack on the Order granted by this Court on September 1, 2010, which approved the settlement of Abitibi's NAFTA claims against the Government of Canada, as well as the related payment to be made to the reorganised successor Canadian operating entity upon emergence. No one has appealed this NAFTA Settlement Order.

[79] That said, in their oral argument, the Noteholders have finally argued that the Court should lift the Stay of Proceedings Order inasmuch as BCFC was concerned. The last extension of the Stay was granted on September 1, 2010, without objection; it expires on September 30, 2010. It is clear from the wording of this Sanction Order that any extension beyond September 30, 2010 will not apply to BCFC.

[80] The Court considers this request made verbally by the Noteholders as unfounded.

[81] No written motion was ever served in that regard to start with. In addition, the Stay remains in effect against BCFC up until September 30, 2010, that is, for about a week or so. The explanations offered by Abitibi's Counsel to leave it as such for the time being are reasonable under the circumstances. It appears proper to allow a few

[12] *Quebecor World Inc. (Arrangement relatif à),* S.C. Montreal, Nº 500-11-032338-085, 2009-06-30, Mongeon J.

days to the interested parties to ascertain the impact, if any, of the Stay not being applicable anymore to BCFC, if alone to ascertain how this impacts upon the various charges created by the Initial Order and subsequent Orders issued by the Court during the course of these proceedings.

[82] There is no support for the concern of the Noteholders as to an ulterior motive of Abitibi for maintaining in place this Stay of Proceedings against BCFC up until September 30, 2010.

[83] All things considered, in the Court's opinion, it would be quite unfair and unreasonable to deny the sanction of the *CCAA* Plan for the benefit of all the stakeholders involved on the basis of the arguments raised by the Noteholders.

[84] Their objections either reargue issues that have been heard, considered and decided, complain of a lack a clarity of the scope of releases that the addition of a few words to the Sanction Order properly addresses, or voice queries about the allocation of important funds to the Abitibi's emergence from the *CCAA* that simply do not concern the entities of which the Noteholders are allegedly creditors, be it in Canada or in the U.S.

[85] When one remains mindful of the relative degrees of prejudice that would flow from granting or refusing the relief sought, it is obvious that the scales heavily tilt in favour of granting the Sanction Order sought.

3. The Contestations of the Provinces of Ontario and British Columbia

[86] Following negotiations that the Provinces involved and Abitibi pursued, with the assistance of the Monitor, up to the very last minute, the interested parties have agreed upon a "carve-out" wording that is satisfactory to every one with respect to some potential environmental liabilities of Abitibi in the event future circumstances trigger a concrete dispute in that regard.

[87] In the Court's view, this is, by far, the most preferred solution to adopt with respect to the disagreement that exists on their respective position as to potential proceedings that may arise in the future under environmental legislation. This approach facilitates the approval of the *CCAA* Plan and the successful restructuring of Abitibi, without affecting the right of any affected party in this respect.

[88] The "carve-out" provisions agreed upon will be included in the Sanction Order.

4. The Contestation of NPower Cogen Limited

[89] By its Contestation, NPower Cogen Limited sought to preserve its rights with respect to what it called the "Cogen Motion", namely a "*motion to be brought by Cogen before this Honourable Court to have various claims heard*" (para. 24(b) and 43 of NPower Cogen Limited Contestation).

[90] Here again, Abitibi and NPower Cogen Limited have agreed on an acceptable "carve-out" wording to be included in the Sanction Order in that regard. As a result, there is no need to discuss the impact of this Contestation any further.

5. Abitibi's Reorganization

[91] The Motion finally deals with the corporate reorganization of Abitibi and the Sanction Order includes declarations and orders dealing with it.

[92] The test to be applied by the Court in determining whether to approve a reorganization under Section 191 of the *CBCA* is similar to the test applied in deciding whether to sanction a plan of arrangement under the *CCAA*, namely: (a) there must be compliance with all statutory requirements; (b) the debtor company must be acting in good faith; and (c) the capital restructuring must be fair and reasonable[13].

[93] It is not disputed by anyone that these requirements have been fulfilled here.

6. The wording of the Sanction Order

[94] In closing, the Court made numerous comments to Abitibi's Counsel on the wording of the Sanction Order initially sought in the Motion. These comments have been taken into account in the subsequent in depth revisions of the Sanction Order that the Court is now issuing. The Court is satisfied with the corrections, adjustments and deletions made to what was originally requested.

FOR THESE REASONS, THE COURT:

[1] **GRANTS** the Motion**.**

Definitions

[2] **DECLARES** that any capitalized terms not otherwise defined in this Order shall have the meaning ascribed thereto in the *CCAA* Plan[14] and the Creditors' Meeting Order, as the case may be.

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[13] *Raymor Industries inc. (Proposition de),* [2010] R.J.Q. 608 (S.C.), 2010 QCCS 376; *Quebecor World Inc. (Arrangement relatif à),* S.C. Montreal, Nº 500-11-032338-085, 2009-06-30, Mongeon J., at para. 7-8; *Mei Computer Technology Group Inc. (Arrangement relatif à*), (S.C., 2005-11-14), SOQUIJ AZ-50380254, 2005 CanLII 54083 (QC C.S.); *Doman Industries Ltd. (Re),* 2003 BCSC 375; *Laidlaw Inc. (Re)*, [2003] O.J. No. 865 (Ont. S.C.J.).

[14] It is understood that for the purposes of this Sanction Order, the *CCAA* Plan is the Plan of Reorganisation and Compromise (as modified, amended or supplemented by *CCAA* Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, *CCAA* Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

Service and Meeting

[3] **DECLARES** that the notices given of the presentation of the Motion and related Sanction Hearing are proper and sufficient, and in accordance with the Creditors' Meeting Order.

[4] **DECLARES** that there has been proper and sufficient service and notice of the Meeting Materials, including the *CCAA* Plan, the Circular and the Notice to Creditors in connection with the Creditors' Meeting, to all Affected Unsecured Creditors, and that the Creditors' Meeting was duly convened, held and conducted in conformity with the *CCAA*, the Creditors' Meeting Order and all other applicable orders of the Court.

[5] **DECLARES** that no meetings or votes of (i) holders of Equity Securities and/or (ii) holders of equity securities of ABH are required in connection with the *CCAA* Plan and its implementation, including the implementation of the Restructuring Transactions as set out in the Restructuring Transactions Notice dated September 1, 2010, as amended on September 13, 2010.

***CCAA* Plan Sanction**

[6] **DECLARES** that:

a) the *CCAA* Plan and its implementation (including the implementation of the Restructuring Transactions) have been approved by the Required Majorities of Affected Unsecured Creditors in each of the following classes in conformity with the *CCAA*: ACI Affected Unsecured Creditor Class, the ACCC Affected Unsecured Creditor Class, the 15.5% Guarantor Applicant Affected Unsecured Creditor Classes, the Saguenay Forest Products Affected Unsecured Creditor Class, the BCFPI Affected Unsecured Creditor Class, the AbitibiBowater Canada Affected Unsecured Creditor Class, the Bowater Maritimes Affected Unsecured Creditor Class, the ACNSI Affected Unsecured Creditor Class, the Office Products Affected Unsecured Creditor Class and the Recycling Affected Unsecured Creditor Class;

b) the *CCAA* Plan was not approved by the Required Majority of Affected Unsecured Creditors in the BCFC Affected Unsecured Creditors Class and that the Holders of BCFC Affected Unsecured Claims are therefore deemed to be Unaffected Creditors holding Excluded Claims against BCFC for the purpose of the *CCAA* Plan and this Order, and that BCFC is therefore deemed not to be an Applicant for the purpose of this Order;

c) the Court is satisfied that the Petitioners and the Partnerships have complied with the provisions of the *CCAA* and all the orders made by this Court in the context of these *CCAA* Proceedings in all respects;

d) the Court is satisfied that no Petitioner or Partnership has either done or purported to do anything that is not authorized by the *CCAA*; and

e) the *CCAA* Plan (and its implementation, including the implementation of the Restructuring Transactions), is fair and reasonable, and in the best interests of the Applicants and the Partnerships, the Affected Unsecured Creditors, the other stakeholders of the Applicants and all other Persons stipulated in the *CCAA* Plan.

[7] **ORDERS** that the *CCAA* Plan and its implementation, including the implementation of the Restructuring Transactions, are sanctioned and approved pursuant to Section 6 of the *CCAA* and Section 191 of the *CBCA*, and, as at the Implementation Date, will be effective and will enure to the benefit of and be binding upon the Applicants, the Partnerships, the Reorganized Debtors, the Affected Unsecured Creditors, the other stakeholders of the Applicants and all other Persons stipulated in the *CCAA* Plan.

CCAA Plan Implementation

[8] **DECLARES** that the Applicants, the Partnerships, the Reorganized Debtors and the Monitor, as the case may be, are authorized and directed to take all steps and actions necessary or appropriate, as determined by the Applicants, the Partnerships and the Reorganized Debtors in accordance with and subject to the terms of the *CCAA* Plan, to implement and effect the *CCAA* Plan, including the Restructuring Transactions, in the manner and the sequence as set forth in the *CCAA* Plan, the Restructuring Transactions Notice and this Order, and such steps and actions are hereby approved.

[9] **AUTHORIZES** the Applicants, the Partnerships and the Reorganized Debtors to request, if need be, one or more order(s) from this Court, including *CCAA* Vesting Order(s), for the transfer and assignment of assets to the Applicants, the Partnerships, the Reorganized Debtors or other entities referred to in the Restructuring Transactions Notice, free and clear of any financial charges, as necessary or desirable to implement and effect the Restructuring Transactions as set forth in the Restructuring Transactions Notice.

[10] **DECLARES** that, pursuant to Section 191 of the *CBCA*, the articles of AbitibiBowater Canada will be amended by new articles of reorganization in the manner and at the time set forth in the Restructuring Transactions Notice.

[11] **DECLARES** that all Applicants and Partnerships to be dissolved pursuant to the Restructuring Transactions shall be deemed dissolved for all purposes without the necessity for any other or further action by or on behalf of any Person, including the Applicants or the Partnerships or their respective securityholders, directors, officers, managers or partners or for any payments to be made in connection therewith, provided, however, that the Applicants, the Partnerships and the Reorganized Debtors shall cause to be filed with the appropriate Governmental Entities articles, agreements

or other documents of dissolution for the dissolved Applicants or Partnerships to the extent required by applicable Law.

[12] **DECLARES** that, subject to the performance by the Applicants and the Partnerships of their obligations under the *CCAA* Plan, and in accordance with Section 8.1 of the *CCAA* Plan, all contracts, leases, Timber Supply and Forest Management Agreements ("TSFMA") and outstanding and unused volumes of cutting rights (backlog) thereunder, joint venture agreements, agreements and other arrangements to which the Applicants or the Partnerships are a party and that have not been terminated including as part of the Restructuring Transactions or repudiated in accordance with the terms of the Initial Order will be and remain in full force and effect, unamended, as at the Implementation Date, and no Person who is a party to any such contract, lease, agreement or other arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of dilution or other remedy) or make any demand under or in respect of any such contract, lease, agreement or other arrangement and no automatic termination will have any validity or effect by reason of:

a) any event that occurred on or prior to the Implementation Date and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults, events of default, or termination events arising as a result of the insolvency of the Applicants and the Partnerships);

b) the insolvency of the Applicants, the Partnerships or any affiliate thereof or the fact that the Applicants, the Partnerships or any affiliate thereof sought or obtained relief under the *CCAA*, the CBCA or the Bankruptcy Code or any other applicable legislation;

c) any of the terms of the *CCAA* Plan, the U.S. Plan or any action contemplated therein, including the Restructuring Transactions Notice;

d) any settlements, compromises or arrangements effected pursuant to the *CCAA* Plan or the U.S. Plan or any action taken or transaction effected pursuant to the *CCAA* Plan or the U.S. Plan; or

e) any change in the control, transfer of equity interest or transfer of assets of the Applicants, the Partnerships, the joint ventures, or any affiliate thereof, or of any entity in which any of the Applicants or the Partnerships held an equity interest arising from the implementation of the *CCAA* Plan (including the Restructuring Transactions Notice) or the U.S. Plan, or the transfer of any asset as part of or in connection with the Restructuring Transactions Notice.

[13] **DECLARES** that any consent or authorization required from a third party, including any Governmental Entity, under any such contracts, leases, TSFMAs and outstanding and unused volumes of cutting rights (backlog) thereunder, joint venture agreements, agreements or other arrangements in respect of any change of control,

transfer of equity interest, transfer of assets or transfer of any asset as part of or in connection with the Restructuring Transactions Notice be deemed satisfied or obtained, as applicable.

[14] **DECLARES** that the determination of Proven Claims in accordance with the Claims Procedure Orders, the Cross-border Claims Protocol, the Cross-border Voting Protocol and the Creditors' Meeting Order shall be final and binding on the Applicants, the Partnerships, the Reorganized Debtors and all Affected Unsecured Creditors.

Releases and Discharges

[15] **CONFIRMS** the releases contemplated by Section 6.10 of the *CCAA* Plan and **DECLARES** that the said releases constitute good faith compromises and settlements of the matters covered thereby, and that such compromises and settlements are in the best interests of the Applicants and its stakeholders, are fair, equitable, and are integral elements of the restructuring and resolution of these proceedings in accordance with the *CCAA* Plan, it being understood that for the purpose of these releases and/or this Order, the terms "Applicants" or "Applicant" are not meant to include Bowater Canada Finance Corporation ("**BCFC**").

[16] **ORDERS** that, upon payment in full in cash of all BI DIP Claims and ULC DIP Claim in accordance with the *CCAA* Plan, the BI DIP Lenders and the BI DIP Agent or ULC, as the case may be, shall at the request of the Applicants, the Partnerships or the Reorganized Debtors, without delay, execute and deliver to the Applicants, the Partnerships or the Reorganized Debtors such releases, discharges, authorizations and directions, instruments, notices and other documents as the Applicants, the Partnerships or the Reorganized Debtors may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges with respect to the BI DIP Claims or the ULC DIP Claim, as the case may be, the whole at the expense of the Applicants, the Partnerships or the Reorganized Debtors.

[17] **ORDERS** that, upon payment in full in cash of their Secured Claims in accordance with the *CCAA* Plan, the ACCC Administrative Agent, the ACCC Term Lenders, the BCFPI Administrative Agent, the BCFPI Lenders, the Canadian Secured Notes Indenture Trustee and any Holders of a Secured Claim, as the case may be, shall at the request of the Applicants, the Partnerships or the Reorganized Debtors, without delay, execute and deliver to the Applicants, the Partnerships or the Reorganized Debtors such releases, discharges, authorizations and directions, instruments, notices and other documents as the Applicants, the Partnerships or the Reorganized Debtors may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges with respect to the ACCC Term Loan Claim, BCFPI Secured Bank Claim, Canadian Secured Notes Claim or any other Secured Claim, as the case may be, the whole at the expense of the Applicants, the Partnerships or the Reorganized Debtors.

For the purposes of the present paragraph [17], in the event of any dispute as to the amount of any Secured Claim, the Applicants, Partnerships or Reorganized Debtors, as the case may be, shall be permitted to pay to the Monitor the full amount in dispute (as specified by the affected Secured Creditor or by this Court upon summary application) and, upon payment of the amount not in dispute, receive the releases, discharges, authorizations, directions, instruments notices or other documents as provided for therein. Any amount paid to the Monitor in accordance with this paragraph shall be held in trust by the Monitor for the holder of the Secured Claim and the payer as their interests shall be determined by agreement between the parties or, failing agreement, as directed by this Court after summary application.

[18] **PRECLUDES** the prosecution against the Applicants, the Partnerships or the Reorganized Debtors, whether directly, derivatively or otherwise, of any claim, obligation, suit, judgment, damage, demand, debt, right, cause of action, liability or interest released, discharged or terminated pursuant to the *CCAA* Plan.

Accounts with Financial Institutions

[19] **ORDERS** that any and all financial institutions (the "Financial Institutions") with which the Applicants, the Partnerships and the Reorganized Debtors have or will have accounts (the "Accounts") shall process and/or facilitate the transfer of, or changes to, such Accounts in order to implement the *CCAA* Plan and the transactions contemplated thereby, including the Restructuring Transactions.

[20] **ORDERS** that Mr. Allen Dea, Vice-President and Treasurer of ABH, or any other officer or director of the Reorganized Debtors, is empowered to take all required acts with any of the Financial Institutions to affect the transfer of, or changes to, the Accounts in order to facilitate the implementation of the *CCAA* Plan and the transactions contemplated thereby, including the Restructuring Transactions.

Effect of failure to implement *CCAA* Plan

[21] **ORDERS** that, in the event that the Implementation Date does not occur, Affected Unsecured Creditors shall not be bound to the valuation, settlement or compromise of their Affected Claims at the amount of their Proven Claims in accordance with the *CCAA* Plan, the Claims Procedure Orders or the Creditors' Meeting Order. For greater certainty, nothing in the *CCAA* Plan, the Claims Procedure Orders, the Creditors' Meeting Order or in any settlement, compromise, agreement, document or instrument made or entered into in connection therewith or in contemplation thereof shall, in any way, prejudice, quantify, adjudicate, modify, release, waive or otherwise affect the validity, enforceability or quantum of any Claim against the Applicants or the Partnerships, including in the *CCAA* Proceedings or any other proceeding or process, in the event that the Implementation Date does not occur.

Charges created in the *CCAA* Proceedings

[22] **ORDERS** that, upon the Implementation Date, all *CCAA* Charges against the Applicants and the Partnerships or their property created by the *CCAA* Initial Order or any subsequent orders shall be determined, discharged and released, provided that the BI DIP Lenders Charge shall be cancelled on the condition that the BI DIP Claims are paid in full on the Implementation Date.

Fees and Disbursements

[23] **ORDERS** and **DECLARES** that, on and after the Implementation Date, the obligation to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants and the Partnerships, in each case at their standard rates and charges and including any amounts outstanding as of the Implementation Date, in respect of the *CCAA* Plan, including the implementation of the Restructuring Transactions, shall become obligations of Reorganized ABH.

Exit Financing

[24] **ORDERS** that the Applicants are authorized and empowered to execute, deliver and perform any credit agreements, instruments of indebtedness, guarantees, security documents, deeds, and other documents, as may be required in connection with the Exit Facilities.

Stay Extension

[25] **EXTENDS** the Stay Period in respect of the Applicants until the Implementation Date.

[26] **DECLARES** that all orders made in the *CCAA* Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order, the Creditors' Meeting Order, or any further Order of this Court.

Monitor and Chief Restructuring Officer

[27] **DECLARES** that the protections afforded to Ernst & Young Inc., as Monitor and as officer of this Court, and to the Chief Restructuring Officer pursuant to the terms of the Initial Order and the other Orders made in the *CCAA* Proceedings, shall not expire or terminate on the Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect.

[28] **ORDERS** and **DECLARES** that any distributions under the *CCAA* Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Applicants for the purposes of section 159 of the Income Tax Act (Canada), section 270 of the Excise Tax Act (Canada), section 14 of the Act Respecting the Ministère du Revenu (Québec), section 107 of the

Corporations Tax Act (Ontario), section 22 of the Retail Sales Tax Act (Ontario), section 117 of the Taxation Act, 2007 (Ontario) or any other similar federal, provincial or territorial tax legislation (collectively the "Tax Statutes") given that the Monitor is only a Disbursing Agent under the *CCAA* Plan, and the Monitor in making such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made under the *CCAA* Plan and this Order and any claims of this nature are hereby forever barred.

[29] **ORDERS** and **DECLARES** that the Disbursing Agent, the Applicants and the Reorganized Debtors, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable Tax withholding and reporting requirements, including withholding a number of shares of New ABH Common Stock equal in value to the amount required to comply with such withholding requirements from the shares of New ABH Common Stock to be distributed to current or former employees and making the necessary arrangements for the sale of such shares on the TSX or the New York Stock Exchange on behalf of the current or former employees to satisfy such withholding requirements. All amounts withheld on account of Taxes shall be treated for all purposes as having been paid to the Affected Unsecured Creditor in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate Governmental Entity.

Claims Officers

[30] **DECLARES** that, in accordance with paragraph [25] hereof, any claims officer appointed in accordance with the Claims Procedure Orders shall continue to have the authority conferred upon, and to the benefit from all protections afforded to, claims officers pursuant to Orders in the *CCAA* Proceedings.

General

[31] **ORDERS** that, notwithstanding any other provision in this Order, the *CCAA* Plan or these *CCAA* Proceedings, the rights of the public authorities of British Columbia, Ontario or New Brunswick to take the position in or with respect to any future proceedings under environmental legislation that this or any other Order does not affect such proceedings by reason that such proceedings are not in relation to a claim within the meaning of the *CCAA* or are otherwise beyond the jurisdiction of Parliament or a court under the *CCAA* to affect in any way is fully reserved; as is reserved the right of any affected party to take any position to the contrary.

[32] **DECLARES** that nothing in this Order or the *CCAA* Plan shall preclude NPower Cogen Limited ("Cogen") from bringing a motion for, or this Court from granting, the relief sought in respect of the facts and issues set out in the Claims Submission of

Cogen dated August 10, 2010 (the "Claim Submission"), and the Reply Submission of Cogen dated August 24, 2010, provided that such relief shall be limited to the following:

a) a declaration that Cogen's claim against Abitibi Consolidated Inc. ("Abitibi") and its officers and directors, arising from the supply of electricity and steam to Bridgewater Paper Company Limited between November 1, 2009 and February 2, 2010 in the amount of £9,447,548 plus interest accruing at the rate of 3% *per annum* from February 2, 2010 onwards (the "Claim Amount") is (i) unaffected by the *CCAA* Plan or Sanction Order; (ii) is an Excluded Claim; or (iii) is a Secured Claim; (iv) is a D&O Claim; or (v) is a liability of Abitibi under its Guarantee;

b) an Order directing Abitibi and its Directors and Officers to pay the Claim Amount to Cogen forthwith; or

c) in the alternative to (b), an order granting leave, if leave be required, to commence proceedings for the payment of the Claim Amount under s. 241 of the *CBCA* and otherwise against Abitibi and its directors and officers in respect of same.

[33] **DECLARES** that any of the Applicants, the Partnerships, the Reorganized Debtors or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of the Order on notice to the Service List.

[34] **DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

[35] **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order, including the registration of this Order in any office of public record by any such court or administrative body or by any Person affected by the Order.

Provisional Execution

[36] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

[37] **WITHOUT COSTS.**

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CLÉMENT GASCON, J.S.C.

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WICKWIRE HOLM
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Mr. David Ward
CASSELS BROCK & BLACKWELL LLP
Attorneys for Wilmington Trust US Indenture Trustee of Unsecured Notes issued by BCFC

Dates of hearing: September 20 and 21, 2010

SCHEDULE "A"

ABITIBI PETITIONERS

1. **ABITIBI-CONSOLIDATED INC.**
2. **ABITIBI-CONSOLIDATED COMPANY OF CANADA**
3. **3224112 NOVA SCOTIA LIMITED**
4. **MARKETING DONOHUE INC.**
5. **ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.**
6. **3834328 CANADA INC.**
7. **6169678 CANADA INC.**
8. **4042140 CANADA INC.**
9. **DONOHUE RECYCLING INC.**
10. **1508756 ONTARIO INC.**
11. **3217925 NOVA SCOTIA COMPANY**
12. **LA TUQUE FOREST PRODUCTS INC.**
13. **ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED**
14. **SAGUENAY FOREST PRODUCTS INC.**
15. **TERRA NOVA EXPLORATIONS LTD.**
16. **THE JONQUIERE PULP COMPANY**
17. **THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY**
18. **SCRAMBLE MINING LTD.**
19. **9150-3383 QUÉBEC INC.**
20. **ABITIBI-CONSOLIDATED (U.K.) INC.**

SCHEDULE "B"

BOWATER PETITIONERS

1. **BOWATER CANADIAN HOLDINGS INC.**
2. **BOWATER CANADA FINANCE CORPORATION**
3. **BOWATER CANADIAN LIMITED**
4. **3231378 NOVA SCOTIA COMPANY**
5. **ABITIBIBOWATER CANADA INC.**
6. **BOWATER CANADA TREASURY CORPORATION**
7. **BOWATER CANADIAN FOREST PRODUCTS INC.**
8. **BOWATER SHELBURNE CORPORATION**
9. **BOWATER LAHAVE CORPORATION**
10. **ST-MAURICE RIVER DRIVE COMPANY LIMITED**
11. **BOWATER TREATED WOOD INC.**
12. **CANEXEL HARDBOARD INC.**
13. **9068-9050 QUÉBEC INC.**
14. **ALLIANCE FOREST PRODUCTS (2001) INC.**
15. **BOWATER BELLEDUNE SAWMILL INC.**
16. **BOWATER MARITIMES INC.**
17. **BOWATER MITIS INC.**
18. **BOWATER GUÉRETTE INC.**
19. **BOWATER COUTURIER INC.**

SCHEDULE "C"

18.6 *CCAA* PETITIONERS

1. **ABITIBIBOWATER INC.**
2. **ABITIBIBOWATER US HOLDING 1 CORP.**
3. **BOWATER VENTURES INC.**
4. **BOWATER INCORPORATED**
5. **BOWATER NUWAY INC.**
6. **BOWATER NUWAY MID-STATES INC.**
7. **CATAWBA PROPERTY HOLDINGS LLC**
8. **BOWATER FINANCE COMPANY INC.**
9. **BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED**
10. **BOWATER AMERICA INC.**
11. **LAKE SUPERIOR FOREST PRODUCTS INC.**
12. **BOWATER NEWSPRINT SOUTH LLC**
13. **BOWATER NEWSPRINT SOUTH OPERATIONS LLC**
14. **BOWATER FINANCE II, LLC**
15. **BOWATER ALABAMA LLC**
16. **COOSA PINES GOLF CLUB HOLDINGS LLC**

TAB 4

See paras. 18, 24-25, 54

Mary Danyluk *Appellant*

v.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson *Respondents*

INDEXED AS: DANYLUK *v.* AINSWORTH TECHNOLOGIES INC.

Neutral citation: 2001 SCC 44.

File No.: 27118.

2000: October 31; 2001: July 12.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Issue estoppel — Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions — Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions — Employment standards officer dismissing employee's complaint — Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel — Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel — Whether preconditions to application of issue estoppel satisfied — If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the *Employment Standards Act* ("ESA") seeking

Mary Danyluk *Appelante*

c.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh et Joseph McBride Watson *Intimés*

RÉPERTORIÉ : DANYLUK *c.* AINSWORTH TECHNOLOGIES INC.

Référence neutre : 2001 CSC 44.

Nº du greffe : 27118.

2000 : 31 octobre; 2001 : 12 juillet.

Présents : Le juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Préclusion découlant d'une question déjà tranchée — Plainte déposée par une employée contre son employeur en vertu de la Loi sur les normes de l'emploi et réclamant le versement de salaire et commissions impayés — Action en dommages-intérêts pour congédiement injustifié et pour salaire et commissions impayés intentée subséquemment par l'employée contre l'employeur — Rejet de la plainte par l'agente des normes d'emploi — Préclusion découlant d'une question déjà tranchée plaidée par l'employeur à l'égard de la réclamation pour salaire et commissions impayés — L'inobservation de l'équité procédurale par l'agente des normes dans sa décision sur la plainte de l'employée empêche-t-elle l'application de cette doctrine? — Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont-elles réunies? — Dans l'affirmative, notre Cour doit-elle exercer son pouvoir discrétionnaire et refuser d'appliquer cette doctrine?

En 1993, un différend relatif à des commissions impayées a opposé une employée et son employeur. Aucune entente n'est intervenue et l'employée a déposé, en vertu de la *Loi sur les normes d'emploi* (la « LNE »),

unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her $2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. L'employeur a rejeté sa demande de commissions et a finalement considéré qu'elle avait remis sa démission. Une agente des normes d'emploi a eu un entretien téléphonique avec l'employée, qu'elle a ensuite rencontrée pendant environ une heure. Avant que la décision soit rendue, l'employée a intenté une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait le paiement du salaire et des commissions. La procédure prévue par la LNE a suivi son cours, mais l'employée n'a pas été avisée des arguments invoqués par l'employeur au sujet de sa plainte et elle n'a pas eu la possibilité d'y répondre. L'agente des normes d'emploi a rejeté la réclamation de l'employée et a ordonné à l'employeur de verser à cette dernière la somme de 2 354,55 $, soit deux semaines de salaire, à titre d'indemnité de préavis. Elle a informé l'employeur de sa décision et, 10 jours plus tard, elle en a avisé l'employée. L'employée ne pouvait interjeter appel de plein droit mais elle avait, en vertu de la LNE, le droit de demander la révision de cette décision. Elle a choisi de ne pas le faire et a plutôt poursuivi son action en dommages-intérêts pour congédiement injustifié. L'employeur a présenté une requête en radiation de la partie de la déclaration qui recoupait la procédure engagée en vertu de la LNE. Le juge des requêtes a considéré que la décision fondée sur la LNE était définitive et il a conclu que la préclusion découlant d'une question déjà tranchée faisait obstacle à la réclamation pour salaire et commissions impayés. La Cour d'appel a confirmé la décision.

Held: The appeal should be allowed.

Arrêt : Le pourvoi est accueilli.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

Bien que, en règle générale, la préclusion découlant d'une question déjà tranchée (*issue estoppel*) puisse être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif, il ne s'agit pas en l'espèce d'une affaire où il convient d'appliquer cette doctrine. Le caractère définitif des instances est une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable, l'application de cette doctrine empêche le recours aux cours de justice, il convient de réexaminer certains principes fondamentaux.

The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

The preconditions require the prior proceeding to be judicial. Here, the ESA decision was judicial. First, the administrative authority issuing the decision is capable of receiving and exercising adjudicative authority. Second, as a matter of law, the decision was required to be made in a judicial manner. While the ESA officers utilize procedures more flexible than those that apply in the courts, their adjudicative decisions must be based on findings of fact and the application of an objective legal standard to those facts.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin* and collateral attack in *Maybrun*.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a mat-

Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont au nombre de trois : (1) que la même question ait été décidée dans une procédure antérieure; (2) que la décision judiciaire antérieure soit définitive; (3) que les parties ou leurs ayants droit soient les mêmes dans chacune des instances. Si le requérant réussit à établir l'existence des conditions d'application, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion devrait être appliquée.

Suivant ces conditions, la décision antérieure doit être une décision judiciaire. En l'espèce, la décision fondée sur la LNE était judiciaire. Premièrement, le décideur administratif ayant rendu la décision peut être investi d'un pouvoir juridictionnel et il est capable d'exercer ce pouvoir. Deuxièmement, sur le plan juridique, la décision devait être prise judiciairement. Bien que les agents des normes d'emploi aient recours à des procédures plus souples que celles des cours de justice, leurs décisions juridictionnelles doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective.

L'appelante conteste l'application de la préclusion découlant d'une question déjà tranchée parce que, conformément à la conclusion de la Cour d'appel, la décision fondée sur la LNE a été rendue sans qu'on donne à l'appelante un préavis suffisant et la possibilité de répondre aux prétentions de l'employeur. Il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Lorsque le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Harelkin* et celles relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*.

En l'espèce, les conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies : la même question est à l'origine des deux instances, la décision de l'agente des normes avait un caractère définitif pour l'application de la Loi en raison du fait que ni l'employeur ni l'employée ne se sont prévalus du mécanisme de révision interne, et les parties

ter of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

sont les mêmes. La Cour doit par conséquent décider si elle doit exercer son pouvoir discrétionnaire et refuser d'appliquer la préclusion. En l'espèce, notre Cour a le droit d'intervenir puisque les tribunaux de juridiction inférieure ont commis une erreur de principe en omettant d'examiner la question de l'exercice du pouvoir discrétionnaire. La liste des facteurs à considérer pour l'exercice de ce pouvoir n'est pas exhaustive. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice dans une affaire donnée. Parmi les facteurs pertinents en l'espèce, mentionnons : le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative, l'objet du texte de la loi, l'existence d'un droit d'appel, les garanties offertes aux parties dans le cadre de l'instance administrative, l'expertise du décideur administratif, les circonstances ayant donné naissance à l'instance administrative initiale et, facteur le plus important, le risque d'injustice. Vu l'effet cumulatif des facteurs susmentionnés, la Cour, dans l'exercice de son pouvoir discrétionnaire, doit refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée. En effet, le fait demeure que la réclamation de l'employée visant des commissions totalisant 300 000 $ n'a tout simplement jamais été examinée et tranchée adéquatement.

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Howard A. Levitt and *J. Michael Mulroy*, for the appellant.

John E. Brooks and *Rita M. Samson*, for the respondents.

The judgment of the Court was delivered by

BINNIE J. — The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some $300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the *Employment Standards Act*, R.S.O. 1990, c. E.14 ("ESA" or "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper and unfair, denied the claim. I agree that in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice

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Howard A. Levitt et *J. Michael Mulroy*, pour l'appelante.

John E. Brooks et *Rita M. Samson*, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — L'appelante prétend que, le 12 octobre 1993, elle a été congédiée du poste de chargée de projet qu'elle occupait chez l'intimée Ainsworth Technologies Inc. Elle soutient que, au moment de son congédiement, son employeur lui devait quelque 300 000 $ en commissions impayées. Les cours de justice ontariennes ont jugé que l'appelante était précluse (« *estopped* ») de saisir les tribunaux de ce différend en raison de sa tentative infructueuse d'obtenir le paiement de cette somme en vertu de la *Loi sur les normes d'emploi*, L.R.O. 1990, ch. E.14 (la « LNE » ou la « Loi »). Adoptant une procédure que la Cour d'appel de l'Ontario a jugé inappropriée et inéquitable, une agente des normes d'emploi a rejeté la demande de l'appelante. En règle générale, la préclusion découlant d'une question déjà tranchée (« *issue estoppel* ») peut, j'en conviens, être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif. Toutefois, je suis d'avis que la présente espèce

should not be applied mechanically to work an injustice. I would allow the appeal.

I. Facts

2 In the fall of 1993, the appellant became involved in a dispute with her employer, the respondent Ainsworth Technologies Inc., over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. These letters were generally copied to her lawyer, Mr. Howard A. Levitt. Her principal complaint concerned an alleged entitlement to commissions of about $200,000 in respect of a project known as the CIBC Lan project, plus other commissions which brought the total to about $300,000.

3 The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had resigned and physically escorted her off the premises.

4 An employment standards officer, Ms. Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994 met with her for about an hour. The appellant gave Ms. Burke various documents including her correspondence with the employer. They had no further meetings.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed

n'est pas une affaire où il convenait d'appliquer cette doctrine. Une doctrine élaborée par les tribunaux dans l'intérêt de la justice ne devrait pas être appliquée mécaniquement et donner lieu à une injustice. J'accueillerais le pourvoi.

I. Les faits

À l'automne 1993, un différend relatif à des commissions impayées a opposé l'appelante et son employeur, l'intimée Ainsworth Technologies Inc. L'appelante a rencontré ses supérieurs et elle leur a envoyé diverses lettres exposant son point de vue. Copie conforme de chacune de ces lettres était généralement transmise à son avocat, M^e^ Howard A. Levitt. L'appelante prétendait principalement avoir droit à environ 200 000 $ à titre de commissions à l'égard d'un projet connu sous le nom de projet CIBC Lan, ainsi qu'à d'autres commissions portant à approximativement 300 000 $ la somme totale réclamée.

L'appelante a rejeté le règlement proposé par l'employeur. Le 4 octobre 1993, elle a déposé, en vertu de la LNE, une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. Le dossier n'indique pas clairement si elle a profité des conseils d'un avocat sur cet aspect du litige. Le 5 octobre, l'employeur a écrit à l'appelante, lui indiquant qu'il rejetait sa demande visant les commissions. Subséquemment, lorsqu'elle s'est présentée au travail, il l'a fait conduire hors de ses locaux, considérant qu'elle avait remis sa démission.

On a demandé à une agente des normes d'emploi, M^me^ Caroline Burke, d'enquêter sur la plainte déposée par l'appelante. Madame Burke a d'abord eu un entretien téléphonique avec l'appelante puis, vers le 30 janvier 1994, elle l'a rencontrée pendant environ une heure. L'appelante a remis à M^me^ Burke divers documents, dont sa correspondance avec l'employeur. Aucune autre rencontre n'a eu lieu par la suite.

Le 21 mars 1994, plus de 6 mois après avoir déposé sa plainte en vertu de la Loi, mais sans qu'une décision ait encore été rendue à cet égard, l'appelante a intenté, par l'entremise de M^e^ Levitt,

damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait également le paiement du salaire et des commissions impayés qui faisaient déjà l'objet de la plainte qu'elle avait présentée en vertu de la LNE.

On June 1, 1994, solicitors for the employer wrote to Ms. Burke responding to the appellant's claim. The employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms. Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop.

6 Le 1er juin 1994, les procureurs de l'employeur ont écrit à Mme Burke au sujet de la plainte de l'appelante. La lettre de l'employeur était accompagnée d'un certain nombre de documents étayant la thèse de ce dernier. Aucun de ces documents n'a été communiqué à l'appelante. Madame Burke n'a pas non plus fourni d'information à l'appelante relativement à la thèse de l'employeur et elle ne lui a pas donné la possibilité de répondre aux arguments qui, selon l'appelante, seraient vraisemblablement avancés par l'employeur. Bref, l'appelante a été tenue à l'écart.

On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she ordered the employer to pay the appellant $2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms. Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

7 Le 23 septembre 1994, l'agente des normes d'emploi a informé l'employeur intimé (mais non l'appelante) qu'elle avait rejeté la réclamation de l'appelante pour commissions impayées. Par contre, elle a ordonné à l'employeur de verser à l'appelante la somme de 2 354,55 $, soit deux semaines de salaire, à titre d'indemnité de préavis. Dix jours plus tard, dans une lettre datée du 3 octobre 1994, Mme Burke a informé l'appelante de l'ordonnance intimant à l'employeur de lui verser deux semaines de salaire à titre d'indemnité de licenciement et du rejet de la réclamation visant les commissions. La lettre disait notamment ce qui suit : [TRADUCTION] « [r]elativement à votre réclamation pour salaire impayé, l'enquête a révélé que vous n'avez pas droit aux 300 000,00 $ que vous réclamez à titre de commissions ». Elle ajoutait que l'appelante pouvait présenter au directeur des normes d'emploi une demande de révision de cette décision, information que Mme Burke a répétée lors d'un entretien téléphonique subséquent avec l'appelante. L'appelante n'a toutefois pas demandé la révision de la décision de Mme Burke, décidant plutôt de poursuivre son action en dommages-intérêts pour congédiement injustifié déposée au civil.

The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs

8 Les intimés ont invoqué la préclusion découlant d'une question déjà tranchée à l'encontre de la réclamation pour salaire et commissions impayés. Dans le cadre de l'instance civile engagée par l'ap-

from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. *Ontario Court (General Division)* (June 10, 1996)

9 The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. Following *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), he concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. *Court of Appeal for Ontario* (1998), 42 O.R. (3d) 235

10 After reviewing the facts of the case, Rosenberg J.A. for the court identified, at pp. 239-40, the issues raised by the appellant's appeal:

This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision

pelante, ils ont présenté une requête en radiation des paragraphes pertinents de la déclaration. Le 10 juin 1996, le juge McCombs de la Cour de l'Ontario (Division générale) a accueilli cette requête. Seule la demande de dommages-intérêts pour congédiement injustifié a pu suivre son cours. Le 2 décembre 1998, la Cour d'appel de l'Ontario a rejeté l'appel formé par l'appelante.

II. Les décisions des juridictions inférieures

A. *Cour de l'Ontario (Division générale)* (10 juin 1996)

Le juge McCombs devait décider si la doctrine de la préclusion découlant d'une question déjà tranchée s'appliquait en l'espèce. S'appuyant sur l'arrêt *Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), il a estimé que cette doctrine pouvait s'appliquer à une question déjà tranchée par un décideur administratif — fonctionnaire ou tribunal. Selon lui, la seule question à trancher était de savoir si la décision de l'agente des normes d'emploi était une décision définitive. Le juge des requêtes a souligné que l'appelante n'avait pas demandé la révision de la décision de l'agente des normes d'emploi ainsi que le lui permettait le par. 67(2) de la Loi. Il a considéré que la décision de l'agente des normes d'emploi était définitive. Les critères d'application de la doctrine de la préclusion découlant d'une question déjà tranchée étaient donc respectés. Les paragraphes de la déclaration de l'appelante ayant trait aux salaire et commissions impayés ont été radiés.

B. *Cour d'appel de l'Ontario* (1998), 42 O.R. (3d) 235

Après examen des faits de l'espèce, le juge Rosenberg, s'exprimant pour la Cour d'appel, a fait état des questions que soulevait l'appel aux p. 239-240 :

[TRADUCTION] La présente affaire porte sur la seconde condition d'application de la préclusion découlant d'une question déjà tranchée, savoir celle voulant que la décision qui, affirme-t-on, donne ouverture à la préclusion soit une décision judiciaire définitive. L'appelante prétend que la décision que rend un agent des normes d'emploi n'est ni judiciaire ni définitive. Elle soutient

should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

également que, quoiqu'il en soit, la procédure suivie par M^me^ Burke en l'espèce était inéquitable et donc que sa décision ne devrait pas donner naissance à la préclusion. De façon plus particulière, l'appelante plaide qu'elle n'a pas été traitée équitablement puisqu'on ne lui a pas remis copie des observations de l'employeur et qu'on ne lui a pas, de ce fait, accordé la possibilité de les réfuter.

In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

11 Le juge Rosenberg a rejeté les prétentions de l'appelante, qu'il a regroupées sous les trois questions suivantes : La décision de l'agente des normes d'emploi était-elle une décision définitive? Cette décision était-elle une décision judiciaire? Quel est l'effet d'une iniquité procédurale sur l'application de la doctrine de la préclusion découlant d'une question déjà tranchée?

In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. He considered *Re Downing and Graydon* (1978), 21 O.R. (2d) 292 (C.A.), to be "determinative of this issue" (p. 249).

12 Selon lui, la décision de l'agente était une décision définitive, étant donné que ni l'une ni l'autre des parties n'avaient exercé le droit d'appel interne prévu au par. 67(2) de la Loi. De plus, bien que les décisions administratives statuant définitivement sur les droits des parties ne soient pas toutes considérées comme « judiciaires » pour l'application de la doctrine de la préclusion découlant d'une question déjà tranchée, le juge Rosenberg a estimé que la procédure établie par la Loi respectait les conditions requises. Il a jugé que l'arrêt *Re Downing and Graydon* (1978), 21 O.R. (2d) 292 (C.A.), était [TRADUCTION] « décisif à cet égard » (p. 249).

Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel (at p. 252):

13 Enfin, le juge Rosenberg s'est demandé si l'inobservation par l'agente des normes d'emploi des règles d'équité procédurale avait un effet en l'espèce sur l'application de la doctrine de la préclusion découlant d'une question déjà tranchée. Il a reconnu que l'agente des normes avait effectivement manqué à ces règles en statuant sur la plainte de l'appelante. Il a néanmoins jugé que ce manquement ne faisait pas obstacle à l'application de la doctrine (à la p. 252):

The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to con-

[TRADUCTION] L'agente était tenue de donner à l'appelante la possibilité de consulter et de réfuter toute information préjudiciable à sa réclamation recueillie par l'agente dans le cours de l'enquête. L'appelante aurait dû tout au moins recevoir copie de la lettre du 1^er^ juin 1994 ainsi qu'un résumé de toute autre information préjudiciable à sa réclamation recueillie dans le cours de l'enquête. Elle aurait également dû se voir accorder la

sider and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

possibilité d'examiner cette information et d'y répondre. L'appelante n'a pas reçu communication des allégations formulées contre elle et elle a été privée de la possibilité de les réfuter : M^me^ Burke n'a donc pas agi judiciairement. En l'espèce, toutefois, ce manquement n'empêche pas l'application de la doctrine de la préclusion découlant d'une question déjà tranchée.

14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law (at p. 252):

De l'avis du juge Rosenberg, même si les agents des normes d'emploi ont l'obligation d'agir judiciairement, le manquement à cette obligation dans un cas donné, du moins lorsqu'il est possible d'interjeter appel, ne fait pas obstacle à l'application de la préclusion découlant d'une question déjà tranchée. Sa conclusion s'appuie sur les considérations de politique d'intérêt général qui sont à la base de deux règles de droit administratif (à la p. 252):

These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature. Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

[TRADUCTION] Ces deux règles sont les suivantes : (1) la règle écartant les recours discrétionnaires en matière de contrôle judiciaire lorsqu'il existe un autre recours approprié; (2) la règle prohibant les contestations indirectes. Dans les faits, ces règles exigent que les parties demandent réparation au moyen de la procédure administrative établie par le législateur. Lorsque les parties disposent d'une voie d'appel, elles ne sont pas admises à l'écarter pour s'adresser aux cours de justice.

15 Rosenberg J.A. noted that if the appellant had applied, under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded, at p. 256:

Le juge Rosenberg de la Cour d'appel a souligné que, si l'appelante avait demandé la révision de la décision de l'agente des normes d'emploi en vertu du par. 67(3) de la Loi, l'arbitre saisi de l'affaire aurait dû tenir une audience. Cette constatation étayait son opinion selon laquelle la procédure de révision prévue par la Loi constitue un autre recours approprié. Le juge Rosenberg a conclu ainsi, à la p. 256 :

In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

[TRADUCTION] En résumé, M^me^ Burke n'a pas accordé à l'appelante le bénéfice des règles de justice naturelle. Le recours qui s'offrait à cette dernière était de demander la révision de la décision de l'agente. Elle ne l'a pas fait. Elle et son employeur sont liés par cette décision.

16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

La Cour d'appel a en conséquence appliqué la doctrine de la préclusion découlant d'une question déjà tranchée et a débouté l'appelante.

III. Relevant Statutory Provisions

Employment Standards Act, R.S.O. 1990, c. E.14

1. In this Act,

. . .

"wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

(a) tips and other gratuities,

(b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,

(c) travelling allowances or expenses,

(d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; ("salaire")

. . .

6. — (1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

65. — (1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,

(a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;

(b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or

(c) issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the

III. Les dispositions législatives pertinentes

Loi sur les normes d'emploi, L.R.O. 1990, ch. E.14 17

1 Les définitions qui suivent s'appliquent à la présente loi.

. . .

« salaire » Rémunération en espèces payable par un employeur à un employé aux termes d'un contrat de travail, verbal ou écrit, exprès ou implicite, paiement qu'un employeur doit verser à un employé en vertu de la présente loi, et allocations de logement ou de repas prescrites par les règlements ou prévues par un accord ou un arrangement à cette fin, à l'exclusion des éléments suivants :

a) les pourboires et autres gratifications,

b) les sommes versées à titre de cadeaux ou de primes qui sont laissées à la discrétion de l'employeur et qui ne sont pas liées au nombre d'heures qu'un employé a travaillé, à sa production ou à son efficacité,

c) les allocations ou indemnités de déplacement,

d) les cotisations de l'employeur à une caisse, un régime ou un arrangement auxquels la partie X de la présente loi s'applique. (« wages »)

. . .

6 (1) La présente loi ne suspend pas les recours civils dont dispose un employé contre son employeur ni n'y porte atteinte.

(2) Si un employé introduit une instance civile contre son employeur en vertu de la présente loi, l'avis d'instance est signifié au directeur, selon la formule prescrite, le jour même où l'instance civile est inscrite au rôle.

65 (1) Si l'agent des normes d'emploi conclut qu'un employé a le droit de percevoir un salaire d'un employeur, il peut, selon le cas :

a) s'entendre avec l'employeur pour que celui-ci verse directement à l'employé le salaire auquel ce dernier a droit;

b) recevoir de l'employeur, au nom de l'employé, le salaire qui doit être versé à ce dernier par suite d'une transaction;

c) ordonner, par écrit, que l'employeur verse sans délai au directeur, en fiducie, le salaire auquel un employé a droit; il ordonne également à l'employeur de verser au directeur, à titre de frais d'administration, celle

Director, of administration costs in the amount of 10 per cent of the wages or $100, whichever is the greater.

. . .

(7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding against the employer even though a review hearing is held to determine another person's liability under this Act.

. . .

67. — (1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled or has found that the employee has no other entitlements or that there are no actions which the employer is to do or is to refrain from doing in order to be in compliance with this Act, the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.

(2) An employee who considers himself or herself aggrieved by the refusal to issue an order to an employer or by the issuance of an order that in his or her view does not include all of the wages or other entitlements to which he or she is entitled may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) or the date of the issue of the order or such longer period as the Director may for special reasons allow for a review of the refusal or of the amount of the order.

(3) Upon receipt of an application for review, the Director may appoint an adjudicator who shall hold a hearing.

. . .

(5) The adjudicator who is conducting the hearing may with necessary modifications exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.

. . .

des deux sommes suivantes qui est la plus élevée, à savoir : 10 pour cent du salaire ou 100 $.

. . .

(7) Si un employeur ne fait pas la demande visée à l'article 68 en vue de la révision d'une ordonnance rendue par un agent des normes d'emploi, l'ordonnance devient sans appel et lie l'employeur même si une audience en révision est tenue afin de déterminer l'obligation d'une autre personne aux termes de la présente loi.

. . .

67 (1) Si, à la suite d'une plainte par écrit d'un employé, l'agent des normes d'emploi conclut que l'employeur a versé à un employé le salaire auquel ce dernier a droit ou a conclu que l'employé n'a droit à rien d'autre ou qu'il n'y a rien que l'employeur doive faire ou s'abstenir de faire pour se conformer à la présente loi, il peut refuser de rendre une ordonnance visant l'employeur. Il en avise l'employé par lettre affranchie à sa dernière adresse connue.

(2) L'employé qui se croit lésé par le refus de l'agent de rendre une ordonnance contre l'employeur ou par une ordonnance qui, à son avis, ne comprend pas le salaire complet auquel il a droit ni ses autres droits peut, dans les quinze jours de la mise à la poste de la lettre visée au paragraphe (1) ou de la date où l'ordonnance a été rendue ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, demander au directeur, par écrit, de réviser le refus ou le montant fixé dans l'ordonnance.

(3) Sur réception de la demande de révision, le directeur peut nommer un arbitre de griefs pour tenir une audience.

. . .

(5) L'arbitre de griefs qui tient l'audience peut exercer, avec les adaptations nécessaires, les pouvoirs que la présente loi confère à un agent des normes d'emploi, et peut rendre une ordonnance à l'égard du refus ou une ordonnance modifiant, annulant ou confirmant l'ordonnance de l'agent des normes d'emploi.

. . .

(7) The order of the adjudicator is not subject to a review under section 68 and is final and binding on the parties.

68. — (1) An employer who considers themself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery or service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72 (2), apply for a review of the order by way of a hearing.

. . .

(3) The Director shall select a referee from the panel of referees to hear the review.

. . .

(7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

(7) L'ordonnance de l'arbitre de griefs n'est pas susceptible de révision dans le cadre de l'article 68. Elle est sans appel et lie les parties.

68 (1) Après avoir versé le salaire qu'il lui est ordonné de payer ainsi que la somme à titre de pénalité qui s'y rapporte, s'il y a lieu, l'employeur qui s'estime lésé par une ordonnance rendue en vertu de l'article 45, 48, 51, 56.2, 58.22 ou 65 peut, dans les quinze jours qui suivent la remise ou la signification de l'ordonnance ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, et à la condition que le salaire n'ait pas été versé en vertu du paragraphe 72 (2), demander que l'ordonnance fasse l'objet d'une révision par voie d'audience.

. . .

(3) Le directeur choisit un arbitre au sein du tableau des arbitres pour tenir l'audience de révision.

. . .

(7) La décision que l'arbitre prend en vertu du présent article est sans appel et lie les parties et les autres personnes que l'arbitre peut préciser.

IV. Analysis

IV. L'analyse

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Le droit tend à juste titre à assurer le caractère définitif des instances. Pour favoriser la réalisation de cet objectif, le droit exige des parties qu'elles mettent tout en œuvre pour établir la véracité de leurs allégations dès la première occasion qui leur est donnée de le faire. Autrement dit, un plaideur n'a droit qu'à une seule tentative. L'appelante a décidé de se prévaloir du recours prévu par la LNE. Elle a perdu. Une fois tranché, un différend ne devrait généralement pas être soumis à nouveau aux tribunaux au bénéfice de la partie déboutée et au détriment de la partie qui a eu gain de cause. Une personne ne devrait être tracassée qu'une seule fois à l'égard d'une même cause d'action. Les instances faisant double emploi, les risques de résultats contradictoires, les frais excessifs et les procédures non décisives doivent être évités. 18

Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of

Le caractère définitif des instances est donc une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est 19

justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (looseleaf), vol. 3 Supp., at 21§17 *et seq*. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-

une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable (conclusion tirée par la Cour d'appel elle-même), l'application de cette doctrine empêche l'appelante de s'adresser aux cours de justice pour réclamer les 300 000 $ qui lui seraient dus, il convient de réexaminer certains principes fondamentaux.

Le droit s'est doté d'un certain nombre de moyens visant à prévenir les recours abusifs. L'un des plus anciens est la doctrine de la préclusion *per rem judicatem*, qui tire son origine du droit romain et selon laquelle, une fois le différend tranché définitivement, il ne peut être soumis à nouveau aux tribunaux : *Farwell c. La Reine* (1894), 22 R.C.S. 553, p. 558, et *Angle c. Ministre du Revenu national*, [1975] 2 R.C.S. 248, p. 267-268. La doctrine est opposable tant à l'égard de la cause d'action ainsi décidée (on parle de préclusion fondée sur la demande, sur la cause d'action ou sur l'action) que des divers éléments constitutifs ou faits substantiels s'y rapportant nécessairement (on parle alors généralement de préclusion découlant d'une question déjà tranchée) : G. S. Holmested et G. D. Watson, *Ontario Civil Procedure* (feuilles mobiles), vol. 3 suppl., 21§17 et suiv. Un autre aspect de la politique établie par les tribunaux en vue d'assurer le caractère définitif des instances est la règle qui prohibe les contestations indirectes, c'est-à-dire la règle selon laquelle l'ordonnance rendue par un tribunal compétent ne doit pas être remise en cause dans des procédures subséquentes, sauf celles prévues par la loi dans le but exprès de contester l'ordonnance : *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223.

Initialement, ces règles ont été établies dans le contexte de procédures judiciaires antérieures. Leur champ d'application a depuis été élargi, avec les adaptations nécessaires, aux décisions de nature judiciaire ou quasi judiciaire rendues par les juridictions administratives — fonctionnaires ou tribunaux. Dans ce contexte, l'objectif spécifique poursuivi consiste à assurer l'équilibre entre le respect

making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

de l'équité envers les parties et la protection du processus décisionnel administratif, dont l'intégrité serait compromise si on autorisait trop facilement les contestations indirectes ou l'engagement d'une nouvelle instance à l'égard de questions déjà tranchées.

22 The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in *The Doctrine of Res Judicata in Canada* (2000), at p. 94 *et seq.*, including *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103 (S.C.), at pp. 104-5, and *Bell v. Miller* (1862), 9 Gr. 385 (U.C. Ch.), at p. 386. The modern cases at the appellate level include *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622 (B.C.C.A.); *Rasanen*, *supra*; *Wong v. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182 (Alta. C.A.); *Machin v. Tomlinson* (2000), 194 D.L.R. (4th) 326 (Ont. C.A.); and *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 112 (C.A.). See also *Thrasyvoulou v. Environment Secretary*, [1990] 2 A.C. 273 (H.L.). Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them": *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

Dans *The Doctrine of Res Judicata in Canada* (2000), p. 94 et suiv., D. J. Lange attribue l'application aux organismes administratifs canadiens de la doctrine de la préclusion découlant d'une question déjà tranchée à certaines décisions datant du milieu du XIX^e^ siècle — notamment les affaires *Robinson c. McQuaid* (1854), 1 P.E.I.R. 103 (C.S.), p. 104-105, et *Bell c. Miller* (1862), 9 Gr. 385 (Ch. H.-C.), p. 386. Parmi les arrêts contemporains rendus par des cours d'appel, mentionnons les suivants : *Raison c. Fenwick* (1981), 120 D.L.R. (3d) 622 (C.A.C.-B.); *Rasanen*, précité; *Wong c. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182 (C.A. Alb.); *Machin c. Tomlinson* (2000), 194 D.L.R. (4th) 326 (C.A. Ont.); et *Hamelin c. Davis* (1996), 18 B.C.L.R. (3d) 112 (C.A.). Voir également *Thrasyvoulou c. Environment Secretary*, [1990] 2 A.C. 273 (H.L.). Des modifications s'imposaient en raison des « différences importantes qui peuvent exister entre ces deux types d'ordonnances [c.-à-d. les ordonnances administratives et les ordonnances judiciaires], notamment quant à leur nature juridique et la place des institutions qui les rendent à l'intérieur de la structure étatique » : *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, par. 4. On s'entend généralement pour dire que les ordonnances des cours de justice sont des ordonnances de nature judiciaire; il n'en est pas de même pour les innombrables ordonnances rendues par les différents tribunaux administratifs.

23 In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on

Dans le présent pourvoi, les parties n'ont pas plaidé la préclusion fondée sur la « cause d'action », estimant apparemment que le cadre législatif de la demande fondée sur la LNE distingue suffisamment cette demande du cadre juridique de common law de l'instance judiciaire. Je n'en dirai par conséquent pas davantage à ce sujet. Les parties ont cependant lié contestation quant à l'application de la préclusion découlant d'une question

the application of issue estoppel and the relevance of the rule against collateral attack.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that

déjà tranchée et à la pertinence de la règle prohibant les contestations indirectes.

La préclusion découlant d'une question déjà tranchée a été définie de façon précise par le juge Middleton de la Cour d'appel de l'Ontario dans l'arrêt *McIntosh c. Parent*, [1924] 4 D.L.R. 420, p. 422 :

> [TRADUCTION] Lorsqu'une question est soumise à un tribunal, le jugement de la cour devient une décision définitive entre les parties et leurs ayants droit. Les droits, questions ou faits distinctement mis en cause et directement réglés par un tribunal compétent comme motifs de recouvrement ou comme réponses à une prétention qu'on met de l'avant, ne peuvent être jugés de nouveau dans une poursuite subséquente entre les mêmes parties ou leurs ayants droit, même si la cause d'action est différente. Le droit, la question ou le fait, une fois qu'on a statué à son égard, doit être considéré entre les parties comme établi de façon concluante aussi longtemps que le jugement demeure. [Je souligne.]

Le juge Laskin (plus tard Juge en chef) a souscrit à cet énoncé dans ses motifs de dissidence dans l'arrêt *Angle*, précité, p. 267-268. Cette description des aspects visés par la préclusion (« [l]es droits, questions ou faits distinctement mis en cause et directement réglés ») est plus exigeante que celle utilisée dans certaines décisions plus anciennes à l'égard de la préclusion fondée sur la cause d'action (par exemple [TRADUCTION] « toute question ayant été débattue ou qui aurait pu à bon droit l'être », *Farwell*, précité, p. 558). S'exprimant au nom de la majorité dans l'arrêt *Angle*, précité, p. 255, le juge Dickson (plus tard Juge en chef) a également fait sienne la définition plus exigeante de l'objet de la préclusion découlant d'une question déjà tranchée. « Il ne suffira pas », a-t-il dit, « que la question ait été soulevée de façon annexe ou incidente dans l'affaire antérieure ou qu'elle doive être inférée du jugement par raisonnement. » La question qui est censée donner naissance à la préclusion doit avoir été « fondamentale à la décision à laquelle on est arrivé » dans l'affaire antérieure. En d'autres termes, comme il est expliqué plus loin, la préclusion vise les faits substantiels, les conclusions de droit ou les conclusions mixtes de fait et de droit (« les questions ») à l'égard desquels on a nécessairement statué (même si on ne

were necessarily (even if not explicitly) determined in the earlier proceedings.

The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the ESA to deal with the claim, the ESA officer lost jurisdiction when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel *per rem judicatem* in the circumstances of this case, and erred in failing to do so.

A. *The Statutory Scheme*

1. The Employment Standards Officer

The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum

l'a pas fait de façon explicite) dans le cadre de l'instance antérieure.

25 Les conditions d'application de la préclusion découlant d'une question déjà tranchée ont été énoncées par le juge Dickson dans l'arrêt *Angle*, précité, p. 254 :

(1) que la même question ait été décidée;

(2) que la décision judiciaire invoquée comme créant la [préclusion] soit finale; et

(3) que les parties dans la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties engagées dans l'affaire où la [préclusion] est soulevée, ou leurs ayants droit.

26 L'appelante soutient que l'agente des normes d'emploi n'a pas — bien quelle ait été tenue de le faire — pris sa décision de manière judiciaire. L'agente disposait, en vertu de la LNE, de la compétence nécessaire pour connaître de la réclamation, mais elle a perdu cette compétence en omettant de communiquer à l'appelante les prétentions de l'employeur et de lui donner la possibilité de les réfuter. L'agente n'a donc jamais rendu une « décision judiciaire » comme elle était tenue de le faire. L'appelante soutient en outre que sa propre omission d'exercer son droit de demander la révision administrative interne de la décision de l'agente ne devrait pas se voir accorder l'effet déterminant que lui a attribué la Cour d'appel de l'Ontario. Selon elle, même si les conditions d'application de la préclusion découlant d'une question déjà tranchée étaient réunies, la cour avait, dans les circonstances de l'espèce, le pouvoir discrétionnaire de la soustraire aux effets draconiens de la préclusion *per rem judicatem*, et elle a commis une erreur en s'abstenant de le faire.

A. *Le cadre législatif*

1. L'agent des normes d'emploi

27 La LNE s'applique à « tout contrat de travail, verbal ou écrit, exprès ou implicite » en Ontario (par. 2(2)), sous réserve de certaines exceptions prévues par règlement, et elle établit un certain

employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

nombre de normes d'emploi minimales en vue de protéger les employés. Ces normes portent notamment sur les heures de travail, le salaire minimum, le salaire pour les heures supplémentaires, les régimes d'avantages sociaux, les jours fériés et les congés payés. Plus particulièrement, la Loi établit une procédure sommaire permettant aux employés qui s'estiment lésés parce que leur employeur aurait omis de se conformer à ces normes de demander réparation à cet égard. L'objectif est d'offrir, dans les cas appropriés, un recours rapide et peu coûteux. Au premier palier, l'examen du différend est confié à un agent des normes d'emploi. Fonctionnaires du ministère du Travail, ces personnes n'ont généralement pas de formation juridique, mais elles possèdent une certaine expérience en matière de relations de travail. La Loi ne prescrit pas la procédure à suivre pour statuer sur les demandes. L'agent des normes d'emploi dispose de pouvoirs étendus qui l'autorisent notamment à pénétrer dans des locaux, à effectuer des inspections, à emporter des documents avec lui et à interroger toute personne à l'égard de questions pertinentes. S'il constate l'inobservation de la loi, l'agent dispose de larges pouvoirs afin de la faire respecter (art. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

En règle générale, sur réception de la demande d'un employé, l'agent des normes d'emploi communique avec l'employeur pour vérifier si le salaire est effectivement impayé et, dans l'affirmative, pour connaître la raison du non-paiement. Bien que, dans la présente affaire, l'agente des normes d'emploi se soit entretenue avec l'appelante pendant une heure, rien n'exige la tenue d'une telle rencontre et, manifestement, aucune audience à laquelle participeraient les deux parties n'est envisagée. D'aucuns estimeraient qu'il s'agit d'une procédure expéditive tout à fait inappropriée pour trancher de façon définitive des prétentions contractuelles présentant une certaine complexité sur les plans juridique et factuel.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There

Ce mécanisme présente de nombreux avantages pour les employés. Les services de l'agent des normes d'emploi sont gratuits. La représentation par avocat n'est pas nécessaire. L'instance se déroule plus rapidement que ce à quoi on pourrait

are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

vraisemblablement s'attendre devant les tribunaux judiciaires. À ces avantages correspondent toutefois des désavantages. Il est probable que l'agent n'a pas de formation juridique et qu'il n'a ni le temps ni les ressources nécessaires pour examiner une demande de nature contractuelle comme cela se passerait dans la salle d'audience d'une cour de justice. Au moment où ces procédures se sont déroulées, des règles inégales s'appliquaient en matière d'appel (ou de « révision » selon les termes de la Loi). En effet, l'employeur pouvait demander de plein droit la révision de la décision (art. 68). Toutefois, comme nous le verrons plus loin, l'employé pouvait lui aussi présenter une demande de révision, mais le directeur pouvait refuser d'y donner suite (par. 67(3)). De même, au cours de la période pertinente le montant des demandes à l'égard desquelles l'agent des normes d'emploi avait compétence n'était pas plafonné. La Loi a depuis été modifiée et seules les réclamations d'au plus 10 000 $ sont maintenant visées (L.O. 1996, ch. 23, par. 19(1)). Si, en l'espèce, l'agente avait statué en faveur de l'employée, l'employeur aurait pu devoir supporter une obligation de 300 000 $ découlant d'une décision présentant de profondes lacunes, à moins d'avoir gain de cause à la suite d'une révision administrative ou d'un contrôle judiciaire.

2. The Review Process

2. La procédure de révision

The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer's decision. Under s. 67(3), "the Director may appoint an adjudicator who shall hold a hearing" (emphasis added). The word "may" grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

30 Comme nous l'avons indiqué, les employés ne peuvent pas interjeter appel de plein droit. En vertu du par. 67(2) de la Loi, l'employé insatisfait de la décision rendue au premier palier peut, dans les 15 jours qui suivent la mise à la poste de la décision, demander par écrit au directeur de réviser cette décision. Aux termes du par. 67(3), « le directeur peut nommer un arbitre de griefs pour tenir une audience » (je souligne). L'emploi du mot « peut » confère au directeur le pouvoir discrétionnaire de décider s'il y aura ou non une audience. La Cour d'appel de l'Ontario a souligné ce point, mais a affirmé que les parties y avaient attaché peu d'importance.

It seems clear the legislature did not intend to confer an appeal as of right. Where the Director

31 Il paraît clair que le législateur n'a pas voulu créer un appel de plein droit. Lorsque le directeur

does appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of "may" and "shall" (and in the French text, the instruction that the Director "*peut nommer un arbitre de griefs pour tenir une audience*" (emphasis added)) puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

nomme un arbitre de griefs, la Loi exige la tenue d'une audience. Il en résulte évidemment des délais et des dépenses supplémentaires pour le ministère et les parties. La juxtaposition des auxiliaires « *may* » et « *shall* » dans la version anglaise du par. 67(3) (et, dans la version française, l'indication que le directeur « peut nommer un arbitre de griefs pour tenir une audience » (je souligne)) écarte tout doute à cet égard. Le législateur ontarien entendait que le directeur dispose du pouvoir discrétionnaire de refuser de saisir un arbitre de griefs d'une demande qui, à son avis, n'est tout simplement pas justifiée. Même les arbitres chargés de la révision prévue au par. 67(3) de la LNE ne sont pas tenus par la loi de posséder une formation juridique. Le législateur ontarien a probablement jugé qu'il n'était pas souhaitable que tout employé insatisfait d'une décision puisse obtenir de plein droit la révision de celle-ci, compte tenu particulièrement du fait que la somme en jeu est souvent relativement modeste. Il va de soi que ce pouvoir discrétionnaire doit être exercé en conformité avec les principes pertinents, mais il n'en demeure pas moins un pouvoir discrétionnaire.

32 If an internal review were ordered, an adjudicator would then have looked at the appellant's claim *de novo* and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her $300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

Si une révision interne avait été ordonnée, un arbitre aurait alors examiné *de novo* la demande de l'appelante et aurait sans aucun doute permis à cette dernière de prendre connaissance des documents de l'employeur et lui aurait donné la possibilité d'y répondre et de les commenter. Je reconnais que, sous le régime de la Loi, les vices procéduraux qui surviennent à l'étape de la décision initiale, y compris l'omission de donner aux intéressés un préavis suffisant et la possibilité de se faire entendre pour réfuter la thèse de la partie adverse, peuvent être corrigés à l'étape de la révision. L'intimée soutient que, du fait que l'appelante a choisi de se prévaloir de la Loi, elle devait recourir au mécanisme de révision prévue pour celle-ci si elle était insatisfaite de la décision rendue au premier palier. Comme elle ne l'a pas fait, elle est précluse de continuer de réclamer la somme de 300 000 $. L'appelante réplique que la procédure prévue par la LNE souffrait de lacunes si profondes qu'il lui était loisible de renoncer à y recourir.

B. *The Applicability of Issue Estoppel*

1. Issue Estoppel: A Two-Step Analysis

The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra.* If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

A common element of the preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K. Turner and K. R. Handley, *The Doc-*

B. *L'applicabilité de la préclusion découlant d'une question déjà tranchée*

1. Préclusion découlant d'une question déjà tranchée : analyse à deux volets

33 Les règles régissant la préclusion découlant d'une question déjà tranchée ne doivent pas être appliquées machinalement. L'objectif fondamental est d'établir l'équilibre entre l'intérêt public qui consiste à assurer le caractère définitif des litiges et l'autre intérêt public qui est d'assurer que, dans une affaire donnée, justice soit rendue. (Il existe des intérêts privés correspondants.) Il s'agit, au cours de la première étape, de déterminer si le requérant (en l'occurrence l'intimée) a établi l'existence des conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Dans l'affirmative, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion *devrait* être appliquée : *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), par. 32; *Schweneke c. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), par. 38-39; *Braithwaite c. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), par. 56.

34 L'appelante avait parfaitement le droit, en première instance, de saisir la Cour supérieure de l'Ontario de ses diverses réclamations financières. L'intimée ne pouvait se voir accorder de plein droit l'application de la préclusion. Il appartenait à la cour de décider, dans l'exercice de son pouvoir discrétionnaire, s'il convenait qu'elle refuse de connaître ou non de certains aspects de la demande ayant déjà fait l'objet de la procédure administrative engagée sous le régime de la LNE.

2. La nature judiciaire de la décision

35 L'exigence fondamentale selon laquelle la décision antérieure doit être une décision judiciaire est un élément qui est commun aux conditions préalables à l'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Selon la doc-

trine of Res Judicata (3rd ed. 1996), at paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, *was* the decision made in a judicial manner? These are distinct requirements:

It is of no avail to prove that the alleged *res judicata* was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.

(Spencer Bower, Turner and Handley, *supra*, para. 20)

36 As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent *ex curia* statement of Handley J. (the current editor of *The Doctrine of Res Judicata*) that:

The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to *res judicata* estoppels.

("Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar Rev.* 214, at p. 215)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard *capable* of supporting an issue

trine (voir, par exemple, G. Spencer Bower, A. K. Turner et K. R. Handley, *The Doctrine of Res Judicata* (3e éd. 1996), par. 18-20), trois éléments peuvent être pris en considération. Premièrement, il faut se pencher sur la nature du décideur administratif ayant rendu la décision. S'agit-il d'un organe pouvant être investi d'un pouvoir juridictionnel et capable d'exercer ce pouvoir? Deuxièmement, sur le plan juridique, la décision litigieuse devait-elle être prise judiciairement? Troisièmement — question mixte de fait et de droit — la décision *a-t-elle été* rendue de manière judiciaire? Il s'agit d'exigences distinctes :

[TRADUCTION] Il ne sert à rien de prouver que la prétendue chose jugée était une décision ou qu'elle a été prononcée conformément aux principes applicables aux tribunaux judiciaires à moins qu'elle ait été rendue par un tel tribunal dans l'exercice de son pouvoir juridictionnel; il ne suffit pas non plus qu'elle ait été prononcée par un tel tribunal, sauf s'il s'agit d'une décision judiciaire sur le fond. Par conséquent, il importe de bien saisir dès le départ ce qu'est un tribunal judiciaire et ce qu'est une décision judiciaire pour les fins qui nous occupent.

(Spencer Bower, Turner et Handley, *op. cit.*, par. 20)

En ce qui concerne le troisième élément, soit la question de savoir si la décision en cause a effectivement été rendue conformément aux exigences applicables aux décisions judiciaires, je souligne l'affirmation suivante, faite récemment par le juge Handley (éditeur actuel de l'ouvrage *The Doctrine of Res Judicata*) en dehors du cadre de ses fonctions de juge :

[TRADUCTION] La décision antérieure — qu'elle soit judiciaire, arbitrale ou administrative — doit avoir été rendue dans les limites de la compétence du décideur pour que puisse être plaidée la préclusion découlant d'une question déjà tranchée.

(« Res Judicata : General Principles and Recent Developments » (1999), 18 *Aust. Bar Rev.* 214, p. 215)

En l'espèce, le désaccord porte principalement sur ce troisième élément : une décision prise sans avoir respecté les exigences en matière de préavis et sans avoir donné à l'intéressé la possibilité de se

estoppel? In my opinion, the answer to this question is yes.

(a) *The Institutional Framework*

The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: *Re Downing and Graydon*, *supra*, *per* Blair J.A., at p. 305:

> In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important *indicia* of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. An earlier legislative limit of $4,000 on unpaid wages (excluding severance pay and benefits payable under pregnancy and parental provisions) was eliminated in 1991 by S.O. 1991, c. 16, s. 9(1), but subsequent to the ESA decision in the present case a new limit of $10,000 was imposed. This is the same limit as is imposed on the Small Claims Court by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 23(1), and O. Reg. 626/00, s. 1(1).

(b) *The Nature of ESA Decisions Under Section 65(1)*

An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

One distinction between administrative and judicial decisions lies in differentiating adjudicative

faire entendre est-elle *capable* de fonder l'application de la préclusion découlant d'une question déjà tranchée? À mon avis, la réponse à cette question est oui.

a) *Le cadre institutionnel*

38 La décision sur laquelle s'est appuyé le juge Rosenberg de la Cour d'appel de l'Ontario à cet égard a trait à la fonction et au rôle génériques de l'agent des normes d'emploi : *Re Downing and Graydon*, précité, le juge Blair, p. 305 :

> [TRADUCTION] En l'espèce, l'agent des normes d'emploi a le pouvoir de décider ainsi que celui d'enquêter. Il fait enquête afin de recueillir les renseignements qui fonderont la décision qu'il doit rendre. Ses fonctions comportent tous les indices importants de l'exercice d'un pouvoir judiciaire, notamment la détermination des faits, l'application du droit à ces faits et la prise d'une décision liant les parties.

Les parties ne contestent pas le fait que les fonctionnaires chargés de l'application de la LNE pouvaient à bon droit être investis de fonctions juridictionnelles devant être exercées de manière judiciaire. Le plafond de 4 000 $ que prévoyait la Loi à l'égard des réclamations pour salaire impayé (à l'exclusion de l'indemnité de cessation d'emploi et des prestations payables au titre des dispositions relatives au congé de maternité et au congé parental) a été aboli en 1991 par L.O. 1991, ch. 16, par. 9(1), mais après la décision rendue en application de la LNE dans la présente affaire, un nouveau plafond de 10 000 $ a été fixé. Il s'agit du même plafond auquel est assujettie la Cour des petites créances par la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, par. 23(1), et le Règl. de l'Ont. 626/00, par. 1(1).

b) *La nature des décisions rendues en application du par. 65(1)*

39 Un tribunal administratif peut exercer des fonctions judiciaires ainsi que des fonctions administratives ou ministérielles. Il en est de même d'un fonctionnaire.

40 Une des caractéristiques qui distinguent les décisions administratives des décisions judiciaires est

tive from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in *Guay v. Lafleur*, [1965] S.C.R. 12, at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in *Thoday v. Thoday*, [1964] P. 181 (Eng. C.A.), at p. 197.

la différence qui existe entre des fonctions juridictionnelles et des fonctions d'enquête. Dans l'exercice des secondes, l'agent des normes d'emploi prend l'initiative de recueillir des éléments d'information. Il agit en tant qu'enquêteur autonome et n'est pas assujetti aux contraintes de la procédure contradictoire. La distinction entre les pouvoirs d'enquête et les pouvoirs juridictionnels a été examinée dans l'arrêt *Guay c. Lafleur*, [1965] R.C.S. 12, p. 17-18. L'inapplicabilité de la préclusion découlant d'une question déjà tranchée aux enquêtes administratives a été mentionnée par le lord juge Diplock dans *Thoday c. Thoday*, [1964] P. 181 (C.A. Angl.), p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts. This is characteristic of a judicial function: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (1998), vol. 2, § 7:1310, p. 7-7.

Quoique les agents des normes d'emploi puissent avoir des fonctions non juridictionnelles, lorsqu'ils accomplissent des fonctions juridictionnelles ils sont tenus de le faire de manière judiciaire. Bien qu'ils aient recours à des procédures plus souples que celles des cours de justice, leurs décisions doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective. Il s'agit là d'une caractéristique de fonctions judiciaires : D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (1998), vol. 2, par. 7:1310, p. 7-7.

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

La décision qui statue sur une plainte après l'obtention de l'information pertinente est une décision de nature judiciaire.

(c) *Particulars of the Decision in Question*

c) *Le détail de la décision en cause*

43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

La Cour d'appel de l'Ontario a conclu que la décision de l'agente des normes d'emploi avait de fait été rendue au mépris des principes de justice naturelle. L'appelante n'a pas été informée des prétentions de l'employeur et n'a pas eu la possibilité de les réfuter.

44 The appellant contends that it is not enough to say the decision *ought* to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in *Rasanen*, *supra*, *per* Abella J.A., at p. 280:

L'appelante soutient qu'il ne suffit pas de dire que la décision *aurait dû* être prise de manière judiciaire, mais qu'il faut plutôt se demander : La décision a-t-elle été prise de manière judiciaire en l'espèce? Cet argument trouve un certain appui dans l'arrêt *Rasanen*, précité, où madame le juge Abella de la Cour d'appel de l'Ontario a dit ceci, à la p. 280 :

As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. [Emphasis added.]

[TRADUCTION] Pour autant que la procédure d'instruction du tribunal administratif donne à chacune des parties la possibilité de connaître les prétentions de l'autre et de les réfuter et que la décision rendue relève de la compétence du tribunal, peu importe alors à quel point la procédure s'apparente à un procès ou aux procédures préalables à celui-ci, je ne vois aucune raison fondée sur des principes qui justifierait, dans le cadre d'une action subséquente, de soustraire les questions décidées par un tribunal administratif à l'application de la préclusion découlant d'une question déjà tranchée. [Je souligne.]

Trial level decisions in Ontario subsequently adopted this approach: *Machado v. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 (Ont. Ct. (Gen. Div.)); *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (Ont. Ct. (Gen. Div.)); *Heynen v. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (Ont. Ct. (Gen. Div.)); *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (Ont. S.C.J.). The statement of Métivier J. in *Munyal v. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58 (Ont. Ct. (Gen. Div.)), at p. 60, reflects that position: 45

Cette approche a subséquemment été retenue par des tribunaux de première instance en Ontario : *Machado c. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 (C. Ont. (Div. gén.)); *Randhawa c. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (C. Ont. (Div. gén.)); *Heynen c. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (C. Ont. (Div. gén.)); *Perez c. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (C.S.J.). Les propos suivants du juge Métivier dans l'affaire *Munyal c. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58 (C. Ont. (Div. gén.)), p. 60, reflètent ce point de vue :

The plaintiff relies on [*Rasanen*] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

[TRADUCTION] La partie demanderesse s'appuie sur [l'arrêt *Rasanen*] et sur d'autres décisions au même effet pour affirmer que le principe de la préclusion découlant d'une question déjà tranchée devrait s'appliquer aux décisions administratives. Ce n'est le cas que lorsque la décision est le fruit d'un processus décisionnel équitable et impartial « comportant une audience dans le cadre de laquelle chacune des parties a la possibilité de prendre connaissance des prétentions de l'autre et de les réfuter ».

In *Wong*, *supra*, the Alberta Court of Appeal rejected an attack on the decision of an employment standards review officer and held that the ESA decision was adequate to create an estoppel as long as "the appellant knew of the case against him and was given an opportunity to state his position" (para. 20). See also *Alderman v. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535 (B.C.S.C.). 46

Dans l'arrêt *Wong*, précité, la Cour d'appel de l'Alberta a rejeté une contestation visant la décision d'un agent de révision en matière de normes d'emploi et a conclu qu'il était possible de plaider la préclusion à l'égard de cette décision dans la mesure où [TRADUCTION] « l'appelant connaissait les prétentions formulées contre lui et avait eu la possibilité de faire valoir son point de vue » (par. 20). Voir également *Alderman c. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535 (C.S.C.-B.).

47 In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision maker erred in carrying out his or her functions. As early as *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (H.L.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in "the observance of the law in the course of its exercise" (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at pp. 584-85. The decision remains a "judicial decision", although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

En toute déférence, j'estime que la thèse voulant que l'inobservation des principes de justice naturelle ait pour effet d'enlever tout caractère « judiciaire » à la décision fondée sur la LNE repose sur une idée fausse. Il se peut que la décision présente des failles, mais elle demeure « judiciaire » (plutôt qu'administrative ou législative). Une fois qu'il est établi que l'auteur de la décision pouvait être investi d'un pouvoir juridictionnel, qu'il pouvait exercer ce pouvoir et que la décision litigieuse devait être rendue de manière judiciaire, celle-ci ne perd pas son caractère « judiciaire » parce que son auteur a commis une erreur dans l'accomplissement de ses fonctions. Dans un vieil arrêt, *R. c. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (H.L.), il a été jugé que la déclaration de culpabilité inscrite par un magistrat albertain ne pouvait être annulée pour cause d'absence de compétence sur le fondement que les témoignages ne révélaient aucune preuve étayant la déclaration de culpabilité ou parce que le magistrat s'était donné des directives erronées dans l'examen de la preuve. Une distinction a été établie entre le pouvoir de juger les accusations et les erreurs qui auraient été commises en matière d'[TRADUCTION] « observation de la loi dans l'exercice de ce pouvoir » (p. 156). Si les conditions préalables à l'exercice d'une compétence de nature judiciaire sont réunies (comme c'est le cas en l'espèce), toute erreur subséquente dans l'exercice de cette compétence, y compris les manquements aux règles de la justice naturelle, ne rend pas la décision nulle mais annulable : *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 584-585. La décision reste une décision « judiciaire », quoiqu'elle souffre de sérieuses lacunes du fait de l'absence de préavis suffisant et du défaut d'accorder la possibilité de se faire entendre.

48 I mentioned at the outset that estoppel *per rem judicatem* is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in *Harelkin*, *supra*. In that case a university student failed in his judicial review application to quash the decision of a

Comme je l'ai mentionné plus tôt, la préclusion *per rem judicatem* est étroitement liée à la règle prohibant les contestations indirectes et, de fait, aux principes régissant le contrôle judiciaire. Si l'appelante s'était adressée à une cour de justice pour demander le contrôle judiciaire de la décision de l'agente des normes d'emploi sans se prévaloir au préalable du mécanisme de révision administrative interne, on lui aurait opposé l'arrêt *Harelkin*, précité, de notre Cour. Dans cette affaire, la

faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the *Harelkin* barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

demande de contrôle judiciaire qu'avait présentée un étudiant de l'université de Regina en vue d'obtenir l'annulation de la décision rendue par un comité d'une faculté de cet établissement et portant que ses notes étaient insatisfaisantes a été rejetée. Ce comité était tenu d'agir judiciairement, mais, tout comme en l'espèce, il avait omis de donner à l'étudiant un préavis suffisant et la possibilité de se faire entendre. Il a été jugé que cette omission n'avait pas fait perdre au comité sa compétence juridictionnelle. La décision du comité était susceptible de contrôle judiciaire, mais notre Cour, dans l'exercice de son pouvoir discrétionnaire, a refusé de faire droit à ce recours. Retenir la thèse de l'appelante en l'espèce entraînerait un résultat anormal. Si elle a raison de prétendre que l'agente des normes d'emploi a cessé d'agir judiciairement et a perdu compétence, à tout point de vue, y compris pour l'application de la préclusion découlant d'une question déjà tranchée, l'obstacle au contrôle judiciaire que constitue l'arrêt *Harelkin* serait habilement contourné. Elle n'aurait en effet pas besoin de demander le contrôle judiciaire de la décision de l'agente pour la faire annuler puisque, selon ce qu'elle soutient, elle a d'office droit à ce qu'on n'en tienne pas compte dans le cadre de son action au civil.

The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though *Maybrun, supra,* says that an act in excess of a jurisdiction which the decision maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to *Maybrun,* on which forum

49 La thèse avancée par l'appelante créerait également une situation anormale pour ce qui concerne la règle prohibant les contestations indirectes. Comme l'a souligné l'intimée, le refus d'appliquer la préclusion découlant d'une question déjà tranchée en l'espèce équivaudrait, en un sens, à faire droit à une contestation indirecte de la décision de l'agente des normes d'emploi, décision qui n'a été contestée ni par voie de révision administrative ni par voie de contrôle judiciaire. Suivant la thèse de l'appelante, un excès de compétence pendant le déroulement de la procédure administrative prévue par la LNE empêche l'application de la préclusion découlant d'une question déjà tranchée, bien que dans l'arrêt *Maybrun*, précité, notre Cour ait dit qu'une mesure outrepassant la compétence que possédait initialement le décideur ne donne pas nécessairement ouverture aux contestations indirectes de cette décision. Suivant cet arrêt, tout dépend du forum devant lequel le législateur a

the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

51 In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law

voulu que soit présentée la contestation d'ordre juridictionnel, savoir le tribunal administratif chargé de la révision ou une cour de justice (par. 49).

À mon sens, il faut inciter le plaideur qui n'a pas gain de cause dans le cadre d'une instance administrative à se prévaloir de tous les recours administratifs qui lui sont ouverts. Il convient de rappeler que, en l'espèce, l'appelante a opté pour le recours prévu par la LNE. Tant les employeurs que les employés doivent être en mesure de s'en remettre aux décisions rendues sous le régime de la LNE à moins qu'une mesure ne soit prise rapidement pour en obtenir l'annulation. Un objectif important du régime établi par le législateur dans la LNE est de faciliter le règlement rapide des différends portant sur les indemnités de licenciement, de sorte que l'employé et l'employeur puissent tourner la page. Dans les cas où, comme en l'espèce, les questions touchant à l'application de la LNE sont tranchées dans un délai d'un an ou moins, il est néanmoins possible, en Ontario, d'intenter une action contractuelle dans les six ans qui suivent le manquement allégué, ce qui peut donner lieu à cinq années d'incertitude. De telles situations doivent être évitées.

En résumé, il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Les conditions préalables à l'exercice de la compétence juridictionnelle doivent être réunies. Lorsqu'il est possible d'affirmer que le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais qu'il a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Harelkin*, précité, et celles

governing judicial review in *Harelkin*, *supra*, and collateral attack in *Maybrun*, *supra*.

Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

I turn now to the three preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) *That the Same Question Has Been Decided*

A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law

relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*, précité.

52 Là où je diverge d'opinion avec la Cour d'appel de l'Ontario, c'est relativement à sa conclusion que le fait pour l'appelante de ne pas avoir demandé la révision administrative de la décision lacunaire de l'agente porte un coup fatal à la thèse de l'appelante. En toute déférence, je suis d'avis que le refus de l'agente des normes d'emploi de donner à l'appelante un préavis suffisant et la possibilité de se faire entendre est un facteur très important dans l'exercice du pouvoir discrétionnaire de la cour, comme nous le verrons plus loin.

53 Je vais maintenant examiner les trois conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité, p. 254.

3. La préclusion découlant d'une question déjà tranchée : application des conditions

a) *La condition requérant que la même question ait déjà été tranchée*

54 Traditionnellement, on définit la cause d'action comme étant tous les faits que le demandeur doit prouver, s'ils sont contestés, pour étayer son droit d'obtenir jugement de la cour en sa faveur : *Poucher c. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Pour que le demandeur ait gain de cause, chacun de ces faits (souvent qualifiés de faits substantiels) doit donc être établi. Il est évident que des causes d'action différentes peuvent avoir en commun un ou plusieurs faits substantiels. En l'espèce, par exemple, l'existence d'un contrat de travail est un fait substantiel commun au recours administratif et à l'action pour congédiement injustifié intentée au civil par l'appelante. L'application de la préclusion découlant d'une question déjà tranchée signifie simplement que, dans le cas où le tribunal judiciaire ou administratif compétent a conclu, sur le fondement d'éléments de preuve ou d'admissions, à l'existence (ou à l'inexistence) d'un fait pertinent — par exemple un contrat de travail valable — , cette même question ne peut être débattue à nouveau dans le cadre d'une instance ultérieure opposant les mêmes parties. En d'autres termes, la pré-

that are necessarily bound up with the determination of that "issue" in the prior proceeding.

clusion vise les questions de fait, les questions de droit ainsi que les questions mixtes de fait et de droit qui sont nécessairement liées à la résolution de cette « question » dans l'instance antérieure.

55 The parties are agreed here that the "same issue" requirement is satisfied. In the appellant's wrongful dismissal action, she is claiming $300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

En l'espèce, les parties conviennent que la condition relative à l'existence d'une « même question » est remplie. Dans son action pour congédiement injustifié, l'appelante réclame 300 000 $ à titre de commissions impayées. Cela met en jeu le droit même qui lui a été refusé dans le cadre de l'instance fondée sur la LNE. Une ou plusieurs des questions de fait ou de droit essentielles à la reconnaissance de ce droit ont nécessairement été tranchées en faveur de l'employeur dans le cadre de la procédure administrative. Si la préclusion découlant d'une question déjà tranchée s'applique, cela a pour effet d'empêcher l'appelante de soutenir que ces questions devraient maintenant être tranchées en sa faveur.

(b) *That the Judicial Decision Which Is Said to Create the Estoppel Was Final*

b) *La condition requérant que la décision judiciaire qui entraînerait l'application de la préclusion ait un caractère définitif*

56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.

Comme il a été indiqué plus tôt, la condition requérant que la décision antérieure soit une décision « judiciaire » (plutôt qu'administrative ou législative) est satisfaite en l'espèce.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

En outre, je souscris à l'opinion de la Cour d'appel de l'Ontario selon laquelle, en raison du fait que l'employée ne s'est pas prévalue du mécanisme de révision interne, la décision de l'agente des normes d'emploi avait un caractère définitif pour l'application de la Loi et était donc susceptible, dans le cours normal des choses, de faire naître la préclusion.

58 I have already noted that in this case, unlike *Harelkin*, *supra*, the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike Harelkin she had no "adequate alternative remedy" available to her as of right. The ESA

J'ai déjà souligné que, en l'espèce, contrairement à l'affaire *Harelkin*, précitée, l'appelante ne disposait d'aucun droit d'appel. Elle pouvait uniquement demander au directeur de faire réviser par un arbitre la décision de l'agente des normes d'emploi. Bien qu'il puisse s'agir d'un facteur à prendre en considération dans l'exercice du pouvoir discrétionnaire de refuser l'application de la préclusion découlant d'une question déjà tranchée, il n'a aucun effet sur le caractère définitif de la décision.

decision must nevertheless be treated as final for present purposes.

L'appelante pourrait à juste titre prétendre, dans le cadre d'une demande de contrôle judiciaire, que contrairement à M. Harelkin elle ne disposait pas, de plein droit, d'un autre « recours approprié ». Néanmoins, la décision de l'agente des normes d'emploi doit être tenue pour définitive pour les fins du présent pourvoi.

(c) *That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies*

c) *La condition requérant que les parties à la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties aux procédures au cours desquelles la préclusion est plaidée, ou leurs ayants droit*

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: *Machin*, *supra*; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), *per* Laskin J.A., at pp. 339-40. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in *Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89 (S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see Holmested and Watson, *supra*, at 21§24, and G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623.

Cette condition garantit la réciprocité. Si elle ne s'appliquait pas, un tiers aux procédures antérieures pourrait exiger qu'une partie à celles-ci soit considérée comme liée, dans le cadre d'une instance ultérieure, par les conclusions tirées au cours des premières procédures, alors que ce tiers, qui ne serait partie qu'à la seconde instance, ne serait pas lié par ces conclusions : *Machin*, précité; *Minott c. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), le juge Laskin, p. 339-340. Cette condition de réciprocité a fait l'objet de certaines critiques par le juge McEachern (plus tard Juge en chef de la Colombie-Britannique), pendant qu'il siégeait en première instance, dans l'affaire *Saskatoon Credit Union Ltd. c. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89 (C.S.), p. 96, et elle a été modifiée de façon substantielle dans bon nombre d'États américains : voir Holmested et Watson, *op. cit.*, 21§24, et G. D. Watson, « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 623.

60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

Évidemment, la notion de « lien de droit » est assez élastique. J. Sopinka, S. N. Lederman et A. W. Bryant, les éminents éditeurs de l'ouvrage *The Law of Evidence in Canada* (2e éd. 1999), affirment avec un certain pessimisme, à la p. 1088, qu'[TRADUCTION] « [i]l est impossible d'être catégorique quant à l'étendue de l'intérêt qui crée un lien de droit » et qu'il faut trancher au cas par cas. En l'espèce, les parties sont les mêmes et il n'y a pas lieu d'explorer davantage les confins des notions de « réciprocité » et d'« identité des parties ».

61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

63 In *Bugbusters*, *supra*, Finch J.A. (now C.J.B.C.) observed, at para. 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke*, *supra*, at paras. 38 and 43:

J'arrive à la conclusion que les conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies en l'espèce.

4. L'exercice du pouvoir discrétionnaire

L'appelante fait valoir que la Cour doit néanmoins exercer son pouvoir discrétionnaire et refuser l'application de la préclusion. Il ne fait aucun doute que ce pouvoir discrétionnaire existe. Dans l'arrêt *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72, le juge Estey a souligné, à la p. 101, que dans le contexte d'une instance judiciaire « ce pouvoir discrétionnaire est très limité dans son application ». À mon avis, le pouvoir discrétionnaire est nécessairement plus étendu à l'égard des décisions des tribunaux administratifs, étant donné la diversité considérable des structures, missions et procédures des décideurs administratifs.

Dans l'arrêt *Bugbusters*, précité, le juge Finch de la Cour d'appel (maintenant Juge en chef de la Colombie-Britannique) a fait les observations suivantes, au par 32 :

> [TRADUCTION] Il faut toujours se rappeler que, bien que les trois conditions d'application de la préclusion découlant d'une question déjà tranchée doivent être réunies pour que celle-ci puisse être invoquée, le fait que ces conditions soient présentes n'emporte pas nécessairement l'application de la préclusion. Il s'agit d'une doctrine issue de l'*equity* et, comme l'indique la jurisprudence, elle présente des liens étroits avec l'abus de procédure. Elle se veut un moyen de rendre justice et de protéger contre l'injustice. Elle implique inévitablement l'exercice par la cour de son pouvoir discrétionnaire pour assurer le respect de l'équité selon les circonstances propres à chaque espèce.

Mis à part, entre parenthèses, le fait que la préclusion *per rem judicatem* soit généralement considérée comme une doctrine de common law (contrairement à la préclusion fondée sur une promesse, qui tire clairement son origine de l'*equity*), j'estime qu'il s'agit d'un énoncé fidèle du droit applicable. Cette remarque incidente du juge Finch a été retenue et appliquée par la Cour d'appel de l'Ontario dans l'affaire *Schweneke*, précitée, par. 38 et 43 :

The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask — is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?

. . .

. . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also *Braithwaite*, *supra*, at para. 56.

Courts elsewhere in the Commonwealth apply similar principles. In *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, *per* Lord Keith of Kinkel, at p. 50:

One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . . .

In the present case Rosenberg J.A. noted in passing at pp. 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at p. 256:

In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

In my view it was an error of principle not to address the factors for and against the exercise of

[TRADUCTION] Le pouvoir discrétionnaire de refuser de donner effet à la préclusion découlant d'une question déjà tranchée ne naît que lorsque les trois conditions d'application de la doctrine sont réunies. [. . .] Ce pouvoir discrétionnaire est nécessairement exercé au cas par cas et son application dépend de l'ensemble des circonstances. Dans l'exercice de ce pouvoir discrétionnaire, la cour doit se poser la question suivante : existe-t-il, en l'espèce, une circonstance qui ferait en sorte que l'application normale de la doctrine créerait une injustice?

. . .

. . . L'exercice du pouvoir discrétionnaire doit tenir compte des réalités propres à chaque affaire et non de préoccupations abstraites, qui sont présentes dans pratiquement tous les cas où la décision invoquée au soutien de la demande d'application a été rendue par un tribunal administratif et non par un tribunal judiciaire.

Voir également *Braithwaite*, précité, par. 56.

64 Les cours de justice d'autres pays du Commonwealth appliquent des principes analogues. Dans l'arrêt *Arnold c. National Westminster Bank plc*, [1991] 3 All E.R. 41, la Chambre des lords a exercé son pouvoir discrétionnaire et refusé d'appliquer la préclusion découlant d'une question déjà tranchée à l'égard d'une sentence arbitrale. Voici ce qu'a dit lord Keith of Kinkel, à la p. 50 :

[TRADUCTION] L'une des raisons d'être de la préclusion étant de rendre justice aux parties, il est loisible aux cours de justice de reconnaître que, dans certaines circonstances, son application rigide produirait l'effet contraire. . .

65 Dans la présente affaire, le juge Rosenberg a mentionné, aux p. 248-249, l'existence possible d'un pouvoir discrétionnaire potentiel mais, en toute déférence, il ne s'y est pas attardé. Il n'a ni examiné ni analysé le bien-fondé de l'exercice de ce pouvoir. Il a simplement conclu ainsi, à la p. 256 :

[TRADUCTION] En résumé, M^me^ Burke n'a pas accordé à l'appelante le bénéfice des règles de justice naturelle. Le recours qui s'offrait à cette dernière était de demander la révision de la décision de l'agente. Elle ne l'a pas fait. Elle et son employeur sont liés par cette décision.

66 Je suis d'avis que la Cour d'appel a commis une erreur de principe en omettant de soupeser les fac-

the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

teurs favorables et défavorables à l'exercice du pouvoir discrétionnaire dont elle était clairement investie. Il ne s'agit pas d'un cas où notre Cour est invitée par la partie appelante à substituer son opinion à celle du juge des requêtes ou de la Cour d'appel. L'appelante a droit à ce que, à un certain point dans le processus, on examine de façon appropriée les facteurs pertinents à l'exercice du pouvoir discrétionnaire, et jusqu'à maintenant on ne l'a pas fait.

67 The list of factors is open. They include many of the same factors listed in *Maybrun* in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in *Minott*, *supra*. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

La liste de ces facteurs n'est pas exhaustive. Elle comporte bon nombre de ceux qui ont été mentionnés dans l'arrêt *Maybrun* en rapport avec la règle prohibant les contestations indirectes. Le juge Laskin a lui aussi proposé une liste fort utile dans l'affaire *Minott*, précitée. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice concrète dans une affaire donnée. Sept facteurs, mentionnés ci-après, sont pertinents dans la présente affaire.

(a) *The Wording of the Statute from which the Power to Issue the Administrative Order Derives*

a) *Le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative*

68 In this case the ESA includes s. 6(1) which provides that:

> No civil remedy of an employee against his or her employer is suspended or affected by this Act. [Emphasis added.]

En l'espèce, la LNE comporte le par. 6(1), qui prévoit ce qui suit :

> La présente loi ne suspend pas les recours civils dont dispose un employé contre son employeur ni n'y porte atteinte. [Je souligne.]

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an issue would be an abuse: *Rasanen*, *supra*, *per* Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

Cette disposition tend à indiquer que, à l'époque pertinente, le législateur ontarien n'entendait pas que le forum prévu par la LNE ait pour effet d'exclure tous les autres. (De récentes modifications apportées à la Loi obligent désormais l'employé à choisir entre la procédure prévue par la LNE ou le recours aux tribunaux judiciaires. Cependant, même avant ces modifications, les cours de justice pouvaient à bon droit conclure que l'engagement de nouvelles procédures à l'égard d'une question constituait un abus : *Rasanen*, précité, le juge en chef adjoint Morden de la Cour d'appel de l'Ontario, p. 293, le juge Carthy, p. 288.)

While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings — including any available appeals — has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

(b) *The Purpose of the Legislation*

The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In *Bugbusters*, *supra*, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. *Forest Act*, R.S.B.C. 1979, c. 140. The expense claim was allowed *despite* an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, *per* Finch J.A., at para. 30, was that

> a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursement] proceedings [under the *Forest Act*].

A similar point was made in *Rasanen*, *supra*, by Carthy J.A., at p. 290:

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking dis-

70 Bien qu'il soit généralement raisonnable pour un défendeur d'escompter pouvoir tourner la page après des procédures — y compris tout appel possible — au terme desquelles sa responsabilité n'a pas été retenue, en l'espèce l'appelante a intenté son action civile contre les intimés avant que l'agente des normes d'emploi n'ait rendu sa décision (comme l'y autorisait clairement la loi pertinente à l'époque). En conséquence, les intimés savaient parfaitement, en droit et en fait, qu'ils devaient se défendre dans des procédures parallèles se chevauchant dans une certaine mesure.

b) *L'objet de la loi*

71 Il est fort possible que le nœud d'une instance administrative soit totalement différent de celui d'un litige subséquent, même si une ou plusieurs des questions litigieuses sont les mêmes. Dans l'affaire *Bugbusters*, précitée, une entreprise forestière a été conscrite afin d'aller combattre un incendie de forêt en Colombie-Britannique. Elle a par la suite demandé le remboursement de ses dépenses en vertu de la *Forest Act*, R.S.B.C. 1979, ch. 140, de cette province. On a fait droit à sa demande *malgré* des allégations selon lesquelles l'incendie avait été causé par un de ses employés qui aurait négligemment jeté une cigarette. (Si l'allégation avait été prouvée, Bugbusters n'aurait pas eu droit au remboursement.) Sa Majesté a par la suite intenté une action en négligence de 5 000 000 $ contre Bugbusters pour être indemnisée des pertes occasionnées par le feu de forêt. Cette dernière a plaidé la préclusion découlant d'une question déjà tranchée. Exerçant son pouvoir discrétionnaire, la Cour d'appel a refusé d'appliquer la doctrine, notamment pour le motif suivant, exposé par le juge Finch, au par. 30 :

> [TRADUCTION] . . . pendant l'instance [en remboursement fondée sur la *Forest Act*], aucune des parties ne pouvait raisonnablement s'attendre à ce qu'il soit statué définitivement sur le droit de Sa Majesté d'être indemnisée de ses pertes.

Une remarque au même effet a été formulée par le juge Carthy dans l'affaire *Rasanen*, précitée, p. 290 :

> [TRADUCTION] Il serait injuste vis-à-vis d'un employé qui a demandé sans délai une indemnité limitée de

covery and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American *Restatement of the Law, Second: Judgments 2d* (1982), vol. 2 § 83(2)(e), which refers to

procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. Counsel for the respondent justly observed, with some exasperation:

As the record makes clear, Danyluk was represented by legal counsel prior to, at the time of, and subsequent to the cessation of her employment. Danyluk and her counsel were well aware of the fact that Danyluk had an initial choice of forums with respect to her claim for unpaid commissions and wages. . . .

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) *The Availability of an Appeal*

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: *Harelkin*, *supra*, at p. 592. Here the employee had no *right* of appeal, but the existence of a potential administrative review and her failure to take advantage of it

4 000 $, renonçant de ce fait à la communication de la preuve et au droit d'être représenté par avocat, de lui opposer ensuite qu'il est lié par le résultat de ce recours et par son effet sur la réclamation d'une somme dix fois plus élevée.

Une réserve semblable est formulée dans l'ouvrage américain *Restatement of the Law, Second : Judgments 2d* (1982), vol. 2, § 83(2)(e), où l'on fait état

[TRADUCTION] . . . des éléments procéduraux requis pour que l'instance permette de régler décisivement le différend, compte tenu de l'ampleur et de la complexité de celui-ci, de l'urgence avec laquelle il faut le trancher et de la possibilité pour les parties de recueillir de la preuve et de formuler des arguments juridiques.

Je suis bien sûr conscient du fait que, en l'espèce, l'appelante a choisi la procédure prévue par la LNE. L'avocat de l'intimée a fait remarquer à juste titre, non sans une certaine exaspération :

[TRADUCTION] Comme l'indique clairement le dossier, M^me^ Danyluk était représentée par avocat avant la cessation d'emploi, au moment de celle-ci et par la suite. Son avocat et elle savaient fort bien qu'elle avait au départ le choix du forum devant lequel présenter sa réclamation pour salaire et commissions impayés. . .

Néanmoins, l'objet de la LNE est d'offrir un moyen relativement rapide et peu coûteux de régler les différends entre employés et employeurs. Accorder un poids excessif aux décisions prises en vertu de la LNE, dans le contexte de l'application de la préclusion découlant d'une question déjà tranchée, obligerait vraisemblablement les parties, en pareils cas, à préparer une demande et une défense équivalentes à celles préparées dans le cadre d'un véritable procès et tendrait ainsi à enlever à l'ensemble du régime établi par la LNE son caractère expéditif. Cette situation compromettrait l'objectif visé par la loi.

c) *L'existence d'un droit d'appel*

Ce facteur correspond à celui de l'autre « recours approprié » applicable en matière de contrôle judiciaire : *Harelkin*, précité, p. 592. Dans la présente affaire, l'employée ne disposait d'aucun *droit* d'appel, mais la possibilité d'une révision

must be counted against her: *Susan Shoe Industries Ltd. v. Ricciardi* (1994), 18 O.R. (3d) 660 (C.A.), at p. 662.

(d) *The Safeguards Available to the Parties in the Administrative Procedure*

As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

Morden A.C.J.O. pointed out in his concurring judgment in *Rasanen*, *supra*, at p. 295: "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." Laskin J.A. made a similar point in *Minott*, *supra*, at pp. 341-42.

(e) *The Expertise of the Administrative Decision Maker*

In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack (*Maybrun*, *supra*, at para. 50):

administrative et l'omission de s'en prévaloir doivent être retenues contre elle : *Susan Shoe Industries Ltd. c. Ricciardi* (1994), 18 O.R. (3d) 660, (C.A.), p. 662.

d) *Les garanties offertes aux parties dans le cadre de l'instance administrative*

75 Comme il a été mentionné précédemment, la procédure expéditive propre à permettre la réalisation des objectifs de la LNE peut tout simplement ne pas convenir pour l'examen de complexes questions de fait ou de droit. Étant maîtres de leur procédure, les organismes administratifs peuvent écarter des éléments de preuve que les cours de justice estiment probants ou encore agir sur le fondement d'éléments que ces dernières ne jugent pas fiables. Si cela s'est produit, il peut s'agir d'un facteur à prendre en compte dans l'exercice du pouvoir discrétionnaire de la cour. En l'espèce, le manquement aux règles de justice naturelle est un facteur clé en faveur de l'appelante.

76 Dans l'affaire *Rasanen*, précitée, p. 295, le juge en chef adjoint Morden a souligné le point suivant, dans ses motifs de jugement concourants : [TRADUCTION] « Je n'exclus pas la possibilité que des lacunes dans la procédure ayant conduit à la première décision puissent à juste titre constituer un facteur dans la décision d'appliquer ou non la préclusion découlant d'une question déjà tranchée. » Le juge Laskin de la Cour d'appel de l'Ontario a tenu des propos analogues dans l'affaire *Minott*, précitée, p. 341-342.

e) *L'expertise du décideur administratif*

77 Dans la présente affaire, l'agente des normes d'emploi, qui n'avait aucune formation juridique, était appelée à trancher une question potentiellement complexe en matière de droit des contrats. L'approche expéditive qui convient pour la grande majorité des demandes fondées sur la LNE n'est pas le genre d'expertise requise en l'espèce. Un facteur similaire s'applique à l'égard de la règle prohibant les contestations indirectes (*Maybrun*, précité, par. 50) :

. . . where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal.

. . . le fait que la contestation de l'ordonnance repose sur des considérations étrangères à l'expertise ou à la raison d'être d'une instance administrative d'appel suggère, sans toutefois être déterminant en lui-même, que le législateur n'a pas voulu réserver à cette instance le pouvoir exclusif de se prononcer sur la validité de l'ordonnance.

(f) *The Circumstances Giving Rise to the Prior Administrative Proceedings*

f) *Les circonstances ayant donné naissance à l'instance administrative initiale*

78 In the appellant's favour, it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) As Laskin J.A. pointed out in *Minott*, *supra*, at pp. 341-42:

Un argument qui peut être avancé en faveur de l'appelante est qu'elle s'est prévalue du recours fondé sur la LNE à un moment où l'imminence de son congédiement faisait d'elle une personne vulnérable. Il est peu probable que le législateur ait voulu qu'une procédure sommaire applicable à la réclamation de petites sommes fasse obstacle à l'examen approfondi de réclamations plus considérables. (La décision ultérieure du législateur de plafonner à 10 000 $ les réclamations pouvant être présentées en vertu de la LNE concorde avec cette interprétation.) Comme l'a fait observer le juge Laskin dans l'arrêt *Minott*, précité, p. 341-342 :

. . . employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them . . . .

[TRADUCTION] . . . les employés présentent une demande au moment où ils sont le plus vulnérables, soit immédiatement après la perte de leur emploi. Le fait qu'ils doivent invariablement agir rapidement pour demander réparation compromet leur aptitude à présenter adéquatement leur point de vue ou à réfuter la thèse de la partie adverse. . .

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the $300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

Par contre, il convient de rappeler que dans la présente affaire l'appelante, agissant alors de son propre chef ou sur les conseils de son avocat, a inclus dans sa demande fondée sur la LNE les 300 000 $ réclamés à titre de commissions et elle doit assumer la responsabilité d'au moins une partie des difficultés résultant de cette décision.

(g) *The Potential Injustice*

g) *Le risque d'injustice*

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the

Suivant ce dernier facteur, qui est aussi le plus important, notre Cour doit prendre un certain recul et, eu égard à l'ensemble des circonstances, se demander si, dans l'affaire dont elle est saisie, l'application de la préclusion découlant d'une question déjà tranchée entraînerait une injustice. Le juge Rosenberg de la Cour d'appel a conclu que l'appelante n'avait pas été informée des allégations

problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

> The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

I would therefore allow the appeal with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Lang Michener, Toronto.

Solicitors for the respondents: Heenan Blaikie, Toronto.

de l'intimée et n'avait pas eu la possibilité d'y répondre. Le juge Rosenberg était donc aux prises avec le problème signalé par le juge Jackson, dans ses motifs dissidents dans l'arrêt *Iron c. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (C.A. Sask.), p. 21 :

> [TRADUCTION] Constituant un moyen de rendre justice aux parties dans le contexte d'une procédure contradictoire, la doctrine de l'autorité de la chose jugée porte en elle-même le germe de l'injustice, spécialement lorsque le droit des parties de se faire entendre est en jeu.

Indépendamment des diverses erreurs de nature procédurale commises par l'appelante en l'espèce, il n'en demeure pas moins que sa réclamation visant des commissions totalisant 300 000 $ n'a tout simplement jamais été examinée et tranchée adéquatement.

81 Vu l'effet cumulatif des facteurs susmentionnés, je suis d'avis que notre Cour doit exercer son pouvoir discrétionnaire et refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée.

V. Le dispositif

82 Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Lang Michener, Toronto.

Procureurs des intimés : Heenan Blaikie, Toronto.

TAB 5

See para. 24

Date: 19980108
Docket: C971470
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NORTHLAND BANK (In Liquidation)

PLAINTIFF

AND:

VICTOR RUSSELL WALTERS

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MACAULAY

(IN CHAMBERS)

Counsel for the Plaintiff:	William B. McAllister, Q.C. and Stella D. Frame
Counsel for the Defendant:	Henning W. Wiebach
Place and Date of Hearing:	Vancouver, B.C. November 21, 1997

[1] Northland Bank is suing Mr. Walters on a judgment for debt originally granted to it in foreclosure proceedings (Action No. H870203) on April 13, 1987. This application is brought pursuant to Supreme Court Rule 18A for judgment in the amount of $1,026,582.77 plus interest and costs.

[2] Northland Bank also seeks a reference for an assessment of costs arising pursuant to the foreclosure proceedings as well as a reference for an accounting to determine any amounts owing for interest, taxes, arrears of taxes, insurance premiums, costs, charges, and expenses arising since the date of pronouncement of the Order Nisi in that action.

Facts

[3] Northland Bank commenced foreclosure proceedings against Mr. Walters, his wife, Barbara Walters, and Sunshine Coast Estates Ltd. (the "Company") on February 20, 1987, and on April 13, 1987, obtained an Order Nisi for foreclosure against various properties as well as judgment against all three in the amount of $5,027,994.52 plus interests and costs.

[4] As a result of court approved sales of the properties, the amount outstanding on the judgment was reduced by July 15, 1992 to $1,026,582.77.

[5] About that time, the Walters commenced negotiations with Northland Bank for a release of the balance of the judgment in exchange for the Walters releasing claims made by them against Northlands alleging negligence in respect of the sale of the properties.

[6] In the course of negotiations, and at the request of Northland Bank, Mr. and Mrs. Walters and the Company provided a Statutory Declaration listing their assets, liabilities and income.

[7] Based on the information contained in the Statutory Declarations, Northland Bank agreed to a settlement, by the terms of which, the bank agreed to a full and complete release of its judgment against the three judgment debtors.

[8] In the spring of 1995, Northland Bank learned that Mr. Walters had failed to disclose his ownership of another company which owned valuable property.

[9] Northland Bank commenced an action to rescind the settlement agreement between it and Mr. Walters on the basis of his failure to disclose his ownership of the other company. After a trial, Curtis J. ordered, on May 15, 1997, that the settlement agreement and release between Northland Bank and Mr. Walters be rescinded on the basis that the settlement had been induced by Mr. Walter's fraudulent misrepresentations. The

bank took no steps to rescind its release of Mrs. Walters or the Company.

[10] On March 14, 1997, Northland Bank commenced this action to recover the debt alleged owing from Mr. Walters. This step was taken because the original judgment was due to expire on April 13, 1997. It was and is the position of Northland Bank that it is entitled to judgment against Mr. Walters as a result of the rescission of the settlement agreement.

[11] As earlier observed, the settlement agreement and release between Northland Bank, Mrs. Walters and the Company has not been rescinded and remains in effect.

Issue

[12] Mr. Walters says that the underlying claim against him has been released as a matter of law as a result of the order voiding his release, but not the release of his wife or the Company. This result occurs, according to him, because the surviving releases are, at that point, analogous to a creditor releasing a single co-debtor. In such circumstance, all co-debtors are released, unless the creditor, at the time of granting the release, has expressly reserved his rights against other debtors.

[13] Northland Bank submits that the continuing release of Mrs. Walters and the Company does not have the effect of releasing Mr. Walters. It is submitted that Mr. Walters is seeking an equitable remedy to which he is not entitled because of his fraudulent misrepresentations.

Analysis

[14] If correct, Mr. Walters' argument leads to the anomalous result that his release occurs as a matter of law due to the release of his wife and the Company, even though the same release is not available to him by reason of his fraud. An analysis of the law demonstrates, in my view, that Mr. Walters' analogy is flawed and that this anomaly does not result.

[15] Counsel for Mr. Walters cited a number of authorities. In ***Re E.W.A.***, [1901] 2 K.B. 642 (C.A.), Collins L.J. addressed the effect on the liability of a debtor where a release had been given to his joint debtor. The facts were as follows. A. and B. had become jointly liable to a bank on a "joint and several" guarantee. The bank obtained judgment against both and then presented a bankruptcy petition against B. alone for the full amount of the judgment. That petition was withdrawn upon payment by B. of one-half the judgment debt, partly in cash and partly in bills. The bank provided B. with a document acknowledging receipt "in full discharge of all claims...against Mr. B." The bank then presented A. with a

bankruptcy petition for the remaining one-half of the judgment debt.

[16] A. took the position that the document provided to B. was equivalent to a release of the joint debt which was the foundation of the judgment, and therefore, was a satisfaction of his liability under the judgment. At p. 648, Collins L.J. put it this way:

> The question really turns on this, whether or not this document has the effect of accord and satisfaction in getting rid of the joint and several liability of B. under the judgment. If it has that effect, it is not disputed that the rule of law applies, namely, that the release of one of two joint debtors has the effect of releasing the other.

He went on to review the provisions of the document and concluded that there was no reservation of rights against the other joint debtor (at p. 649):

> ...on the face of this document, there is no intention shewn so to limit its effect, and that it is framed in the widest possible terms so as to cover, not only this particular debt, but all other claims by the bank in connection with the Professional and Trades Papers, Limited, for it is admitted that the foundation of the judgment was the guarantee, and at the time this document was drawn up there was this joint liability on the judgment to the extent of 6000*l*...
>
> Accordingly, I am of opinion that the liability on the judgment is clearly embraced in the claims discharged by the acceptance of this receipt. Why, then, should any limitation be placed upon the effect of this discharge of "all claims"? If there is no such limitation, the effect of the document is that it releases the claim against both co-debtors.

His Lordship went on to conclude that there was nothing in the surrounding circumstances which would satisfy the court that the plain meaning of the document should be qualified (p. 650):

> If it had been pointed out to B. at the time that it was intended by the bank to reserve their rights against the other debtor, he might have refused to pay the money and give the bills. It appears to me that there is nothing in the surrounding circumstances of this case, or in the fact of one-half of the entire sum being accepted from one debtor, to lead to the inference that the persons contracting here intended to limit the release to one only of the debtors.

[17] It is of note that Collins L.J. goes on to consider and distinguish two cases in which the surrounding circumstances did justify limiting the wording of an apparent release (See: ***Re Armitage*** (1877), 5 Ch.5. 46 and ***Re Wolmerhausen*** (1890), 38 W.R. 537). It is clear from that discussion that the court may consider all of the circumstances even where there is an apparent release of the whole of the debt.

[18] In my view, ***Re E.W.A.***, *supra*, is authority for the proposition that a contractual acceptance of a discharge of the whole of a debt from one joint debtor will serve as a release of another debtor, absent surrounding circumstances justifying a limitation of the wording of the release. In my opinion, this provides no support for Mr. Walters. In the present case, the only contractual discharge was the original release of all joint debtors. That release was set aside as against Mr. Walters due solely to his fraudulent inducement. The

surrounding circumstances make it abundantly clear that Northland Bank was attempting, by its lawsuit, to reactivate its claims against Mr. Walters. It was successful in doing so. Incidental to that, the release of Mrs. Walters and the Company were unchallenged and, accordingly remain in effect.

[19] Counsel for Mr. Walters also relies on ***Toronto Dominion Bank v. Higgott et al.*** (1984), 48 O.R. (2d) 708 (H.C.). In that case, the bank had executed full releases in favour of two of several guarantors in exchange for partial payment. In finding that the release operated to discharge all the other debtors, the court observed that the rationale for the principle is (p. 711) "that the joint guarantee of the debt was part of the consideration for the contract of each debtor." For that reason, the court was not prepared to consider the surrounding circumstances. In my view, this case is clearly distinguishable.

[20] ***Cassimjee et al. v. Jarrett et al.*** (1975), 8 O.R. (2d) 726 (H.C.) is also relied on. That case turns on the effect of a payment by a joint tortfeasor in full satisfaction of the plaintiff's claim. To the extent that the same claim is also brought against another tortfeasor, it is extinguished by the payment as the underlying cause of action has been removed. Nothing has happened in the case at bar that could operate as a removal of the underlying cause of action except the original release. This case does not assist the defendant.

[21] In ***Shoker v. Vollans*** (21 April 1997), New Westminster S026950, (B.C.S.C.), the plaintiff sought summary judgment against one of two defendants for the balance owing under a promissory note signed by both defendants. Earlier, the plaintiff had agreed to accept one-half the amount owing under the note from the co-defendant in exchange for a release of all claims against him. The remaining defendant was not a party to the release nor did he consent to its terms.

[22] Smith J. sets out a number of exceptions to the principle that a release of one of several joint and several debtors will discharge the others, absent an express reservation of rights. He describes the exceptions as considerations of the equities of a given situation. In my view, this is consistent with the discussion of surrounding circumstances in ***Re E.W.A.***, *supra*. He also points to s. 44 of the ***Law and Equity Act***, R.S.B.C. 1996, c. 253:

> 44. Generally in all matters not particularly mentioned in this Act in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity prevail.

Smith J. considered it significant that the remaining defendant had not been in any way prejudiced by the settlement with the co-defendant for one-half the debt. He considered the perverse result that would obtain if the co-defendant were able to recover one-half the amount paid by him, viz, one-quarter of the debt, from the defendant if he was successful in resisting

liability. In the circumstances, he found the defendant liable for his one-half share in spite of the release. I consider both those factors to be present in the case at bar as well. There is no prejudice caused to Mr. Walters by leaving the release against his wife and the Company undisturbed. Further, it would lead to a perverse result if Northland Bank were to lose the opportunity to claim against Mr. Walters, brought about solely by his fraud, just by seeking to assert its rights against him.

[23] Even if the situation is analogous to a release of a co-debtor, which I do not accept, the surrounding circumstances are exceptional and I am prepared to find and do find that Northland Bank, with the full knowledge of Mr. Walters, reserved its right to sue. There can be no prejudice in the circumstances, nor has Northland Bank, done or agreed to anything since that constitutes a release of the present claim.

Res Judicata

[24] Counsel for Mr. Walters also submitted that the failure of Mr. Walters to disclose his ownership of the Company was not fraudulent. In my view, this involves re-litigating the issue decided against him by Curtis J. in his Reasons for Judgement dated May 15, 1997. Where a final judicial decision has been made on an issue, parties are not permitted to re-litigate that issue unless some overriding question of fairness requires a

rehearing (See: ***Saskatoon Credit Union Ltd v. Central Park Enterprises Ltd.*** (1988), 22 B.C.L.R. (2d) 89 (S.C.)). I am advised that the judgment of Curtis J. is currently under appeal; however, it has full force and effect unless and until such time as it is reversed on appeal. There is no overriding question of fairness requiring a rehearing in the circumstances.

Conclusion

[25] Northland Bank is entitled to judgment in the amount of $1,026,582.77.

[26] Northland Bank has also claimed pre-judgment interest pursuant to the ***Court Order Interest Act***, R.S.B.C. 1996, c. 79, from July 15, 1992 to the date of judgment. I have not had the benefit of argument as to whether July 15, 1992 is the appropriate commencement date for pre-judgment interest, particularly having regard to Northland Bank's apparent entitlement to post-judgment interest during some of this period. Failing agreement, the parties may make written submissions respecting this issue.

[27] Northland Bank is entitled to a reference for an assessment of costs arising pursuant to the foreclosure proceedings (Action No. H870203), as well as a reference for an accounting to determine any amounts owing for interest, taxes,

arrears of taxes, insurance premiums, costs, charges, and expenses arising since the date of pronouncement of the Order Nisi in Action No. H870203.

[28] Northland Bank is entitled to its costs on Scale 3 in this action.

"M.D. Macaulay J."

M.D. MACAULAY J.

TAB 6

Canadian Union of Public Employees, Local 79 *Appellant*

v.

City of Toronto and Douglas C. Stanley *Respondents*

and

Attorney General of Ontario *Intervener*

INDEXED AS: TORONTO (CITY) *v.* C.U.P.E., LOCAL 79

Neutral citation: 2003 SCC 63.

File No.: 28840.

2003: February 13; 2003: November 6.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour law — Arbitration — Dismissal without just cause — Evidence — Recreation instructor dismissed after being convicted of sexual assault — Conviction upheld on appeal — Arbitrator ruling that instructor had been dismissed without just cause — Whether union entitled to relitigate issue decided against employee in criminal proceedings — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Judicial review — Standard of review — Labour arbitration — Recreation instructor dismissed after being convicted of sexual assault — Arbitrator ruling that instructor had been dismissed without just cause — Whether arbitrator entitled to revisit conviction — Whether correctness is appropriate standard of review — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

O worked as a recreation instructor for the respondent City. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-

Syndicat canadien de la fonction publique, section locale 79 *Appelant*

c.

Ville de Toronto et Douglas C. Stanley *Intimés*

et

Procureur général de l'Ontario *Intervenant*

RÉPERTORIÉ : TORONTO (VILLE) *c.* S.C.F.P., SECTION LOCALE 79

Référence neutre : 2003 CSC 63.

N° du greffe : 28840.

2003 : 13 février; 2003 : 6 novembre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit du travail — Arbitrage — Congédiement sans motif valable — Preuve — Instructeur en loisirs congédié après avoir été déclaré coupable d'agression sexuelle — Déclaration de culpabilité confirmée en appel — Arbitre ayant statué que l'instructeur avait été congédié sans motif valable — Le syndicat est-il habilité à remettre en cause une question tranchée à l'encontre de l'employé dans une instance criminelle? — Loi sur la preuve, L.R.O. 1990, ch. E.23, art. 22.1 — Loi sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 48.

Contrôle judiciaire — Norme de contrôle — Arbitrage en relations du travail — Instructeur en loisirs congédié après avoir été déclaré coupable d'agression sexuelle — Arbitre ayant statué que l'instructeur avait été congédié sans motif valable — L'arbitre est-il habilité à revenir sur la déclaration de culpabilité? — La norme de contrôle appropriée est-elle celle de la décision correcte? — Loi sur la preuve, L.R.O. 1990, ch. E.23, art. 22.1 — Loi sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 48.

O travaillait comme instructeur en loisirs pour la Ville intimée. Il a été accusé d'agression sexuelle contre un garçon confié à sa surveillance. Il a plaidé non coupable. Lors de son procès devant un juge seul, il a témoigné

examined. The trial judge found that the complainant was credible and that O was not. He entered a conviction, which was affirmed on appeal. The City fired O a few days after his conviction. O grieved the dismissal. At the arbitration hearing, the City submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The complainant was not called to testify. O testified, claiming that he had never sexually assaulted the boy. The arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether O had sexually assaulted the boy. No fresh evidence was introduced. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that O had been dismissed without just cause. The Divisional Court quashed the arbitrator's ruling. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted. From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. Casting doubt over the validity of a criminal conviction is a very serious matter. Collateral attacks and relitigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy

et a subi un contre-interrogatoire. Le juge du procès a conclu que le plaignant était crédible, contrairement à O. Il a rendu un verdict de culpabilité, qui a par la suite été confirmé en appel. La Ville a congédié O quelques jours après le prononcé du verdict. O a déposé un grief contestant son congédiement. À l'audition du grief, la Ville a déposé en preuve le témoignage que le plaignant avait donné lors du procès criminel ainsi que les notes du superviseur de O, lequel avait rencontré le plaignant à l'époque. Le plaignant n'a pas été cité comme témoin. O a témoigné, affirmant qu'il n'avait jamais agressé sexuellement le garçon. L'arbitre a statué que la déclaration de culpabilité était recevable en preuve, mais qu'elle ne constituait pas une preuve concluante que O s'était livré à une agression sexuelle sur le garçon. Aucune nouvelle preuve n'a été présentée. L'arbitre a conclu que la présomption née de la déclaration de culpabilité avait été repoussée, et que O avait été congédié sans motif valable. La Cour divisionnaire a annulé la décision de l'arbitre. La Cour d'appel a confirmé cette décision.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie et Arbour : Lorsqu'ils doivent décider si une déclaration de culpabilité, recevable *prima facie* en vertu de l'art. 22.1 de la *Loi sur la preuve* de l'Ontario, devrait être réfutée ou considérée comme concluante, les tribunaux font appel à la doctrine de l'abus de procédure pour déterminer si la remise en cause porterait atteinte au processus décisionnel judiciaire. La doctrine de l'abus de procédure fait intervenir le pouvoir inhérent du tribunal d'empêcher que sa procédure soit utilisée abusivement d'une manière qui aurait pour effet de discréditer l'administration de la justice. Elle a été appliquée pour empêcher la réouverture de litiges dans des circonstances où les exigences strictes de la préclusion découlant d'une question déjà tranchée n'étaient pas remplies, mais où la réouverture aurait néanmoins porté atteinte aux principes d'économie, de cohérence, de caractère définitif des instances et d'intégrité de l'administration de la justice. La raison pour laquelle la partie cherche à rouvrir le débat, et le titre auquel elle le fait, ne sauraient constituer des facteurs décisifs pour l'application de la règle interdisant la remise en question. Ce qui n'est pas permis, c'est d'attaquer un jugement en tentant de soulever de nouveau la question devant un autre forum. C'est l'accent correctement mis sur le processus plutôt que sur l'intérêt des parties qui révèle pourquoi il ne devrait pas y avoir remise en cause. D'un point de vue systémique, la remise en cause s'accompagne de graves effets préjudiciables et il faut s'en garder à moins que des circonstances n'établissent qu'elle est, dans les faits, nécessaire à la crédibilité et à l'efficacité du processus juridictionnel dans son ensemble. Mettre en

result. The common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse a self-standing and independent "principle of finality" as either a separate doctrine or as an independent test to preclude relitigation.

The appellant union was not entitled, either at common law or under statute, to relitigate the issue decided against the grievor in the criminal proceedings. The facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. O was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. There is nothing in this case that militates against the application of the doctrine of abuse of process to bar the relitigation of O's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the respondent City had established just cause for O's dismissal.

Issue estoppel has no application in this case since the requirement of mutuality of parties has not been met. With respect to the collateral attack doctrine, the appellant does not seek to overturn the sexual abuse conviction itself, but rather contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct.

Per LeBel and Deschamps JJ.: As found by the majority, this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. There was also agreement that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law involving the interpretation of the arbitrator's constituent statute,

doute la validité d'une déclaration de culpabilité est une action très grave. La contestation indirecte et la remise en cause ne constituent pas des moyens appropriés car elles imposent au processus juridictionnel des contraintes excessives et ne font rien pour garantir un résultat plus fiable. Les doctrines de la préclusion découlant d'une question déjà tranchée, de la contestation indirecte et de l'abus de procédure, reconnues en common law, répondent adéquatement aux préoccupations qui surgissent lorsqu'il faut pondérer le principe de l'irrévocabilité des jugements et celui de l'équité envers un justiciable particulier. Il n'est nul besoin d'ériger le principe de l'irrévocabilité en doctrine distincte ou critère indépendant pour interdire la remise en cause.

Le syndicat appelant n'était pas, en vertu de la common law ou d'une disposition législative, habilité à remettre en cause la question tranchée à l'encontre de l'employé dans l'instance criminelle. Les faits du présent pourvoi illustrent l'abus flagrant de procédure qui résulte de l'autorisation de ce type de remise en cause. O avait été déclaré coupable par un tribunal criminel et il avait épuisé toutes les voies d'appel. La déclaration de culpabilité était valide en droit, avec tous les effets juridiques en découlant. Il n'y a rien en l'espèce qui milite contre l'application de la doctrine de l'abus de procédure pour interdire la remise en cause de la déclaration de culpabilité de O. L'arbitre était juridiquement tenu de donner plein effet à la déclaration de culpabilité. L'erreur de droit qu'il a commise lui a fait tirer une conclusion manifestement déraisonnable. S'il avait bien compris la preuve et tenu compte des principes juridiques applicables, il n'aurait pu faire autrement que de conclure que la Ville intimée avait démontré l'existence d'un motif valable pour le congédiement de O.

La préclusion découlant d'une question déjà tranchée ne s'applique pas en l'espèce étant donné que l'exigence de réciprocité n'a pas été remplie. En ce qui concerne la doctrine de la contestation indirecte, l'appelant ne cherche pas à faire infirmer la déclaration de culpabilité pour agression sexuelle, mais conteste simplement, dans le cadre d'une demande différente comportant des conséquences juridiques différentes, le bien-fondé de cette déclaration.

Les juges LeBel et Deschamps : Comme le concluent les juges majoritaires, il convient de régler ce pourvoi en fonction de la doctrine de l'abus de procédure, et non des doctrines plus restreintes et plus techniques de la contestation indirecte ou de la préclusion découlant d'une question déjà tranchée (*issue estoppel*). Il y a également accord avec l'opinion majoritaire selon laquelle, lorsqu'une déclaration de culpabilité est remise en cause dans le cadre d'une procédure de grief, la norme

an external statute, and a complex body of common law rules and conflicting jurisprudence dealing with relitigation, an issue at the heart of the administration of justice. The arbitrator's determination in this case that O's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. His failure to do so was sufficient to render his ultimate decision that O had been dismissed without just cause — a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard — patently unreasonable, according to the jurisprudence of the Court.

Because of growing concerns with the ways in which the standards of review currently available within the pragmatic and functional approach are conceived of and applied, the administrative law aspects of this case require further discussion. The patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Certain fundamental legal questions — for instance constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation — typically fall to be decided on the correctness standard. Not all questions of law, however, must be reviewed under a standard of correctness. Resolving general legal questions may be an important component of the work of some administrative adjudicators. In many instances, the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. If the general question of law is closely connected to the adjudicator's core area of expertise, the decision will typically be entitled to deference.

In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. To pass a review for patent unreasonableness, a decision must be one that can be rationally supported. It would be wrong for a reviewing court to intervene in decisions that are incorrect, rather than limiting its intervention to those decisions that lack a rational foundation. If this occurs, the line between correctness on the one hand, and patent unreasonableness, on the other, becomes blurred. The boundaries between

de contrôle applicable est celle de la décision correcte. Cette question de droit exigeait l'interprétation de la loi constitutive de l'arbitre, d'une loi non constitutive ainsi que d'un ensemble complexe de règles de common law et d'une jurisprudence contradictoire ayant trait à la remise en cause, question qui est au cœur de l'administration de la justice. La décision de l'arbitre qui permettrait de remettre la déclaration de culpabilité de O en cause pendant l'examen du grief n'était pas correcte. Légalement, l'arbitre devait donner pleinement effet à la déclaration de culpabilité de O. L'omission de le faire a suffi pour rendre la décision ultime portant que O avait été congédié sans motif valable — décision ressortissant entièrement au domaine d'expertise de l'arbitre et donc révisable selon une norme commandant la déférence — manifestement déraisonnable suivant la jurisprudence de la Cour.

En raison des préoccupations croissantes liées à la manière dont sont conçues et appliquées les normes de contrôle qu'offre actuellement l'analyse pragmatique et fonctionnelle, il est opportun d'approfondir l'analyse des aspects du pourvoi relevant du droit administratif. À l'heure actuelle, la norme de la décision manifestement déraisonnable n'offre pas aux cours de justice des paramètres suffisamment clairs pour contrôler les décisions des tribunaux administratifs. Certaines questions de droit fondamentales — notamment en ce qui concerne la Constitution et les droits de la personne, de même que les libertés civiles, ainsi que d'autres questions revêtant une importance centrale pour le système juridique dans son ensemble, comme celle de la remise en cause — commandent généralement l'application de la norme de la décision correcte. Toute décision sur une question de droit, cependant, n'est pas assujettie à la norme de la décision correcte. Le règlement de questions de droit générales peut constituer un aspect important de la tâche dévolue à certains tribunaux administratifs. Dans bien des cas, la norme de contrôle appropriée à l'application des règles générales de la common law ou du droit civil par un tribunal spécialisé ne devrait pas être la norme de la décision correcte mais plutôt celle de la décision raisonnable. Si la question de droit générale est étroitement liée au domaine d'expertise fondamentale du décideur, sa décision fera généralement l'objet de déférence.

La cour appelée à contrôler une décision selon la norme actuelle du manifestement déraisonnable n'a pas à déterminer la décision correcte. Pour résister à l'analyse selon la norme du manifestement déraisonnable, la décision doit avoir un fondement rationnel. La cour de révision aurait tort de modifier une décision incorrecte, et non seulement une décision sans fondement rationnel. Si cela se produit, la ligne de démarcation entre la norme de la décision correcte, d'une part, et la norme de la décision manifestement déraisonnable, d'autre part, s'obscursit.

patent unreasonableness and reasonableness *simpliciter* are even less clear and approaches to sustain a workable distinction between them raise their own problems. In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? In summary, the current framework exhibits several drawbacks. These include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

The role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously. Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds ensures that they are fair.

Administrative law has developed considerably over the last 25 years. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

Cases Cited

By Arbour J.

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La frontière entre le caractère manifestement déraisonnable et le caractère raisonnable *simpliciter* est encore moins claire, et les tentatives pour établir une distinction valable entre elles comportent leurs propres difficultés. En fin de compte, la question essentielle demeure la même pour les deux normes : la décision du tribunal était-elle conforme à la raison? En résumé, le cadre actuel présente plusieurs inconvénients, dont les difficultés conceptuelles et pratiques découlant du chevauchement entre la norme du manifestement déraisonnable et celle du raisonnable *simpliciter*, de même que la difficulté résultant parfois de l'interaction entre la norme du manifestement déraisonnable et celle de la décision correcte.

La cour appelée à déterminer la norme de contrôle doit rester fidèle à la volonté du législateur d'investir le tribunal administratif du pouvoir de rendre la décision. Elle doit en outre respecter le principe fondamental selon lequel, dans une société où prime le droit, le pouvoir ne doit pas être exercé de manière arbitraire. Le contrôle judiciaire axé sur le fond vise à déterminer si la décision du tribunal administratif peut se justifier rationnellement, et celui axé sur la procédure, si elle est équitable.

Le droit administratif a connu un développement considérable au cours des 25 dernières années. Cette évolution, qui témoigne d'une grande déférence envers les décideurs administratifs et reconnaît l'importance de leur rôle, a soulevé certaines difficultés ou préoccupations. Il restera à examiner, dans une affaire qui s'y prête, la solution qu'il conviendrait d'apporter à ces difficultés. Les tribunaux devraient-ils passer à un système de contrôle judiciaire comportant deux normes, celle de la décision corrrecte et une norme révisée et unifiée de raisonnabilité? Devrions-nous tenter de définir plus clairement la nature et la portée de chaque norme ou repenser leur relation et leur application? Voilà peut-être une partie de la tâche qui attend les cours de justice : construire à partir de l'évolution récente tout en s'appuyant sur la tradition juridique qui a façonné le cadre des règles actuelles de droit en matière de contrôle judiciaire.

Jurisprudence

Citée par la juge Arbour

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42; *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249, aff'd (1984), 48 O.R. (2d) 266; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] 1 Q.B. 283; *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232; *R. v. Banks*, [1916] 2 K.B. 621; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, rev'd [2002] 3 S.C.R. 307, 2002 SCC 63; *Franco v. White* (2001), 53 O.R. (3d) 391; *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21; *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32, aff'd (1987), 21 C.P.C. (2d) 302; *R. v. McIlkenny* (1991), 93 Cr. App. R. 287; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *R. v. Bromley* (2001), 151 C.C.C. (3d) 480; *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756; *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215, aff'd (1978), 18 O.R. (2d) 714; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670; *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106.

By LeBel J.

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Douglas J. Wray and *Harold F. Caley*, for the appellant.

Jason Hanson, *Mahmud Jamal* and *Kari M. Abrams*, for the respondent the City of Toronto.

No one appeared for the respondent Douglas C. Stanley.

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Douglas J. Wray et *Harold F. Caley*, pour l'appelant.

Jason Hanson, *Mahmud Jamal* et *Kari M. Abrams*, pour l'intimée la Ville de Toronto.

Personne n'a comparu pour l'intimé Douglas C. Stanley.

Sean Kearney, *Mary Gersht* and *Meredith Brown*, for the intervener.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

Arbour J. —

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to

Sean Kearney, *Mary Gersht* et *Meredith Brown*, pour l'intervenant.

Version française du jugement de la juge en chef McLachlin et des juges Gonthier, Iacobucci, Major, Bastarache, Binnie et Arbour rendu par

La juge Arbour —

I. Introduction

Une personne déclarée coupable d'agression sexuelle et congédiée par son employeur pour cette raison peut-elle être réintégrée dans ses fonctions par un arbitre qui conclut, eu égard à la preuve dont il dispose, qu'il n'y a pas eu d'agression sexuelle? C'est essentiellement la question que pose le présent pourvoi.

Comme la Cour d'appel de l'Ontario et la Cour divisionnaire, je conclus qu'un arbitre ne peut réexaminer une déclaration de culpabilité. Je suis donc d'avis de rejeter le pourvoi, bien que pour des motifs qui diffèrent quelque peu de ceux des juridictions inférieures.

II. Les faits

Glenn Oliver travaillait comme instructeur en loisirs pour la Ville de Toronto, intimée en l'instance. Il a été accusé d'agression sexuelle contre un jeune garçon confié à sa surveillance, et il a plaidé non coupable. Lors de son procès devant un juge seul, il a témoigné et a subi un contre-interrogatoire. Il a cité plusieurs témoins en défense, dont des témoins de moralité. Le juge du procès a conclu que le plaignant était crédible mais non Oliver. Il a rendu un verdict de culpabilité, qui a par la suite été confirmé en appel. Il a condamné Oliver à une peine d'emprisonnement de 15 mois et à un an de probation.

La Ville de Toronto intimée a congédié Oliver quelques jours après le prononcé du verdict, et Oliver a déposé un grief contestant son congédiement. À l'audition du grief, la Ville a déposé en preuve le témoignage que le jeune garçon avait donné lors du procès criminel ainsi que les notes du

testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

The arbitrator ruled that the criminal conviction was admissible as *prima facie* but not conclusive evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause.

III. Procedural History

A. *Superior Court of Justice (Divisional Court)* (2000), 187 D.L.R. (4th) 323

At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellant's argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision", applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each

superviseur d'Oliver, lequel avait rencontré le jeune garçon à l'époque, mais elle n'a pas cité le garçon comme témoin. Encore une fois, Oliver a témoigné et a affirmé qu'il n'avait pas commis d'agression sexuelle contre le jeune garçon.

5 L'arbitre a déterminé que la déclaration de culpabilité était recevable à titre de preuve *prima facie* mais qu'elle ne constituait pas une preuve concluante qu'Oliver s'était livré à une agression sexuelle sur le garçon. On n'a présenté à l'audition aucune preuve de fraude ni aucun nouvel élément de preuve non disponible au procès. L'arbitre a conclu que la présomption née de la déclaration de culpabilité avait été repoussée et qu'Oliver avait été congédié sans motif valable.

III. Historique des procédures judiciaires

A. *Cour supérieure de justice (Cour divisionnaire)* (2000), 187 D.L.R. (4th) 323

6 La Cour divisionnaire a accueilli la demande de contrôle judiciaire et annulé la décision de l'arbitre. Elle a entendu cette affaire en même temps que l'affaire *Ontario c. S.E.E.F.P.O.* (*Ontario c. S.E.E.F.P.O.*, [2003] 3 R.C.S. 149, 2003 CSC 64, dont jugement est rendu simultanément par la Cour.) Le juge O'Driscoll a déterminé que bien que l'art. 22.1 de la *Loi sur la preuve*, L.R.O. 1990, ch. E.23, s'appliquât à tous les arbitrages, la remise en cause était interdite par les doctrines de la contestation indirecte, de la préclusion découlant d'une question déjà tranchée (*issue estoppel*) et de l'abus de procédure. Il a fait observer que les déclarations de culpabilité constituent des jugements valides qui ne peuvent faire l'objet de contestation indirecte dans le cadre d'un arbitrage subséquent (par. 74-79). Relativement à la doctrine de la préclusion découlant d'une question déjà tranchée, en vertu de laquelle la décision rendue contre une partie est à l'abri des contestations indirectes à moins que de nouveaux éléments de preuve déterminants soient présentés ou que la fraude soit établie, le juge a statué qu'elle interdisait elle aussi la remise en cause, et il a rejeté l'argument de l'appelant selon lequel il n'y avait pas de connexité d'intérêts parce que le syndicat, non l'employé, avait déposé le grief. Le juge a également statué que la doctrine de l'abus

case, the standard for judicial review had been met (para. 86).

de procédure, laquelle empêche la contestation indirecte de la décision d'un autre tribunal par une partie qui [TRADUCTION] « a eu l'entière possibilité de contester la décision », s'appliquait en l'espèce (par. 81 et 90). Enfin, le juge O'Driscoll a conclu que dans chaque cas il avait été satisfait à la norme de contrôle, qu'il s'agisse de la norme de la décision correcte ou de celle de la décision manifestement déraisonnable (par. 86).

B. *Court of Appeal for Ontario* (2001), 55 O.R. (3d) 541

B. *Cour d'appel de l'Ontario* (2001), 55 O.R. (3d) 541

7 Doherty J.A. for the court held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing the relitigation of issues finally decided in a previous judicial proceeding", the appropriate standard of review was correctness (paras. 22 and 38).

Rendant jugement pour la cour, le juge Doherty a statué que, comme il s'agissait essentiellement de déterminer si le Syndicat canadien de la fonction publique (SCFP ou le syndicat) pouvait remettre en cause la question tranchée dans le procès criminel et que cette analyse [TRADUCTION] « reposait sur l'interprétation [par l'arbitre] des règles et principes de la common law relatifs à la remise en cause de questions ayant donné lieu à une décision définitive dans une instance antérieure », la norme de contrôle applicable était la norme de la décision correcte (par. 22 et 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

Le juge Doherty a conclu que la doctrine de la préclusion découlant d'une question déjà tranchée ne s'appliquait pas. Même s'il existait un lien de droit entre le syndicat et l'employé, la Ville de Toronto intimée n'avait joué aucun rôle dans le procès criminel et n'avait aucun lien avec le ministère public. Il a également conclu que pour déterminer si la remise en cause était permise, il n'était guère utile d'assimiler la tentative du syndicat appelant de débattre à nouveau de la culpabilité de l'employé à une contestation indirecte de l'ordonnance du tribunal. Puis, affirmant qu'il valait peut-être mieux limiter l'emploi des mots « abus de procédure » aux cas où les demandeurs engagent des poursuites judiciaires pour des motifs illégitimes, il a entrepris l'examen approfondi de ce qu'il a appelé [TRADUCTION] « le principe de l'irrévocabilité ».

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results, and which serves to conserve the

Le juge Doherty a rejeté l'appel en se fondant sur ce principe. Il a statué que suivant la jurisprudence sur l'autorité de la chose jugée, les tribunaux devaient mettre en balance l'importance de l'irrévocabilité — qui réduit l'incertitude et les résultats

resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice (at para. 100):

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest, and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

Evidence Act, R.S.O. 1990, c. E.23

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or

(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

contradictoires tout en permettant d'économiser les ressources des parties et de l'appareil judiciaire — et [TRADUCTION] « la recherche de la justice dans chaque affaire » (par. 94). Il a exposé les questions auxquelles il fallait répondre lorsqu'il s'agit de pondérer la prétention à l'irrévocabilité et l'accès d'un justiciable particulier à la justice (au par. 100) :

[TRADUCTION]

- La doctrine de la chose jugée s'applique-t-elle?
- Si la doctrine s'applique, la partie contre qui elle s'applique peut-elle démontrer que la recherche de la justice devrait l'emporter sur le principe de l'irrévocabilité?
- Si la doctrine ne s'applique pas, la partie qui cherche à empêcher la remise en cause peut-elle démontrer que le principe de l'irrévocabilité devrait l'emporter sur la prétention voulant que la justice exige la remise en cause?

10 En fin de compte, le juge Doherty a rejeté l'appel, concluant que [TRADUCTION] « les considérations relatives à l'irrévocabilité doivent l'emporter sur le droit allégué du SCFP de remettre en cause la culpabilité d'Oliver » (par. 102). Il a tiré cette conclusion parce qu'il n'y avait pas eu d'allégation que le procès criminel était entaché de fraude, parce que les accusations en cause étant graves, il était probable que l'employé leur avait opposé la meilleure défense possible, et parce qu'aucun nouvel élément de preuve n'avait été présenté lors de l'arbitrage (par. 103-108).

IV. Les dispositions législatives applicables

11 *Loi sur la preuve*, L.R.O. 1990, ch. E.23

22.1 (1) La preuve qu'une personne a été déclarée coupable ou libérée au Canada à l'égard d'un acte criminel constitue la preuve, en l'absence de preuve contraire, que l'acte criminel a été commis par la personne si, selon le cas :

a) il n'a pas été interjeté appel de la déclaration de culpabilité ou de la libération et le délai d'appel est expiré;

b) il a été interjeté appel de la déclaration de culpabilité ou de la libération, mais l'appel a été rejeté ou a fait l'objet d'un désistement et aucun autre appel n'est prévu.

(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

48. (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. *Standard of Review*

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (see also

(2) Le paragraphe (1) s'applique que la personne déclarée coupable ou libérée soit une partie à l'instance ou non.

(3) Pour l'application du paragraphe (1), un certificat énonçant seulement la substance et l'effet de l'accusation et de la déclaration de culpabilité ou de la libération, et omettant la partie de forme, qui se présente comme étant signé par l'officier ayant la garde des archives du tribunal qui a déclaré le contrevenant coupable ou qui l'a libéré, ou par son adjoint, constitue une preuve suffisante de la déclaration de culpabilité ou de la libération de la personne, une fois prouvé que la personne est bien celle désignée sur le certificat comme ayant été déclarée coupable ou libérée, sans qu'il soit nécessaire d'établir l'authenticité de la signature ni la qualité officielle de la personne qui paraît être le signataire.

Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A

48. (1) Chaque convention collective contient une disposition sur le règlement, par voie de décision arbitrale définitive et sans interruption du travail, de tous les différends entre les parties que soulèvent l'interprétation, l'application, l'administration ou une prétendue violation de la convention collective, y compris la question de savoir s'il y a matière à arbitrage.

V. Analyse

A. *La norme de contrôle*

Mon collègue le juge LeBel examine en détail la jurisprudence de notre Cour concernant les normes de contrôle. Il passe en revue les préoccupations et critiques que soulève le système de contrôle judiciaire à triple norme. Ces questions n'ayant pas été débattues devant nous en l'espèce et, sans l'éclairage qu'apporterait un véritable débat contradictoire sur ce point, je ne souhaite pas formuler de commentaires sur l'opportunité de s'écarter du cadre d'analyse des normes de contrôle que nous avons récemment réitéré. (Voir les arrêts unanimes de notre Cour *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, et *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20.)

La Cour d'appel a bien appliqué les principes de l'analyse pragmatique et fonctionnelle énoncés dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S.

Dr. Q, *supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard. . . . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she

982 (voir aussi *Dr Q*, précité), pour déterminer l'intention du législateur quant à l'étendue du contrôle judiciaire des décisions des tribunaux administratifs.

14 Le juge Doherty a correctement déterminé que la norme de la décision manifestement déraisonnable est la norme générale de contrôle applicable à la décision d'un arbitre sur la question de savoir si l'existence d'un motif valable de congédiement a été établie. Comme il l'a signalé, toutefois, les décisions que les arbitres ont à rendre au cours d'un arbitrage n'appellent pas nécessairement toutes la même norme de contrôle. Cette remarque va dans le sens de la distinction établie par le juge Cory, s'exprimant au nom des juges majoritaires, dans l'arrêt *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, où il a dit, au par. 39 :

> Il a été statué à plusieurs reprises que les connaissances et l'expertise que possède un conseil d'arbitrage en matière d'interprétation d'une convention collective ne s'étendent habituellement pas à l'interprétation de mesures législatives extrinsèques. Les conclusions d'un conseil sur l'interprétation d'une loi ou de la common law peuvent généralement faire l'objet d'un examen selon la norme de la décision correcte. [. . .] Il peut y avoir dérogation à cette règle dans des cas où la loi est intimement liée au mandat du tribunal et où celui-ci est souvent appelé à l'examiner. [Je souligne.]

15 En l'espèce, le caractère raisonnable de la décision de l'arbitre de réintégrer l'employé dans ses fonctions dépend du bien-fondé de sa prémisse selon laquelle il n'était pas lié par la déclaration de culpabilité, prémisse qui reposait sur son analyse de règles complexes de common law et de décisions contradictoires. Le droit en matière de remise en cause de questions ayant fait l'objet de décisions judiciaires définitives antérieures n'est pas seulement complexe; il joue également un rôle central dans l'administration de la justice. Bien interprétées et bien appliquées, les doctrines de l'autorité de la chose jugée et de l'abus de procédure règlent les interactions entre les différents décideurs judiciaires. Ces règles et principes exigent des décideurs qu'ils réalisent un équilibre entre l'irrévocabilité, l'équité, l'efficacité et l'autorité des décisions judiciaires. L'application de ces règles, doctrines et principes

must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.

16 Therefore I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. *Section 22.1 of Ontario's Evidence Act*

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary", that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content, and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction — the finding of another court — admissible for the truth of its content, as an exception to the inadmissibility of hearsay (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 120; *Phipson on Evidence* (14th ed. 1990), at paras. 33-94 and 33-95).

échappe clairement au domaine d'expertise des arbitres du travail qui peuvent devoir y faire appel. Lorsque cela se produit, les arbitres doivent trancher correctement la question de droit posée. Une analyse incorrecte peut suffire à entraîner un résultat manifestement déraisonnable. Ces observations ont récemment été réitérées par le juge Iacobucci dans l'arrêt *Parry Sound (District), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, [2003] 2 R.C.S. 157, 2003 CSC 42, par. 21.

La Cour d'appel avait donc raison, selon moi, de statuer que l'arbitre devait décider correctement si le SCFP était, en vertu de la common law ou d'une disposition législative, habilité à remettre en cause la question tranchée à l'encontre de l'employé dans l'instance criminelle.

B. *L'article 22.1 de la Loi sur la preuve de l'Ontario*

L'article 22.1 de la *Loi sur la preuve* de l'Ontario n'est pas d'un grand secours pour trancher le présent pourvoi. Il énonce que la preuve qu'une personne a été déclarée coupable d'un acte criminel fait preuve, « en l'absence de preuve contraire », que l'acte criminel a été commis par cette personne.

Comme le juge Doherty le souligne avec raison (au par. 42), l'art. 22.1 prévoit que la validité d'une déclaration de culpabilité peut être contestée dans une instance subséquente, mais il est muet sur les circonstances susceptibles de permettre ou non une telle contestation. Ce sont les doctrines de common law relatives à l'autorité de la chose jugée, à la préclusion découlant d'une question déjà tranchée, à la contestation indirecte et à l'abus de procédure qui règlent cette question. L'article 22.1 pose le principe de la recevabilité de la déclaration de culpabilité comme preuve de son contenu et établit son caractère probant en l'absence de réfutation. En tant que règle de preuve, cette disposition touche en partie au ouï-dire, en ce qu'elle établit la recevabilité de la déclaration de culpabilité — la conclusion d'un autre tribunal — comme preuve de son contenu, par dérogation à la règle interdisant le ouï-dire (D. M. Paciocco et L. Stuesser, *The Law of Evidence* (3e éd. 2002), p. 120; *Phipson on Evidence* (14e éd. 1990), par. 33-94 et 33-95).

Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary". There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

19 En l'espèce, toutefois, la recevabilité de la déclaration de culpabilité n'est pas en cause : la déclaration de culpabilité est recevable en preuve en vertu de l'art. 22.1. Il faut cependant déterminer si elle peut être réfutée par une « preuve contraire ». Il y a des circonstances où des éléments de preuve visant à réfuter la présomption que la personne déclarée coupable a commis le crime sont recevables, en particulier lorsque la déclaration concerne une personne autre qu'une partie, mais il y a également des circonstances où la présentation de tels éléments de preuve n'est pas permise. Si la doctrine de la préclusion découlant d'une question déjà tranchée ou encore celle de l'abus de procédure interdisent la remise en cause des faits essentiels de la déclaration de culpabilité, aucune « preuve contraire » ne pourra en écarter l'effet. La déclaration de culpabilité constitue alors une preuve concluante que la personne qui y est visée a commis le crime.

This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound*, *supra*, at para 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, aff'd (1984), 48 O.R. (2d) 266 (C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits". However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), at p. 541; see also *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law

20 Cette interprétation est conforme à la règle d'interprétation posant qu'en l'absence d'indication expresse au contraire la loi est présumée ne pas s'écarter des principes généraux de droit. Dans *Parry Sound*, précité, par. 39, le juge Iacobucci a analysé et appliqué cette présomption. L'article 22.1 codifie le principe établi dans la décision canadienne clé *Demeter c. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (H.C. Ont.), p. 264, conf. par (1984), 48 O.R. (2d) 266 (C.A.), où après un examen approfondi de la jurisprudence canadienne et anglaise, le juge Osler a statué qu'une déclaration de culpabilité est recevable dans une instance civile subséquente comme preuve *prima facie* que la personne qui y est mentionnée a commis l'acte allégué, [TRADUCTION] « sous réserve de réfutation au fond ». Toutefois, la common law reconnaît également que la présomption de culpabilité établie par une déclaration de culpabilité ne peut être repoussée que lorsque la réfutation ne constitue pas un abus de procédure (*Demeter* (H.C.), précité, p. 265; *Hunter c. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), p. 541; voir aussi *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), p. 22, le juge Blair). L'article 22.1 ne change rien à cette situation; le législateur n'a pas explicitement écarté

doctrines and the rebuttal is consequently subject to them.

21 The question therefore is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. *The Common Law Doctrines*

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle". I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided

les doctrines de common law et, par conséquent, la réfutation y est assujettie.

Il faut donc examiner si l'application d'une de ces doctrines interdit en l'espèce la remise en cause des faits qui fondent la déclaration de culpabilité.

C. *Les doctrines de common law*

Les décisions des juridictions inférieures, en l'espèce, ont traité abondamment des trois doctrines de common law connexes que sont la préclusion découlant d'une question déjà tranchée, l'abus de procédure et la contestation indirecte. On a vu dans chacune de ces doctrines un moyen possible d'empêcher le syndicat de remettre en cause devant l'arbitre la déclaration de culpabilité de l'employé. Bien que la Cour divisionnaire et la Cour d'appel aient toutes deux conclu que le syndicat ne pouvait débattre à nouveau de la culpabilité attestée par la condamnation, elles ont exprimé des vues divergentes sur l'applicabilité des différentes doctrines invoquées à l'appui de cette conclusion. La Cour divisionnaire s'est dite d'avis que la remise en cause était interdite par les doctrines de la contestation indirecte, de la préclusion découlant d'une question déjà tranchée et de l'abus de procédure, tandis que la Cour d'appel, estimant qu'aucune de ces doctrines ne pouvaient, dans l'état où elles se trouvent, avoir pour effet d'empêcher la réfutation, s'est plutôt appuyée sur le principe autonome de « l'irrévocabilité ». Je crois utile de démêler ces diverses règles et doctrines avant d'examiner celle qui s'applique en l'espèce. Je souligne d'entrée de jeu que ces doctrines de common law sont interreliées et que souvent plus d'une doctrine permettra d'arriver à un résultat particulier. Même si la préclusion découlant d'une question déjà tranchée et la contestation indirecte peuvent être toutes deux considérées comme des applications particulières de la doctrine plus large de l'abus de procédure, les trois ne sont pas toujours entièrement interchangeables.

(1) La préclusion découlant d'une question déjà tranchée

La préclusion découlant d'une question déjà tranchée est un volet du principe de l'autorité de la chose jugée (l'autre étant la préclusion fondée

in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Professor Watson, *supra*, argues that explicitly abolishing the mutuality requirement,

sur la cause d'action), qui interdit de soumettre à nouveau aux tribunaux des questions déjà tranchées dans une instance antérieure. Pour que le tribunal puisse accueillir la préclusion découlant d'une question déjà tranchée, trois conditions préalables doivent être réunies : (1) la question doit être la même que celle qui a été tranchée dans la décision antérieure; (2) la décision judiciaire antérieure doit avoir été une décision finale; (3) les parties dans les deux instances doivent être les mêmes ou leurs ayants droit (*Danyluk c. Ainsworth Technologies Inc.*, [2001] 2 R.C.S. 460, 2001 CSC 44, par. 25 (le juge Binnie)). La dernière exigence, à laquelle on a donné le nom de « réciprocité », a été largement abandonnée aux États-Unis et, dans ce pays ainsi qu'au Royaume-Uni, elle a suscité un ample débat en doctrine et en jurisprudence, comme elle l'a fait dans une certaine mesure ici (voir G. D. Watson, « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 623, p. 648-651). Compte tenu des conclusions différentes tirées par les tribunaux inférieurs sur l'applicabilité de la préclusion découlant d'une question déjà tranchée, je crois utile d'examiner ce débat d'un peu plus près.

24 Les deux premières exigences de la préclusion découlant d'une question déjà tranchée sont remplies en l'espèce. La dernière, celle de la réciprocité, ne l'est pas. Dans la poursuite criminelle initiale, le litige opposait Sa Majesté la Reine du chef du Canada et Glenn Oliver. Dans l'arbitrage, les parties étaient le SCFP et la Ville de Toronto, l'employeur d'Oliver. Il n'est pas nécessaire, pour l'application de l'exigence de la réciprocité, de décider si l'on peut raisonnablement conclure à l'existence d'un rapport d'auteur à ayant droit entre Oliver et le SCFP, puisqu'il est clair qu'il n'en n'existe pas entre la Couronne, en sa qualité de poursuivant dans l'instance criminelle, et la Ville de Toronto, et qu'il n'y en aurait pas non plus s'il s'agissait d'un employeur provincial plutôt que municipal (comme dans le pourvoi connexe *Ontario c. S.E.E.F.P.O.*).

25 De nombreux auteurs ont critiqué l'exigence de la réciprocité en matière de préclusion découlant d'une question déjà tranchée. Dans son article, le professeur Watson, *loc. cit.*, soutient que l'abolition

as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Professor Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants . . . .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). He describes the offensive use of non mutual issue estoppel as follows (at p. 631):

> The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc*., now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due

explicite de cette condition, comme aux États-Unis, réduirait la confusion juridique et supprimerait la possibilité que l'application stricte de la doctrine conduise à une injustice. Les arguments que cet auteur et d'autres (voir aussi D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)) ont mis de l'avant pour exhorter les tribunaux canadiens à abandonner l'exigence de la réciprocité ont contribué à l'élaboration des principes fondant l'interdiction de la remise en cause. Je suis toutefois d'avis que notre droit comporte les outils appropriés et qu'il n'y a pas lieu de modifier l'exigence de la réciprocité, comme le nécessiterait la présente affaire.

Dans l'étude très éclairante qu'il a consacrée à l'abandon de l'exigence de la réciprocité aux États-Unis, le professeur Watson signale, à la p. 631, que la condition a d'abord cessé d'être exigée lorsque la préclusion était invoquée en défense :

> [TRADUCTION] L'utilisation défensive de la préclusion lorsqu'il n'y a pas réciprocité est simple. Si P, n'ayant pas eu gain de cause dans une poursuite l'ayant opposé à D1, poursuit ensuite D2 pour la même question, D2 peut invoquer en défense la préclusion découlant de la précédente poursuite, à moins que l'instance n'ait pas offert l'entière possibilité de débattre équitablement de la question ou qu'en raison d'autres facteurs il soit injuste ou déraisonnable de permettre la préclusion. Le raisonnement est que P ne devrait pas être autorisé à intenter de nouveau un procès qu'il a déjà perdu simplement en changeant de défendeur . . .

Le professeur Watson expose ensuite les difficultés qui surgissent si l'on abandonne l'exigence de la réciprocité lorsque la préclusion découlant d'une question déjà tranchée est invoquée en demande, comme l'a fait la Cour suprême des États-Unis dans *Parklane Hosiery Co. c. Shore*, 439 U.S. 322 (1979). Il décrit ainsi l'utilisation offensive de la préclusion (à la p. 631) :

> [TRADUCTION] La force de cette doctrine offensive de la préclusion sans exigence de réciprocité est illustrée par les instances afférentes à des désastres résultant d'une cause unique, comme un écrasement d'avion. Supposons que P1 poursuit le transporteur aérien pour négligence dans l'exploitation de l'appareil et que le tribunal lui donne raison. La préclusion offensive sans réciprocité permet alors à une succession de P de poursuivre le transporteur et de plaider que la question de la négligence a déjà été tranchée. Cela, parce que si le transporteur aérien

process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

Properly understood, our case could be viewed as falling under this second category — what would be described in U.S. law as "non-mutual offensive preclusion". Although technically speaking the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-33:

First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".

Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that

a équitablement pu opposer une défense entière à l'allégation de négligence dans la poursuite n^{o} 1, il a eu la possibilité d'être entendu, il a bénéficié de l'application régulière de la loi et ne devrait pas être autorisé à remettre en cause la question de la négligence. Dans *Parklane*, la cour s'est toutefois rendu compte que pour statuer en toute équité sur l'utilisation offensive de la préclusion sans exigence de réciprocité, il fallait apporter des réserves à la doctrine.

28

Ainsi comprise, la présente espèce pourrait être classée dans la seconde catégorie — ce qu'en droit américain on appellerait la [TRADUCTION] « préclusion offensive sans exigence de réciprocité ». En effet, bien que strictement parlant la Ville de Toronto ne soit pas « en demande » dans l'arbitrage, elle cherche à bénéficier de la déclaration de culpabilité que le ministère public a obtenue contre Oliver dans une poursuite distincte antérieure à laquelle la Ville n'était pas partie. Elle souhaite empêcher Oliver de débattre à nouveau d'une question qu'il a contestée au cours de la poursuite criminelle et sur laquelle il n'a pas eu gain de cause. Le droit américain reconnaît les difficultés particulières que pose cette catégorie. Le professeur Watson explique ce qui suit aux p. 632-633 :

[TRADUCTION] Premièrement, la cour a reconnu que la disparition de l'exigence de la réciprocité entraînait des effets différents selon que la préclusion découlant d'une question déjà tranchée était invoquée en demande ou en défense. Lorsque le moyen est invoqué en défense, il contribue à limiter les litiges, mais invoqué en demande, il encourage plutôt les demandeurs potentiels à ne pas prendre part à la première action. « Puisqu'un demandeur peut invoquer un jugement antérieur prononcé contre un défendeur, mais qu'il n'est pas lié par un jugement antérieur donnant gain de cause au défendeur, il sera plus enclin à opter pour l'attentisme dans l'espoir que la première action intentée par un autre demandeur produira un jugement favorable. » Si le moyen n'est pas assorti de limites, la préclusion offensive sans exigence de réciprocité risque donc d'accroître et non de réduire le nombre de litiges. Pour résoudre ce problème, la cour a statué, dans *Parklane*, qu'il conviendrait de rejeter la préclusion dans l'action n^{o} 2 « lorsqu'un demandeur aurait aisément pu se joindre à l'action antérieure ».

Deuxièmement, la cour a reconnu que dans certaines circonstances, « il serait injuste pour le défendeur » de recevoir la préclusion sans exigence de réciprocité, et elle a donné des exemples de situations inéquitables : a) il est possible que la partie défenderesse n'ait pas été très

is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.

In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free

motivée à présenter une défense vigoureuse à la première action si, par exemple, le montant de dommages-intérêts réclamé était minime ou symbolique, en particulier s'il était peu prévisible que des actions subséquentes soient intentées, b) la préclusion en demande peut être injuste si le jugement invoqué est lui-même incompatible avec un ou plusieurs jugements antérieurs rendus en faveur de la partie défenderesse, c) la deuxième action offre à la partie défenderesse des moyens procéduraux dont elle ne disposait pas dans la première et qui pourraient facilement entraîner un résultat différent, par exemple lorsque la partie défenderesse a dû présenter sa défense devant un forum peu propice où elle ne pouvait citer de témoins ou lorsqu'elle jouissait de possibilités beaucoup moindres de communication de la preuve dans la première action.

En définitive, la cour a statué qu'en règle générale les affaires où un demandeur aurait facilement pu se porter codemandeur à la première action ou lorsque, pour les raisons susmentionnées ou pour d'autres, l'application du moyen en demande serait injuste pour la partie défenderesse, le juge de première instance ne devrait pas autoriser le recours à la préclusion offensive.

Il ressort clairement du passage précédent que la doctrine américaine de la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité, n'est pas d'application automatique, comme le démontrent les éléments discrétionnaires susceptibles d'entraîner le rejet de ce moyen. L'expérience américaine indique que l'abandon de l'exigence de la réciprocité suscite une double préoccupation : (1) l'application de la préclusion doit être suffisamment encadrée et prévisible pour assurer l'efficacité, et (2) elle doit comporter assez de souplesse pour empêcher les injustices. Selon moi, c'est ce qu'offre la doctrine de l'abus de procédure, en particulier dans des affaires mettant en cause une déclaration de culpabilité relative à un acte criminel grave, comme la présente espèce. Dans de tels cas, les véritables préoccupations, que la Cour d'appel a exposées avec justesse dans ses motifs, ne se rattachent pas tant à la réciprocité qu'à l'intégrité et à la cohérence de l'administration de la justice. Ce sera souvent le cas lorsque la préclusion reposera sur une conclusion prononcée en matière criminelle où beaucoup des préoccupations traditionnelles relatives à la réciprocité perdent de leur importance.

Par exemple, la notion du demandeur « attentiste » et « opportuniste » qui évite délibérément

rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Law Society of Upper Canada, *Rules of Professional Conduct* (2000), Commentary Rule 4.01(3), at p. 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232, at pp. 256-57, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621 (C.C.A.), at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation". For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the

de prendre le risque de se joindre à la poursuite initiale mais qui cherche plus tard à profiter de la victoire obtenue par la partie qui aurait dû être sa codemanderesse, a peu de pertinence. Il n'y a pas lieu de craindre que cela se produise lorsque la première instance est une poursuite criminelle. Même si elles le voulaient, les victimes ne pourraient se porter partie à la poursuite criminelle de façon à ce que leur action civile contre l'accusé soit jugée dans un même procès. Les employeurs ne sont pas admis non plus à participer à la poursuite criminelle pour que leur employé soit par la même occasion congédié pour motif valable.

31 Par contre, malgré le fait que personne ne peut se joindre à la poursuite criminelle, le poursuivant, en tant que partie, représente l'intérêt public. Il représente un intérêt collectif dans le règlement juste et régulier de la poursuite. On le considère comme un ministre de la justice qui n'a rien à gagner ni à perdre dans l'issue des procès mais qui doit veiller à ce que les tribunaux rendent des verdicts justes et bien fondés. (Voir Barreau du Haut-Canada, *Code de déontologie* (2000), règle 4.01(3) et le commentaire afférent, p. 62; *R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12; *Lemay c. The King*, [1952] 1 R.C.S. 232, p. 256-257, le juge Cartwright; et *R. c. Banks*, [1916] 2 K.B. 621 (C.C.A.), p. 623.) L'exigence de réciprocité de la doctrine de la préclusion découlant d'une question déjà tranchée, qui veut que seul le ministère public et ses ayants droit soient irrecevables à remettre en cause la culpabilité de l'accusé, ne rend guère compte du vrai rôle du poursuivant.

32 Comme l'illustre la présente espèce, ce sont l'intégrité du système de justice criminel et l'autorité accrue du verdict de culpabilité qui sont les considérations primordiales, et non certaines des préoccupations plus traditionnelles de la préclusion découlant d'une question déjà tranchée où l'accent est mis sur les intérêts des parties, comme les dépens et les « incidents vexatoires » multiples. Pour ces motifs, il n'y a à mon sens aucune nécessité en l'espèce de supprimer ou d'assouplir l'exigence de la réciprocité, établie depuis longtemps, et je conclurais que

arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson*, *supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk*, *supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in

la préclusion découlant d'une question déjà tranchée n'est pas applicable. Se pose maintenant la question de savoir si la décision de l'arbitre équivalait à une contestation indirecte du verdict du tribunal criminel.

(2) La contestation indirecte

La règle interdisant les contestations indirectes rend irrecevables les actions visant l'infirmation de déclarations de culpabilité par des tribunaux n'ayant pas compétence en cette matière. Comme la Cour l'a affirmé dans l'arrêt *Wilson c. La Reine*, [1983] 2 R.C.S. 594, p. 599, cette règle est

> un principe fondamental établi depuis longtemps [selon lequel] une ordonnance rendue par une cour compétente est valide, concluante et a force exécutoire, à moins d'être infirmée en appel ou légalement annulée. De plus, la jurisprudence établit très clairement qu'une telle ordonnance ne peut faire l'objet d'une attaque indirecte; l'attaque indirecte peut être décrite comme une attaque dans le cadre de procédures autres que celles visant précisément à obtenir l'infirmation, la modification ou l'annulation de l'ordonnance ou du jugement.

Ainsi, la Cour a jugé, dans *Wilson*, précité, qu'un juge d'une juridiction inférieure n'avait pas compétence pour examiner la validité d'une autorisation d'écoute électronique délivrée par une cour supérieure. D'autres décisions jurisprudentielles constituant l'assise de cette règle avaient aussi pour contexte des tentatives de faire infirmer des décisions d'autres tribunaux et non une simple remise en cause des faits de l'espèce. Dans *R. c. Sarson*, [1996] 2 R.C.S. 223, par. 35, notre Cour a statué qu'en raison de la règle interdisant les contestations indirectes, le recours en *habeas corpus* par lequel un détenu contestait une déclaration de culpabilité fondée sur une disposition législative subséquemment jugée inconstitutionnelle ne pouvait être accueilli parce que l'affaire du détenu n'était plus « en cours » et que celui-ci « était détenu conformément au jugement d'un tribunal compétent ». De la même façon, la Cour a jugé, dans l'arrêt *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, que le propriétaire d'une mine qui avait décidé de ne pas suivre le processus administratif d'appel applicable relativement à une amende pour pollution n'était pas admis à contester la validité de la

subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of

pénalité devant un tribunal judiciaire parce que la loi prévoyait que les appels étaient entendus par un tribunal administratif. Dans l'arrêt *Danyluk*, précité, par. 20, le juge Binnie a défini la règle prohibant les contestations indirectes comme « la règle selon laquelle l'ordonnance rendue par un tribunal compétent ne doit pas être remise en cause dans des procédures subséquentes, sauf celles prévues par la loi dans le but exprès de contester l'ordonnance » (je souligne).

34 Chacune des affaires susmentionnées soulève la question du tribunal compétent pour connaître de contestations relatives au jugement lui-même. En l'espèce, toutefois, le syndicat ne cherche pas à faire infirmer la déclaration de culpabilité pour agression sexuelle, mais conteste simplement, dans le cadre d'une demande différente comportant des conséquences juridiques différentes, le bien-fondé de cette déclaration. Il s'agit d'une attaque implicite du bien-fondé factuel de la décision, non pas de la contestation de la validité juridique de celle-ci, puisqu'elle est manifestement valide. Les « contestations indirectes » prohibées constituent un abus du processus judiciaire. Or, comme la règle qui prohibe les contestations indirectes met l'accent sur la contestation de l'ordonnance elle-même et de ses effets juridiques, la meilleure façon d'aborder la question en l'espèce me paraît être de recourir directement à la doctrine de l'abus de procédure.

(3) L'abus de procédure

35 Les juges disposent, pour empêcher les abus de procédure, d'un pouvoir discrétionnaire résiduel inhérent. L'abus de procédure a été décrit, en common law, comme consistant en des procédures « injustes au point qu'elles sont contraires à l'intérêt de la justice » (*R. c. Power*, [1994] 1 R.C.S. 601, p. 616) et en un traitement « oppressif » (*R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667). La juge McLachlin (plus tard Juge en chef) l'a défini de la façon suivante dans l'arrêt *R. c. Scott*, [1990] 3 R.C.S. 979, p. 1007 :

. . . l'abus de procédure peut avoir lieu si : (1) les procédures sont oppressives ou vexatoires; et (2) elles violent les principes fondamentaux de justice sous-jacents au sens de l'équité et de la décence de la société. La première

oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway*, *supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

condition, à savoir que les poursuites sont oppressives ou vexatoires, se rapporte au droit de l'accusé d'avoir un procès équitable. Cependant, la notion fait aussi appel à l'intérêt du public à un régime de procès justes et équitables et à la bonne administration de la justice.

La doctrine de l'abus de procédure s'applique dans des contextes juridiques divers. Le traitement injuste ou oppressif d'un accusé peut priver le ministère public du droit de continuer les poursuites relatives à une accusation : *Conway*, précité, p. 1667. Dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, notre Cour a statué qu'un délai déraisonnable causant un préjudice grave peut constituer un abus de procédure. Lorsque la *Charte canadienne des droits et libertés* est invoquée, la doctrine de l'abus de procédure reconnue en common law est subsumée sous les principes de la *Charte* de telle sorte que les principes de l'abus de procédure et les recours constitutionnels empiètent souvent les uns sur les autres (*R. c. O'Connor*, [1995] 4 R.C.S. 411). La doctrine continue néanmoins de trouver application comme réparation non fondée sur la *Charte* : *États-Unis d'Amérique c. Shulman*, [2001] 1 R.C.S. 616, 2001 CSC 21, par. 33.

Dans le contexte qui nous intéresse, la doctrine de l'abus de procédure fait intervenir [TRADUCTION] « le pouvoir inhérent du tribunal d'empêcher que ses procédures soient utilisées abusivement, d'une manière [. . .] qui aurait [. . .] pour effet de discréditer l'administration de la justice » (*Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481 (C.A.), par. 55, le juge Goudge, dissident, approuvé par [2002] 3 R.C.S. 307, 2002 CSC 63). Le juge Goudge a développé la notion de la façon suivante aux par. 55 et 56 :

> [TRADUCTION] La doctrine de l'abus de procédure engage le pouvoir inhérent du tribunal d'empêcher que ses procédures soient utilisées abusivement, d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait autrement pour effet de discréditer l'administration de la justice. C'est une doctrine souple qui ne s'encombre pas d'exigences particulières telles que la notion d'irrecevabilité (voir *House of Spring Gardens Ltd. c. Waite*, [1990] 3 W.L.R. 347, p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application

Un cas d'application de l'abus de procédure est lorsque le tribunal est convaincu que le litige a essentiellement pour but de rouvrir une question qu'il a déjà tranchée. [Je souligne.]

Ainsi qu'il ressort du commentaire du juge Goudge, les tribunaux canadiens ont appliqué la doctrine de l'abus de procédure pour empêcher la réouverture de litiges dans des circonstances où les exigences strictes de la préclusion découlant d'une question déjà tranchée (généralement les exigences de lien de droit et de réciprocité) n'étaient pas remplies, mais où la réouverture aurait néanmoins porté atteinte aux principes d'économie, de cohérence, de caractère définitif des instances et d'intégrité de l'administration de la justice. (Voir par exemple *Franco c. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. c. Stevenson*, [1986] 5 W.W.R. 21 (C.A. Sask.); et *Bjarnarson c. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (B.R. Man.), conf. par (1987), 21 C.P.C. (2d) 302 (C.A. Man.).) Cette application a suscité des critiques, certains disant que la doctrine de l'abus de procédure pour remise en cause n'est ni plus ni moins que la doctrine générale de la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité, à laquelle il manque les importantes conditions que les tribunaux américains ont reconnues comme parties intégrantes de la doctrine (Watson, *loc. cit.*, p. 624-625).

38 Certes, la doctrine de l'abus de procédure a débordé des stricts paramètres du principe de l'autorité de la chose jugée tout en lui empruntant beaucoup de ses fondements et quelques-unes de ses restrictions. D'aucuns la voient davantage comme une doctrine auxiliaire, élaborée en réaction aux règles établies de la préclusion (découlant d'une question déjà tranchée ou fondée sur la cause d'action), que comme une doctrine indépendante (Lange, *op. cit.*, p. 344). Les raisons de principes étayant la doctrine de l'abus de procédure pour remise en cause sont identiques à celles de la préclusion découlant d'une question déjà tranchée (Lange, *op. cit.*, p. 347-348) :

[TRADUCTION] Les deux raisons de principe, savoir qu'un litige puisse avoir une fin et que personne ne puisse être tracassé deux fois par la même cause d'action, ont

of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter*, *supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in

été invoquées comme principes fondant l'application de la doctrine de l'abus de procédure pour remise en cause. D'autres principes ont également été invoqués : la préservation des ressources des tribunaux et des parties, le maintien de l'intégrité du système judiciaire afin d'éviter les résultats contradictoires et la protection du principe du caractère définitif des instances si important pour la bonne administration de la justice.

L'énoncé classique de la doctrine moderne de l'abus de procédure et de ses liens avec l'autorité de la chose jugée se trouve dans la décision *Hunter*, précitée, confirmant *McIlkenny c. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.). Il s'agissait d'une poursuite en dommages-intérêts pour préjudice corporel intentée par les six hommes reconnus coupables de l'explosion de deux pubs de Birmingham. Ils prétendaient avoir été battus par la police pendant leur interrogatoire. Les demandeurs avaient soulevé le même grief lors du procès criminel, mais le juge et le jury avaient conclu que les confessions avaient été volontaires et que la police n'avait pas eu recours à la violence. Lord Denning, M.R., de la Cour d'appel, a appliqué la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité, et a statué que le jugement antérieur empêchait l'examen de la question de savoir si la police avait usé de violence, même si cette question était invoquée contre un nouvel adversaire. Signalant que dans des affaires analogues, les tribunaux avaient parfois refusé d'autoriser une partie à soulever de nouveau une question parce qu'il s'agissait d'un abus de procédure, lord Denning a estimé que le principe applicable était plutôt celui de la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité.

La Chambre des lords, statuant en appel, n'a pas endossé la tentative de lord Denning de modifier le principe de la préclusion découlant d'une question déjà tranchée, mais elle est parvenue à une conclusion identique en appliquant la doctrine de l'abus de procédure. Lord Diplock s'est exprimé en ces termes, à la p. 541 :

[TRADUCTION] L'abus de procédure illustré en l'espèce est l'introduction d'une instance devant un tribunal judiciaire dans le but d'attaquer indirectement une décision définitive rendue contre le demandeur par un autre tribunal compétent dans une instance antérieure, où le

previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

It is important to note that a public inquiry after the civil action of the six accused in *Hunter*, *supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq*.). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter*, *supra*, at p. 536.)

Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter*, *supra*, and *Demeter*, *supra*), the focus is less

demandeur a eu l'entière possibilité de contester la décision devant le tribunal qui l'a rendue.

41 Il importe de signaler qu'une enquête publique instituée après la poursuite civile intentée par les six accusés dans l'affaire *Hunter*, précitée, a donné lieu à la conclusion que les aveux des accusés de Birmingham avaient été obtenus par suite de brutalités policières (voir *R. c. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), p. 304 et suiv.). À mon avis, cela ne saurait justifier d'alléger les mécanismes procéduraux mis en place pour assurer le caractère définitif des instances en matière criminelle. Notre Cour et d'autres tribunaux ont reconnu l'existence du risque d'erreur judiciaire (voir *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7, par. 1; et *R. c. Bromley* (2001), 151 C.C.C. (3d) 480 (C.A.T.-N.), p. 517-518). Bien qu'il faille prévoir des garanties pour protéger les innocents et, de façon plus générale, pour inspirer confiance dans les décisions judiciaires, la remise en cause perpétuelle n'est pas pour autant garante de l'exactitude factuelle.

42 L'attrait de la doctrine de l'abus de procédure provient de ce qu'elle n'est pas alourdie par les exigences précises du principe de l'autorité de la chose jugée tout en ménageant le pouvoir discrétionnaire d'empêcher la remise en cause de litiges et ce, essentiellement dans le but de préserver l'intégrité du processus judiciaire. (Voir les motifs du juge Doherty, par. 65; voir également *Demeter* (H.C.), précité, p. 264, et *Hunter*, précité, p. 536.)

43 Ceux qui critiquent cette doctrine font valoir que l'utilisation de l'abus de procédure à la place de la préclusion brouille la vraie question sans rien ajouter d'autre qu'une vague impression de pouvoir discrétionnaire. Je ne partage pas cette vue. À tout le moins dans des circonstances comme celles de la présente espèce, c'est-à-dire une tentative de remettre en cause une déclaration de culpabilité, j'estime que cette doctrine répond beaucoup mieux aux véritables enjeux. Dans tous ses cas d'application, la doctrine de l'abus de procédure vise essentiellement à préserver l'intégrité de la fonction judiciaire. Qu'elle ait pour effet de priver le ministère public du droit de continuer la poursuite à cause de délais inacceptables (voir *Blencoe*, précité), ou d'empêcher

on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to

une partie civile de faire appel aux tribunaux à mauvais escient (voir *Hunter*, précité, et *Demeter*, précité), l'accent est mis davantage sur l'intégrité du processus décisionnel judiciaire comme fonction de l'administration de la justice que sur l'intérêt des parties. Dans une affaire comme la présente espèce, c'est cette préoccupation qui commande d'interdire la remise en cause, plus que toute perception d'injustice envers une partie qui serait de nouveau appelée à faire la preuve de ses prétentions, par exemple. Cela compris, il est plus facile d'établir les paramètres de la doctrine et de définir les principes applicables à l'exercice du pouvoir discrétionnaire.

Le processus décisionnel judiciaire, et l'importance d'en préserver l'intégrité, ont été bien décrits par le juge Doherty. Voici ce qu'on peut lire au par. 74 de ses motifs :

> [TRADUCTION] Dans ses diverses manifestations, le processus décisionnel judiciaire vise à rendre justice. Par processus décisionnel judiciaire, j'entends les divers tribunaux judiciaires ou administratifs auxquels il faut s'adresser pour le règlement des litiges. Lorsque la même question est soulevée devant divers tribunaux, la qualité des décisions rendues au terme du processus judiciaire se mesure non par rapport au résultat particulier obtenu de chaque forum, mais par le résultat final découlant des divers processus. Par justice, j'entends l'équité procédurale, l'obtention du résultat approprié dans chaque affaire et la perception plus générale que l'ensemble du processus donne des résultats cohérents, équitables et exacts.

Lorsqu'ils doivent décider si une déclaration de culpabilité, recevable *prima facie* en vertu de l'art. 22.1 de la *Loi sur la preuve* de l'Ontario, devrait être réfutée ou considérée comme concluante, les tribunaux font appel à la doctrine de l'abus de procédure pour déterminer si la remise en cause porterait atteinte au processus décisionnel judiciaire défini précédemment. Lorsque l'accent est correctement mis sur l'intégrité du processus, la raison pour laquelle la partie cherche à rouvrir le débat ou sa qualité de défendeur plutôt que de demandeur dans le nouveau litige ne sauraient constituer des facteurs décisifs pour l'application de la règle interdisant la remise en question.

En l'espèce, il importe donc peu qu'Oliver veuille principalement rouvrir le débat pour être réengagé et

secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter*, *supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

The appellant relies on *Re Del Core*, *supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues

non pour contester sa déclaration de culpabilité afin d'en attaquer la validité. Il n'y a pas lieu ici d'invoquer les arrêts *Hunter* et *Demeter* (H.C.), précités, pour souligner l'importance de la raison de la remise en cause. Il était certes évident, dans les deux affaires, que les parties cherchant à rouvrir le débat voulaient faire casser leur déclaration de culpabilité, mais cela a peu d'importance dans l'application de la doctrine de l'abus de procédure. Il n'est pas illégitime en soi de vouloir attaquer un jugement; la loi permet de poursuivre cet objectif par divers mécanismes de révision comme l'appel ou le contrôle judiciaire. De fait, la possibilité de faire réviser un jugement constitue un aspect important du principe de l'irrévocabilité des décisions. Une décision est irrévocable ou définitive et elle lie les parties seulement lorsque tous les recours possibles en révision sont épuisés ou ont été abandonnés. Ce qui n'est pas permis, c'est d'attaquer un jugement en tentant de soulever de nouveau la question devant un autre forum. Par conséquent, les raisons animant la partie ont peu ou pas d'importance.

47 Il n'y a pas de raison non plus de restreindre l'application de la doctrine de l'abus de procédure aux seuls cas où la remise en cause est le fait du demandeur. La désignation des parties au second litige peut masquer la situation réelle. En l'espèce, par exemple, indépendamment des formalités de la procédure de grief, qui d'Oliver et de son syndicat ou de la Ville de Toronto faudrait-il considérer comme à l'origine du différend en matière de travail? D'un point de vue formaliste, c'est le syndicat qui est la partie demanderesse dans la procédure d'arbitrage, mais c'est la Ville qui a invoqué la déclaration de culpabilité d'Oliver comme motif de congédiement. Du point de vue de l'intégrité du processus juridictionnel, toutefois, je ne vois pas quelle différence il y a entre caractériser Oliver comme demandeur ou le caractériser comme défendeur relativement à la remise en cause de sa déclaration de culpabilité.

48 L'appelant invoque *Re Del Core*, précité, à l'appui de sa prétention que la doctrine de l'abus de procédure ne s'applique qu'aux demandeurs. Dans cet arrêt, toutefois, les juges majoritaires ne se sont pas prononcés sur la question de savoir dans quelles

determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

> The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so. . . . Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined . . . . [Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter*, *supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), *Franco*, *supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See for example *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), at p. 218, aff'd without reference to this point (1978), 18 O.R. (2d) 714 (C.A.); *Bomac*, *supra*, at pp. 26-27; *Bjarnarson*, *supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Gen. Div.), at p. 115; see also

circonstances, le cas échéant, l'intérêt public peut empêcher la remise en question de conclusions formulées dans une instance criminelle. Le juge Blair, notamment, n'a pas limité les circonstances permettant de conclure à l'abus de procédure aux seules affaires où une personne déclarée coupable cherche à remettre en question la validité de cette déclaration dans une instance subséquente qu'elle-même a engagée (à la p. 22) :

> [TRADUCTION] Le droit de contester une déclaration de culpabilité est assorti d'une importante réserve. Une personne visée par une déclaration de culpabilité ne peut tenter de prouver que la déclaration était erronée lorsque dans les circonstances cela constituerait un abus de procédure. [. . .] Les tribunaux ont rejeté les tentatives de remettre en cause les questions mêmes qui avaient été examinées au procès criminel, dans les cas où ils estimaient que l'instance civile constituait une contestation indirecte de la déclaration de culpabilité. La portée de cette réserve reste à déterminer . . . [Je souligne.]

S'il est vrai que la jurisprudence le plus souvent citée à l'appui du pouvoir des tribunaux d'empêcher la remise en cause de questions sur lesquelles il a déjà été statué, lorsque la préclusion découlant d'une question déjà tranchée n'est pas applicable, se rapporte à des affaires où une personne déclarée coupable a intenté une action civile dans le but d'attaquer une conclusion formulée dans l'instance criminelle (savoir *Demeter* (H.C.), précité, et *Hunter*, précité; voir aussi *Q. c. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), et *Franco*, précité, par. 29-31), il n'existe aucune raison de principe pour que ce droit ne s'exerce que dans ces circonstances. Les tribunaux ont appliqué la doctrine de l'abus de procédure à plusieurs reprises pour empêcher un défendeur de remettre en cause des conclusions formulées contre lui dans une instance antérieure. Voir notamment *Nigro c. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), p. 218, conf. sans mention de ce point par (1978), 18 O.R. (2d) 714 (C.A.); *Bomac*, précité, p. 26-27; *Bjarnarson*, précité, p. 39; *Germscheid c. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson c. Geswein* (1995), 25 C.C.L.T. (2d) 49 (B.R. Man.), p. 61; *Roenisch c. Roenisch* (1991), 85 D.L.R. (4th) 540 (B.R. Alb.), p. 546; *Saskatoon Credit Union, Ltd. c. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (C.S.C.-B.), p. 438; *Canadian Tire*

P. M. Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-97; and Watson, *supra*, at pp. 648-51.

It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see M. Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that

Corp. c. Summers (1995), 23 O.R. (3d) 106 (Div. gén.), p. 115; voir aussi P. M. Perell, « Res Judicata and Abuse of Process » (2001), 24 *Advocates Q.* 189, p. 196-197; et Watson, *loc. cit.*, p. 648-651.

50 Des auteurs ont soutenu qu'il est difficile de concevoir comment le fait de se défendre peut constituer un abus de procédure (voir M. Teplitsky, « Prior Criminal Convictions : Are They Conclusive Proof? An Arbitrator's Perspective », dans K. Whitaker et autres, dir., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). On donne souvent comme raison d'être du principe de l'autorité de la chose jugée qu'une partie ne devrait pas être tracassée deux fois pour la même cause d'action, c'est-à-dire qu'on ne devrait pas lui imposer le fardeau de débattre une autre fois de la même question (Watson, *loc. cit.*, p. 633). Bien sûr, un défendeur peut se réjouir d'avoir une autre occasion de mettre en cause une question tranchée contre lui. C'est l'accent correctement mis sur le processus plutôt que sur l'intérêt des parties qui révèle pourquoi il ne devrait pas y avoir remise en cause dans un tel cas.

51 La doctrine de l'abus de procédure s'articule autour de l'intégrité du processus juridictionnel et non autour des motivations ou de la qualité des parties. Il convient de faire trois observations préliminaires à cet égard. Premièrement, on ne peut présumer que la remise en cause produira un résultat plus exact que l'instance originale. Deuxièmement, si l'instance subséquente donne lieu à une conclusion similaire, la remise en cause aura été un gaspillage de ressources judiciaires et une source de dépenses inutiles pour les parties sans compter les difficultés supplémentaires qu'elle aura pu occasionner à certains témoins. Troisièmement, si le résultat de la seconde instance diffère de la conclusion formulée à l'égard de la même question dans la première, l'incohérence, en soi, ébranlera la crédibilité de tout le processus judiciaire et en affaiblira ainsi l'autorité, la crédibilité et la vocation à l'irrévocabilité.

52 La révision de jugements par la voie normale de l'appel, en revanche, accroît la confiance dans le résultat final et confirme l'autorité du processus ainsi que l'irrévocabilité de son résultat. D'un

from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended

point de vue systémique, il est donc évident que la remise en cause s'accompagne de graves effets préjudiciables et qu'il faut s'en garder à moins que des circonstances n'établissent qu'elle est, dans les faits, nécessaire à la crédibilité et à l'efficacité du processus juridictionnel dans son ensemble. Il peut en effet y avoir des cas où la remise en cause pourra servir l'intégrité du système judiciaire plutôt que lui porter préjudice, par exemple : (1) lorsque la première instance est entachée de fraude ou de malhonnêteté, (2) lorsque de nouveaux éléments de preuve, qui n'avaient pu être présentés auparavant, jettent de façon probante un doute sur le résultat initial, (3) lorsque l'équité exige que le résultat initial n'ait pas force obligatoire dans le nouveau contexte. C'est ce que notre Cour a dit sans équivoque dans l'arrêt *Danyluk*, précité, par. 80.

Les facteurs discrétionnaires qui visent à empêcher que la préclusion découlant d'une question déjà tranchée ne produise des effets injustes, jouent également en matière d'abus de procédure pour éviter de pareils résultats indésirables. Il existe de nombreuses circonstances où l'interdiction de la remise en cause, qu'elle découle de l'autorité de la chose jugée ou de la doctrine de l'abus de procédure, serait source d'inéquité. Par exemple, lorsque les enjeux de l'instance initiale ne sont pas assez importants pour susciter une réaction vigoureuse et complète alors que ceux de l'instance subséquente sont considérables, l'équité commande de conclure que l'autorisation de poursuivre la deuxième instance servirait davantage l'administration de la justice que le maintien à tout prix du principe de l'irrévocabilité. Une incitation insuffisante à opposer une défense, la découverte de nouveaux éléments de preuve dans des circonstances appropriées, ou la présence d'irrégularités dans le processus initial, tous ces facteurs peuvent l'emporter sur l'intérêt qu'il y a à maintenir l'irrévocabilité de la décision initiale (*Danyluk*, précité, par. 51; *Franco*, précité, par. 55).

Ces considérations revêtent une pertinence particulière s'agissant de la tentative de remettre en cause une déclaration de culpabilité. Mettre en doute la validité d'une déclaration de culpabilité est une action très grave et, dans un cas comme celui qui nous intéresse, il est inévitable que la conclusion de

or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. *Application of Abuse of Process to Facts of the Appeal*

I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet as pointed out by Doherty J.A. (at para. 84):

Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of

l'arbitre ait précisément cet effet, qu'il ait été voulu ou non. L'administration de la justice doit disposer de tous les moyens légitimes propres à prévenir les déclarations de culpabilité injustifiées et à y remédier s'il s'en présente. La contestation indirecte et la remise en cause, toutefois, ne constituent pas des moyens appropriés, selon moi, car elles imposent au processus juridictionnel des contraintes excessives et ne font rien pour garantir un résultat plus fiable.

55 Compte tenu de ce qui précède, il est clair que les doctrines de la préclusion découlant d'une question déjà tranchée, de la contestation indirecte et de l'abus de procédure, reconnues en common law, répondent adéquatement aux préoccupations qui surgissent lorsqu'il faut pondérer le principe de l'irrévocabilité des jugements et celui de l'équité envers un justiciable particulier. Il n'est donc nul besoin, comme l'a fait la Cour d'appel, d'ériger le principe de l'irrévocabilité en doctrine distincte ou critère indépendant pour interdire la remise en cause.

D. *L'application de la doctrine de l'abus de procédure en l'espèce*

56 À mon avis, les faits de la présente espèce illustrent l'abus flagrant de procédure qui résulte de l'autorisation de ce type de remise en cause. L'employé avait été déclaré coupable par un tribunal criminel et il avait épuisé toutes les voies d'appel. La déclaration de culpabilité était valide en droit, avec tous les effets juridiques en découlant. Pourtant, comme l'a signalé le juge Doherty (au par. 84) :

[TRADUCTION] Même si l'arbitre s'est défendu d'avoir examiné le bien-fondé de la décision du juge Ferguson, c'est exactement ce qu'il a fait. Il est impossible de ne pas conclure, à la lecture des motifs de l'arbitre, qu'il avait la conviction que l'instance criminelle était entachée de graves erreurs et qu'Oliver avait été condamné à tort. Cette conclusion tirée à l'occasion d'une instance à laquelle la poursuite n'était pas même partie ne peut que porter atteinte à l'intégrité du système de justice criminel. Tout observateur sensé se demanderait comment il se peut qu'un tribunal ait conclu hors de tout doute raisonnable qu'Oliver était coupable, et qu'après confirmation du verdict par la Cour d'appel, il soit déterminé, dans une autre instance, qu'il n'a pas commis cette même agression. Cet observateur ne comprendrait pas non plus qu'Oliver

sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court — or the jury —, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

ait pu à bon droit être reconnu coupable d'agression sexuelle contre le plaignant et condamné à quinze mois d'emprisonnement, mais qu'une autre instance donne lieu à la conclusion qu'il n'a pas commis l'agression sexuelle et qu'il doit être réintégré dans des fonctions où des jeunes comme le plaignant seraient placés sous sa surveillance.

Ces décisions contradictoires mettraient inévitablement la Ville de Toronto dans une situation où une personne condamnée pour agression sexuelle est rétablie dans un emploi qui la met en contact avec des jeunes très vulnérables comme la victime de l'agression dont elle a été déclarée coupable. On peut supposer que cela induirait le public informé et sensé à évaluer le bien-fondé de l'un ou l'autre des jugements relatifs à la culpabilité de l'employé. L'autorité et l'irrévocabilité des décisions de justice visent précisément à éliminer la nécessité d'un tel exercice.

De plus, l'arbitre est beaucoup moins en mesure de rendre une décision correcte sur la culpabilité que le juge présidant une instance criminelle — ou que le jury —, qui dispose pour le guider de règles de preuve axées sur la recherche équitable de la vérité ainsi que d'une norme de preuve exigeante, et qui a l'expérience des questions en cause. Qui plus est, la norme de contrôle applicable aux conclusions de l'arbitre, en cas de contestation, est moins exigeante que celle qui s'applique aux décisions des juges de cours criminelles. Bref, il n'y a rien, dans une affaire comme la présente espèce, qui milite contre l'application de la doctrine de l'abus de procédure pour interdire la remise en cause de la déclaration de culpabilité de l'employé. L'arbitre était juridiquement tenu de donner plein effet à la déclaration de culpabilité. L'erreur de droit qu'il a commise lui a fait tirer une conclusion manifestement déraisonnable. S'il avait bien compris la preuve et tenu compte des principes juridiques applicables, il n'aurait pu faire autrement que de conclure que la Ville de Toronto avait démontré l'existence d'un motif valable pour le congédiement d'Oliver.

VI. Dispositif

Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

The reasons of LeBel and Deschamps JJ. were delivered by

LeBel J. —

I. Introduction

I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without just cause — a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard — patently unreasonable, according to the jurisprudence of our Court.

While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R.

Version française des motifs des juges LeBel et Deschamps rendus par

Le juge LeBel —

I. Introduction

60 J'ai pris connaissance des motifs de la juge Arbour et je souscris au dispositif qu'elle propose dans le présent pourvoi. Je conviens que le sort de ce pourvoi doit être réglé en fonction de l'abus de procédure, et non des principes plus restreints et plus techniques de la contestation indirecte ou de la préclusion découlant d'une question déjà tranchée (*issue estoppel*). Je conviens également que la norme de contrôle appropriée est celle de la décision correcte, à l'égard de la question de la remise en cause d'une déclaration de culpabilité dans le cadre d'une procédure de grief. La nature de cette question de droit demandait de l'arbitre qu'il interprète non seulement la *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A, mais aussi la *Loi sur la preuve*, L.R.O. 1990, ch. E.23, et qu'il statue sur l'applicabilité d'un certain nombre de principes de common law portant sur la remise en cause de questions déjà décidées dans le cadre d'un litige antérieur. Comme le fait remarquer la juge Arbour, ce problème se situe au cœur de l'administration de la justice. Enfin, je conviens que la décision de l'arbitre qui permettait de remettre la déclaration de culpabilité de Glenn Oliver en cause pendant l'examen du grief n'était pas correcte. Légalement, l'arbitre devait donner pleinement effet à cette déclaration de culpabilité. L'omission de le faire a suffi pour rendre manifestement déraisonnable, suivant la jurisprudence de notre Cour, la décision finale selon laquelle Oliver avait été congédié sans motif valable — une décision qui ressortissait entièrement au domaine d'expertise de l'arbitre et devait donc faire l'objet d'un contrôle selon une norme commandant la déférence.

61 Même si je suis d'accord avec la conclusion de la juge Arbour en l'espèce, j'estime opportun d'approfondir l'examen des aspects du pourvoi relevant du droit administratif. Dans mes motifs concourants dans *Chamberlain c. Surrey School*

710, 2002 SCC 86, I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 149; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; *Chamberlain*, *supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what in my view is growing criticism with the ways in which the standards of review currently available within the

District No. 36, [2002] 4 R.C.S. 710, 2002 CSC 86, j'ai soulevé quelques inquiétudes quant au caractère approprié d'une approche qui traiterait la méthode pragmatique et fonctionnelle comme cadre d'analyse fondamental destiné à s'appliquer sans flexibilité lors du contrôle judiciaire sur le fond dans toutes les affaires de droit administratif, y compris celles relatives à la décision d'une instance non juridictionnelle. Dans certaines circonstances, comme celles de *Chamberlain*, le recours à ce cadre d'analyse pour circonscrire la norme de contrôle appropriée risque d'occulter la véritable question que doit trancher la cour de justice chargée du contrôle.

Dans le présent pourvoi et *Ontario c. S.E.E.F.P.O.*, [2003] 3 R.C.S. 149, 2003 CSC 64, sur lesquels statue simultanément notre Cour et qui portent tous deux sur le contrôle judiciaire de la décision d'une instance juridictionnelle, je ne suis pas préoccupé par l'applicabilité de l'analyse pragmatique et fonctionnelle proprement dite. Cependant, lorsque, comme en l'espèce, la question en litige constitue si clairement une question de droit, à la fois, d'une importance capitale pour le système juridique dans son ensemble et étrangère au domaine d'expertise de l'arbitre, il devient inutile qu'une cour se livre à une analyse pragmatique et fonctionnelle détaillée pour identifier une norme de contrôle fondée sur la décision correcte. En pareilles circonstances, pour déterminer la norme de contrôle applicable, la cour doit en fait éviter d'adopter une démarche rigide. En effet, celle-ci risquerait de réduire l'analyse pragmatique et fonctionnelle et le cadre souple et contextuel qu'elle offre à la vérification et à l'application pure et simple d'une liste de facteurs prédéterminés (voir *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29, par. 149; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26; *Chamberlain*, précité, par. 195, le juge LeBel).

La présente espèce et le pourvoi connexe *Ontario c. S.E.E.F.P.O.* soulèvent une question plus particulière, celle des préoccupations croissantes liées à la manière dont sont conçues et appliquées les normes

pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 26; J. G. Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; F. A. V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), at pp. 32-33). Reviewing courts too, have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27, illustrate:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular

de contrôle qu'offre actuellement l'analyse pragmatique et fonctionnelle. Des auteurs et avocats ont affirmé douter sérieusement que notre Cour ait exposé de manière suffisamment claire le fondement théorique de chacune des normes existantes. Une bonne partie de leurs critiques vise ce qu'ils ont qualifié de confusion « épistémologique » qui entourerait la relation entre le manifestement déraisonnable et le raisonnable *simpliciter* (voir, par exemple, D. J. Mullan, « Recent Developments in Standard of Review », dans l'Association du Barreau canadien (Ontario), *Taking the Tribunal to Court : A Practical Guide for Administrative Law Practitioners* (2000), p. 26; J. G. Cowan, « The Standard of Review : The Common Sense Evolution? », exposé présenté initialement à la rencontre de la section du droit administratif, Association du Barreau de l'Ontario, 21 janvier 2003, p. 28; F. A. V. Falzon, « Standard of Review on Judicial Review or Appeal », dans *Administrative Justice Review Background Papers : Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), p. 32-33). Les cours de justice chargées de contrôles ont parfois également exprimé de la frustration à l'égard de ce qu'elles perçoivent comme un manque apparent de clarté dans ce domaine, comme l'illustrent les propos du juge Barry dans *Miller c. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (C.S.T.-N. (1re inst.)), par. 27 :

> [TRADUCTION] Tenter de comprendre les distinctions établies par la cour entre la décision « manifestement déraisonnable », « raisonnable » ou « correcte » s'apparente parfois à observer un jongleur maniant trois objets transparents. Selon l'éclairage, à certains moments l'on croit apercevoir les objets. Mais à d'autres, l'on ne voit rien et l'on se demande en fait s'il y a vraiment trois objets distincts.

64

La Cour ne peut rester insensible aux préoccupations ou critiques constantes de la communauté juridique concernant l'état de la jurisprudence canadienne dans une partie importante du droit. Il est vrai que les parties au présent pourvoi n'ont pas présenté d'observations qui remettaient en cause la jurisprudence en matière de normes de contrôle. Il n'en reste pas moins qu'à l'occasion une analyse ou un examen en profondeur de l'état du droit

representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

– the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and,

– the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less

peut s'avérer nécessaire malgré l'absence d'observations particulières dans une espèce donnée. Étant donné leur vaste domaine d'application, les règles de droit qui régissent les normes de contrôle doivent être prévisibles, pratiques et cohérentes. Les parties à un litige n'ont souvent aucun intérêt personnel à assurer la cohérence globale de notre jurisprudence en matière de normes de contrôle et l'uniformité de son application. Leur objectif, bien compréhensible, consiste à démontrer en quoi les positions qu'elles avancent sont conformes aux règles de droit telles qu'elles existent, et non de suggérer des améliorations à ces règles pour le bénéfice du bien commun. La tâche d'assurer le caractère prévisible, pratique et cohérent de la jurisprudence incombe en premier lieu aux juges, tâche qu'ils accomplissent de préférence avec, mais exceptionnellement sans le concours des avocats. J'ajouterais que, même si les parties n'ont pas présenté d'observations sur l'analyse que je me propose d'entreprendre dans les présents motifs, elles n'en subiront aucun préjudice.

Dans ce contexte, le présent pourvoi nous offre l'occasion de réévaluer les contours des différentes normes de contrôle, ce qui s'impose particulièrement, selon moi, à l'égard de la norme du manifestement déraisonnable. J'examinerai donc :

– l'interaction entre la décision correcte et la décision manifestement déraisonnable, tant en l'espèce que dans le contexte du contrôle judiciaire de la décision d'une instance juridictionnelle en général, afin de clarifier la relation conflictuelle entre ces deux normes;

– la distinction entre le manifestement déraisonnable et le raisonnable *simpliciter*, qui demeure nébuleuse malgré bien des tentatives d'explication.

Comme le confirme l'analyse qui suit, à l'heure actuelle, la norme de la décision manifestement déraisonnable n'offre pas aux cours de justice des paramètres suffisamment clairs pour contrôler les décisions des tribunaux administratifs. Dès le début, la norme du manifestement déraisonnable a parfois été confondue, de manière préoccupante, avec ce qui devrait être son antithèse, la norme de la décision correcte. En outre, il devient de plus en plus

deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. *The Two Standards of Review Applicable in This Case*

Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions — for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation — typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

difficile de distinguer la norme de ce qui est réputé représenter sa contrepartie, commandant une moins grande déférence, la norme de la décision raisonnable *simpliciter*. Il reste à voir comment il est possible de résoudre ces difficultés.

II. Analyse

A. *Les deux normes de contrôle applicables en l'espèce*

Deux normes de contrôle entrent en jeu en l'espèce, et certaines précisions s'imposent au préalable sur l'application de la norme de la décision correcte. Comme je l'ai déjà signalé brièvement, certaines questions de droit fondamentales — notamment en ce qui concerne la Constitution et les droits de la personne, de même que les libertés civiles, ainsi que d'autres questions revêtant une importance centrale pour le système juridique dans son ensemble, comme celle de la remise en cause — commandent généralement l'application de la norme de la décision correcte. À mon avis, la cour de justice chargée du contrôle devra rarement se livrer à l'analyse pragmatique et fonctionnelle de manière exhaustive pour conclure en ce sens. Je ne voudrais pas, cependant, que l'on déduise de mes propos à ce sujet ou des motifs des juges majoritaires en l'espèce qu'il faut appliquer la norme de la décision correcte chaque fois qu'un arbitre ou une autre instance administrative spécialisée est appelé à interpréter et à appliquer les règles générales de la common law ou du droit civil. S'il en allait ainsi, le contrôle judiciaire selon la norme de la décision correcte verrait sa portée s'accroître sensiblement. Une telle approche rendrait les tribunaux administratifs moins aptes, spécialement dans des domaines complexes et très spécialisés comme le droit du travail, à apporter à un problème juridique une solution originale particulièrement adaptée au contexte. À mon sens, dans bien des cas, la norme de contrôle appropriée à l'application des règles générales de la common law et du droit civil par un tribunal spécialisé ne devrait pas être la norme de la décision correcte mais plutôt celle de la décision raisonnable. De brèves explications s'imposent.

(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC*"), at pp. 960-61; and *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47, at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate

(1) La norme de la décision correcte

Notre Cour a à maintes reprises souligné l'importance de la déférence judiciaire dans le domaine du droit du travail. En général, les lois régissant les relations de travail confèrent aux arbitres et aux commissions ou conseils des relations de travail de larges pouvoirs pour le règlement de la vaste gamme de problèmes susceptibles de se poser dans ce domaine et elles font bénéficier les décisions de ces instances de la protection d'une clause privative. Si le législateur en a décidé ainsi c'est que, comme l'a signalé le juge Cory dans *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, par. 35, le domaine des relations de travail est « délicat et explosif » et « [i]l est essentiel de disposer d'un moyen de pourvoir à la prise de décisions rapides, par des experts du domaine sensibles à la situation, décisions qui peuvent être considérées définitives par les deux parties » (voir également *Canada (Procureur général) c. Alliance de la fonction publique du Canada*, [1993] 1 R.C.S. 941 (« *AFPC* »), p. 960-961; *Ivanhoe inc. c. TUAC, section locale 500*, [2001] 2 R.C.S. 565, 2001 CSC 47, par. 32). Il est donc rare qu'une cour de justice appelée à contrôler une décision en matière de relations de travail applique la norme de la décision correcte.

En l'espèce et dans *Ontario c. S.E.E.F.P.O.*, je conviens qu'il y a lieu d'appliquer la norme de la décision correcte à la décision de l'arbitre relative à la remise en cause de la déclaration de la culpabilité, mais un certain nombre de mises en garde me paraissent indispensables. Tout d'abord, même si l'arbitre était tenu de rendre une décision correcte relativement à cette question de droit, ceci n'entraînait pas pour autant l'application d'un contrôle fondé sur la norme de la décision correcte à l'ensemble de sa décision (voir *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157, par. 48). La déférence s'imposait à l'égard de la décision de l'arbitre sur l'existence d'un motif de congédiement valable dans le cas d'Oliver. Dire que, compte tenu des faits de l'espèce, la décision incorrecte de l'arbitre concernant la question de

question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp.*, *supra*, at para. 48).

Second, it bears repeating that the application of correctness here is very much a product of the nature of this particular legal question: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan*, *supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention"

droit a eu une incidence sur le caractère raisonnable de l'ensemble de sa décision diffère sensiblement de l'affirmation selon laquelle la décision de l'arbitre sur la question ultime du congédiement injustifié devait être correcte. L'absence d'une telle distinction risque de provoquer un « élargissement considérable et injustifié des possibilités de contrôler les décisions administratives » (voir *Société Radio-Canada*, précité, par. 48).

70 Deuxièmement, il importe de rappeler que, en l'espèce, l'application de la norme de la décision correcte est intimement liée à la nature de cette question de droit en particulier : la déclaration de culpabilité d'un employé peut-elle être remise en cause dans le cadre d'un arbitrage? Cette question de droit exigeait l'interprétation de la loi constitutive de l'instance administrative, une mesure législative extrinsèque, ainsi que d'un ensemble complexe de règles de common law et d'une jurisprudence contradictoire. Qui plus est, il s'agit d'une question d'une importance fondamentale, de grande portée et susceptible d'avoir de graves répercussions sur l'administration de la justice dans son ensemble. En d'autres termes, cette question mettait en jeu l'expertise et le rôle essentiel des cours de justice. L'on ne saurait prétendre que le décideur jouit à son égard d'une quelconque compétence ou expertise institutionnelle relative. Par conséquent, sa décision doit être correcte sur ce point.

71 Cependant, notre Cour s'est montrée très prudente en signalant que toute décision sur une question de droit n'était pas assujettie à la norme de la décision correcte. Tout d'abord, comme notre Cour l'a fait observer, dans bien des cas il est difficile d'établir une ligne de démarcation claire entre une question de fait, une question mixte de fait et de droit et une question de droit; en fait, ces questions sont souvent inextricablement liées (voir *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, par. 37; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 37). De manière encore plus précise, comme l'a écrit le juge Bastarache dans *Pushpanathan*, précité, « il peut convenir de faire preuve d'un degré élevé de retenue même à l'égard de pures questions de

(para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan*, *supra*, at para. 34, once a "broad relative expertise has been established", this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324. This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard", an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education*, *supra*, at para. 39; *Canadian Broadcasting Corp.*, *supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe*, *supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600, endorsed in *Pushpanathan*, *supra*, at para. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop

droit, si d'autres facteurs de l'analyse pragmatique et fonctionnelle semblent indiquer que cela correspond à l'intention du législateur » (par. 37). Le facteur crucial à cet égard demeure l'expertise.

Comme le juge Bastarache l'a signalé dans *Pushpanathan*, précité, par. 34, « une fois établie l'expertise relative », notre Cour s'est montrée disposée à faire preuve « de beaucoup de retenue même dans des cas faisant jouer des questions très générales d'interprétation de la loi, si le texte en cause est la loi constitutive du tribunal » : voir par exemple *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, et *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324. Notre Cour a par ailleurs statué que même si les interprétations de mesures législatives intrinsèques par les tribunaux administratifs « peuvent généralement faire l'objet d'un examen selon la norme de la décision correcte », des exceptions peuvent exister à cette règle générale et la déférence peut s'imposer lorsque « la loi est intimement liée au mandat du tribunal et [que] celui-ci est souvent appelé à l'examiner » : voir *Conseil de l'éducation de Toronto (Cité)*, précité, par. 39; *Société Radio-Canada*, précité, par. 48. Et, ce qui importe peut-être davantage à la lumière des questions que soulève le présent pourvoi, notre Cour a décidé que la déférence peut s'imposer lorsque, avec le temps, le tribunal administratif a acquis une expertise dans l'application d'une règle générale de common law ou de droit civil dans son domaine spécialisé : voir *Ivanhoe*, précité, par. 26; la juge L'Heureux-Dubé (dissidente), dans *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554, p. 599-600, motifs approuvés dans *Pushpanathan*, précité, par. 37.

Dans le domaine des relations de travail, les questions générales relevant de la common law et du droit civil se trouvent souvent étroitement imbriquées avec celles qui relèvent plus particulièrement du droit du travail. Le règlement de questions de droit générales peut donc constituer un aspect important de la tâche dévolue à certains tribunaux administratifs dans ce domaine. L'assujettissement de toutes ces décisions à la norme de décision correcte donnerait au contrôle judiciaire une portée

a body of jurisprudence that is tailored to the specialized context in which they operate.

Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentiality the holding of this Court in *Ivanhoe*, *supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890). This appeal does not represent a departure from this general principle.

The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan*, *supra*, at para. 49; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71, at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can

beaucoup plus grande que celle voulue par le législateur, ce qui affaiblirait fondamentalement la capacité des tribunaux du travail à développer une jurisprudence adaptée à ce domaine spécialisé.

74 Lorsqu'un tribunal administratif doit trancher une question de droit générale dans l'accomplissement de son mandat légal, sa décision fera généralement l'objet de déférence (surtout en présence d'une clause privative), pour autant que la question soit étroitement liée au domaine d'expertise fondamentale du tribunal. C'est ce qu'a essentiellement conclu notre Cour dans *Ivanhoe*, précité, où, après avoir relevé l'existence d'une clause privative, la juge Arbour a ajouté que, même si la question en litige relevait tant du droit civil que du droit du travail, les commissaires du travail et le tribunal du travail avaient droit à la déférence judiciaire parce qu'ils « ont développé [. . .] une expertise particulière en la matière, adaptée au contexte spécifique des relations de travail, qui n'est pas partagée par les cours de justice » (par. 26; voir également *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890). Dans le présent pourvoi, notre Cour ne déroge pas à ce principe général.

75 La dernière mise en garde qui s'impose selon moi a trait à l'application de deux normes de contrôle en l'espèce. Notre Cour a reconnu à un certain nombre d'occasions que les différentes décisions d'un tribunal administratif dans une affaire donnée peuvent commander différents degrés de déférence, selon les circonstances (voir *Pushpanathan*, précité, par. 49; *Macdonell c. Québec (Commission d'accès à l'information)*, [2002] 3 R.C.S. 661, 2002 CSC 71, par. 58, les juges Bastarache et LeBel, dissidents). Ce pourrait être le cas dans la présente affaire où l'arbitre a statué sur une question de droit fondamentale échappant à son domaine d'expertise. Cette question de droit, malgré son caractère fondamental pour l'appréciation de la décision dans son ensemble, se distingue aisément d'une deuxième question pour laquelle la décision de l'arbitre appelait la déférence : Oliver a-t-il été congédié pour un motif valable?

76 Toutefois, je le répète, même si la question tranchée par l'arbitre en l'espèce peut se scinder en

be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

(2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

(a) *The Definitions of Patent Unreasonableness*

78 This Court has set out a number of definitions of "patent unreasonableness", each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (p. 237). Cory J.'s characterization in *PSAC*, *supra*, of patent unreasonableness as a "very strict test",

deux questions distinctes dont l'une peut faire l'objet d'un contrôle judiciaire fondé sur la norme de la décision correcte, cela n'arrive que rarement. Les divers éléments qui sous-tendent une décision ont plus de chance d'être inextricablement liés les uns aux autres, en particulier dans un domaine complexe comme celui des relations de travail, de sorte que la cour de justice chargée du contrôle doit considérer que la décision du tribunal forme un tout.

(2) La norme de la décision manifestement déraisonnable

Dans les présents motifs, je me penche sur la manière dont le critère de la décision manifestement déraisonnable s'applique à l'heure actuelle, compte tenu des liens existant entre cette norme et celles de la décision correcte et de la décision raisonnable *simpliciter*. Mes observations à cet égard valent dans le contexte du contrôle judiciaire de la décision d'une instance administrative de nature juridictionnelle.

a) *Les définitions du caractère manifestement déraisonnable*

Notre Cour a donné un certain nombre de définitions du « caractère manifestement déraisonnable », chacune d'elles devant indiquer le degré élevé de déférence inhérent à cette norme de contrôle. L'on observe un chevauchement entre les définitions, qui sont souvent combinées les unes aux autres. Elles appartiennent à deux catégories principales. La première met l'accent sur l'importance du défaut requis pour qu'une décision soit manifestement déraisonnable. La deuxième insiste sur le caractère « flagrant ou évident » du défaut et, par conséquent, sur le caractère plus ou moins envahissant du contrôle nécessaire à sa mise au jour.

Pour analyser les principales définitions, je mettrais dans la première catégorie celle du juge Dickson (plus tard Juge en chef) dans *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227 (« *SCFP* ») : une décision n'est manifestement déraisonnable que si elle est « déraisonnable au point de ne pouvoir rationnellement s'appuyer sur la législation pertinente »

which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-64), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

In the second category, I would place Iacobucci J.'s description in *Southam*, *supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

More recently, in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand", drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

(p. 237). Dans *AFPC*, précité, le juge Cory qualifie la norme de la décision manifestement déraisonnable de « critère très strict », qui n'est respecté que lorsqu'une décision est « clairement irrationnelle, c'est-à-dire, de toute évidence non conforme à la raison » (p. 963-964). Cette définition appartient également à la première catégorie (bien qu'elle puisse également faire partie de la seconde, selon l'interprétation qu'on en fait).

80 Figure dans la seconde catégorie la définition proposée par le juge Iacobucci dans *Southam*, précité, savoir une décision entachée, de manière « flagrante ou évidente » d'un défaut : « Si le défaut est manifeste au vu des motifs du tribunal, la décision de celui-ci est alors manifestement déraisonnable. Cependant, s'il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable » (par. 57).

81 Plus récemment, dans *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, le juge Iacobucci a qualifié de manifestement déraisonnable la décision qui est « à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir », en faisant appel aux deux catégories susmentionnées pour concevoir cette définition. Voici ses commentaires à ce propos (au par. 52) :

> Dans *Southam*, précité, par. 57, la Cour explique que la différence entre une décision déraisonnable et une décision manifestement déraisonnable réside « dans le caractère flagrant ou évident du défaut ». Autrement dit, dès qu'un défaut manifestement déraisonnable a été relevé, il peut être expliqué simplement et facilement, de façon à écarter toute possibilité réelle de douter que la décision est viciée. La décision manifestement déraisonnable a été décrite comme étant « clairement irrationnelle » ou « de toute évidence non conforme à la raison » (*Canada (procureur général) c. Alliance de la Fonction publique du Canada*, [1993] 1 R.C.S. 941, p. 963-964, le juge Cory; *Centre communautaire juridique de l'Estrie c. Sherbrooke (Ville)*, [1996] 3 R.C.S. 84, par. 9-12, le juge Gonthier). Une décision qui est manifestement déraisonnable est à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir.

82 Similarly, in *C.U.P.E. v. Ontario*, *supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam*, *supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan*, *supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario*, *supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

(b) *The Interplay Between the Patent Unreasonableness and Correctness Standards*

84 As I observed in *Chamberlain*, *supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain*, *supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Dr. Q*, *supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

De même, dans *S.C.F.P. c. Ontario*, précité, le juge Binnie a lié les deux catégories en qualifiant de décision manifestement déraisonnable « celle qui comporte un défaut "flagrant et évident" (*Southam*, précité, par. 57) et qui est à ce point viciée, pour ce qui est de mettre à exécution l'intention du législateur, qu'aucun degré de déférence judiciaire ne peut justifier logiquement de la maintenir (*Ryan*, précité, par. 52) » (par. 165 (je souligne)).

L'on a suggéré à propos des différentes formulations du critère par notre Cour qu'« [i]l s'[agissait] non pas de critères indépendants ou de rechange, mais simplement de façons d'exprimer la seule question qui se pose : qu'est-ce qui fait qu'une chose est manifestement déraisonnable? » (*S.C.F.P. c. Ontario*, précité, par. 20, le juge Bastarache, dissident). Bien que ce puisse être effectivement le cas, il me paraît néanmoins important de reconnaître que, en raison de ce qui constitue, sous certains rapports, des différences subtiles, mais quand même assez importantes entre les diverses réponses de notre Cour à cette question, les paramètres du « manifestement déraisonnable » ne sont pas aussi clairs qu'ils pourraient l'être. Ce qui a contribué à rendre de plus en plus difficile l'application de cette norme, ce sur quoi je me penche ci-après.

b) *L'interaction entre la norme du manifestement déraisonnable et celle de la décision correcte*

Comme je l'ai fait remarquer dans *Chamberlain*, précité, la différence entre le contrôle selon la norme de la décision correcte et le contrôle selon la norme de la décision manifestement déraisonnable est « intuitive et relativement facile à constater » (*Chamberlain*, précité, par. 204, le juge LeBel). Ces normes se situent aux deux extrémités de l'échelle de la déférence judiciaire, un contrôle judiciaire serré s'imposant dans le cas de la première et la question étant laissée à l'appréciation quasi exclusive du décideur dans le cas de la seconde (voir *Dr Q*, précité, par. 22). Malgré la frontière conceptuelle qui sépare clairement ces deux normes, en pratique, il n'est pas toujours aussi facile que l'on pourrait le croire de les distinguer.

(i) Patent Unreasonableness and Correctness in Theory

In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *CUPE*, *supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see D. J. Mullan, *Administrative Law* (2001), at p. 69; see also H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-86).

Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*CUPE*, *supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 ("*Nipawin*"), at p. 389, and in *CUPE*, *supra*, at p. 237:

> . . . acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment" in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969]

(i) La norme de la décision manifestement déraisonnable et celle de la décision correcte, en théorie

85 Pour comprendre l'interaction entre la norme du manifestement déraisonnable et celle de la décision correcte, il vaut la peine de signaler que, dès le début, il semble avoir existé, à tout le moins, un certain degré d'incertitude conceptuelle quant à la juste portée du contrôle selon la norme de la décision manifestement déraisonnable. Dans *SCFP*, précité, le juge Dickson a défini le caractère manifestement déraisonnable de deux manières, qui tendaient à orienter la mise en application de ce critère dans des directions opposées (voir D. J. Mullan, *Administrative Law* (2001), p. 69; voir également H. W. MacLauchlan, « Transforming Administrative Law : The Didactic Role of the Supreme Court of Canada » (2001), 80 *R. du B. can.* 281, p. 285-286).

86 Le professeur Mullan explique que, d'une part, le juge Dickson a justifié le contrôle visant à faire ressortir le caractère manifestement déraisonnable par le fait que les dispositions législatives sont souvent ambiguës et peuvent donc se prêter à de multiples interprétations; la question que doit poser la cour est de savoir si l'interprétation du tribunal peut « rationnellement s'appuyer sur la législation pertinente » (*SCFP*, précité, p. 237). D'autre part, le juge Dickson a également assimilé la décision manifestement déraisonnable à une décision entachée de certaines erreurs emportant annulation, comme celles qu'il avait auparavant énumérées dans *Union internationale des employés des services, local n^o^ 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382 (« *Nipawin* »), p. 389, et *SCFP*, précité, p. 237 :

> . . . le fait d'agir de mauvaise foi, de fonder la décision sur des données étrangères à la question, d'omettre de tenir compte de facteurs pertinents, d'enfreindre les règles de la justice naturelle ou d'interpréter erronément les dispositions du texte législatif de façon à entreprendre une enquête ou répondre à une question dont il n'est pas saisi.

87 Curieusement, comme le fait observer Mullan, cette énumération [TRADUCTION] « reprend la liste des erreurs emportant annulation que lord Reid a dressée dans l'arrêt de principe de la

2 A.C. 147. *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a correctness basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*", [1970] S.C.R. 425 (see Mullan, *Administrative Law*, *supra*, at pp. 69-70; see also *National Corn Growers*, *supra*, at p. 1335, *per* Wilson J.).

88 In characterizing patent unreasonableness in *CUPE*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law*, *supra*, at p. 70).

89 If Dickson J.'s reference to *Anisminic* in *CUPE*, *supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 ("*Paccar*").

90 In *Paccar*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as

Chambre des lords » *Anisminic Ltd. c. Foreign Compensation Commission*, [1969] 2 A.C. 147. Cet arrêt [TRADUCTION] « est habituellement considéré comme fondamental, en droit anglais, pour ce qui est de l'assujettissement de toutes les décisions relatives à une question de droit au contrôle selon la norme de la décision correcte » (je souligne). En fait, notre Cour [TRADUCTION] « a cité en l'approuvant cet extrait des motifs de lord Reid et l'a invoqué pour justifier l'intervention judiciaire dans une affaire qualifiée de "point culminant" du contrôle "activiste" au Canada : *Metropolitan Life Insurance Co. c. International Union of Operating Engineers, Local 796* », [1970] R.C.S. 425 (voir Mullan, *Administrative Law*, *op. cit.*, p. 69-70; voir également *National Corn Growers*, précité, p. 1335, la juge Wilson).

Dans *SCFP*, pour caractériser la norme du manifestement déraisonnable, le juge Dickson a ensuite invoqué simultanément un degré élevé de déférence (choix parmi un ensemble de solutions raisonnables possibles) et une attitude historiquement interventionniste (fondée sur l'existence d'erreurs emportant annulation). C'est pourquoi, pour citer Mullan, [TRADUCTION] « il est facile de comprendre que le renvoi à *Anisminic* soit problématique » (Mullan, *Administrative Law*, *op. cit.*, p. 70).

Si, dans *SCFP*, précité, le renvoi du juge Dickson à *Anisminic* suggère la présence d'une certaine ambiguïté quant à la portée prévue du contrôle selon la norme du manifestement déraisonnable, des jugements ultérieurs ont également fait ressortir l'existence d'un rapport quelque peu problématique entre cette norme et celle de la décision correcte pour ce qui est de l'établissement et, surtout, de l'application de la démarche que commande la norme du manifestement déraisonnable. La tension à cet égard tient en partie à des désaccords sur l'hypothèse de départ du contrôle selon la norme du manifestement déraisonnable. *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983 (« *Paccar* »), en est un bon exemple.

Dans *Paccar*, le juge Sopinka (motifs concourants du juge Lamer (plus tard Juge en chef)) a dit que, dans le cadre de la démarche appropriée

one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*CUPE*, *supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20).

pour l'application de la norme du manifestement déraisonnable, la cour de justice se demande tout d'abord si la décision du tribunal administratif est correcte : « la retenue judiciaire n'entre en jeu que si la cour de justice est en désaccord avec le tribunal administratif. Ce n'est qu'à ce moment-là qu'il est nécessaire de se demander si l'erreur (ainsi découverte) est raisonnable ou déraisonnable » (p. 1018). Comme Mullan le fait observer, cette démarche soulève des inquiétudes en ce que non seulement elle est entièrement incompatible [TRADUCTION] « avec la position du juge Dickson dans [*SCFP*, précité], savoir qu'il arrive souvent qu'un problème d'interprétation législative n'appelle pas qu'une seule solution, mais elle suppose également la prépondérance de la cour de justice sur l'organisme ou le tribunal administratif lorsqu'il s'agit de circonscrire la portée des dispositions en cause » (Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 20).

In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but . . . then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20; see also D. J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-70). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see M. Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 *Queen's L.J.* 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

91 À mon avis, cette démarche comporte des difficultés supplémentaires. Il peut être difficile pour une cour de justice de conclure qu'[TRADUCTION] « une erreur a été commise [. . .] et de s'abstenir de la corriger au motif qu'elle n'est pas aussi importante qu'elle aurait pu l'être » (voir Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 20; voir également D. J. Mullan, « Of Chaff Midst the Corn : American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review » (1991), 45 Admin. L.R. 264, p. 269-270). De plus, conclure tout d'abord que la décision du tribunal est incorrecte peut orienter l'analyse subséquente visant à déterminer si d'autres interprétations sont raisonnables (voir M. Allars, « On Deference to Tribunals, With Deference to Dworkin » (1994), 20 *Queen's L.J.* 163, p. 187). La distinction cruciale entre ce qui, de l'avis de la cour de justice, est « incorrect » et ce qui « n'est pas rationnellement défendable » est alors compromise.

The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J.

92 L'autre solution veut que la cour de justice s'abstienne de décider si la décision du tribunal administratif est « correcte » (voir Allars, *loc. cit.*, p. 197). Il s'agit essentiellement de la

concurring) took to patent unreasonableness in *Paccar*, *supra*. He wrote, at pp. 1004 and 1005:

> The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.
>
> . . .
>
> I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 ("*CUPE, Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*CUPE, Local 301*, *supra*, at para. 59; see also *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 771 and 774-75).

94 This view was recently forcefully rearticulated in *Ryan*, *supra*. Iacobucci J. wrote, at paras. 50-51:

> [W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. . . . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

démarche préconisée par le juge La Forest (motifs concourants du juge en chef Dickson) dans *Paccar*, précité. Il a dit aux p. 1004 et 1005 :

> Les cours de justice doivent prendre soin de vérifier si la décision du tribunal a un fondement rationnel plutôt que de se demander si elles sont d'accord avec celle-ci.
>
> . . .
>
> J'estime qu'il n'est pas nécessaire de déterminer de façon concluante si la décision de la Commission est « juste » en ce sens que c'est la décision à laquelle je serais parvenu si la cause avait été entendue quant au fond par notre Cour. Il suffit de dire que le résultat auquel la Commission est arrivée n'est pas manifestement déraisonnable.

Cette thèse, du moins pour l'essentiel, l'a emporté. Comme l'a fait remarquer la juge L'Heureux-Dubé dans *Syndicat canadien de la fonction publique, section locale 301 c. Montréal (Ville)*, [1997] 1 R.C.S. 793 (« *SCFP, section locale 301* »), « notre Cour l'a mentionné à plusieurs reprises, lorsqu'on évalue si une action de nature administrative est manifestement déraisonnable, l'objectif n'est pas de réviser la décision ou l'action quant au fond mais plutôt de déterminer si elle est manifestement déraisonnable, étant donné les dispositions législatives régissant ce conseil en particulier et la preuve présentée devant lui » (par. 53). En d'autres termes, l'application de la norme du manifestement déraisonnable ne doit pas « devenir un moyen pour permettre à une cour de justice de substituer sa propre opinion » (*SCFP, section locale 301*, précité, par. 59; voir également *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756, p. 771 et 774-775).

Récemment, notre Cour a reformulé ce point de vue avec fermeté dans *Ryan*, précité, par la voix du juge Iacobucci (aux par. 50-51) :

> [L]orsqu'elle décide si une mesure administrative est déraisonnable, la cour ne doit à aucun moment se demander ce qu'aurait été la décision correcte. [. . .] La norme de la décision raisonnable n'implique pas que l'instance décisionnelle dispose simplement d'une « marge d'erreur » par rapport à ce que la cour estime être la solution correcte.

. . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

I think it important to emphasize that neither the case at bar, nor the companion case of *Ontario v. O.P.S.E.U.*, should be misinterpreted as a retreat from the position that in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were two standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness — whether the employees' criminal convictions could be relitigated — and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness — whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "rationally supported"; this standard cannot be met where, as here, what supports the adjudicator's decision — indeed, what that decision is wholly premised on — is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable — a conclusion that flows from the applicability of two separate standards of review — is very different from suggesting

. . . À la différence d'un examen selon la norme de la décision correcte, il y a souvent plus d'une seule bonne réponse aux questions examinées selon la norme de la décision raisonnable. [. . .] Même dans l'hypothèse où il y aurait une réponse meilleure que les autres, le rôle de la cour n'est pas de tenter de la découvrir lorsqu'elle doit décider si la décision est déraisonnable.

Même si le juge Iacobucci a tenu ces propos en liaison avec la norme de la décision raisonnable *simpliciter*, ils s'appliquent également à la norme de la décision manifestement déraisonnable, qui commande une plus grande déférence.

Il me paraît important de préciser que ni les présents motifs ni ceux de l'arrêt connexe *Ontario c. S.E.E.F.P.O.* n'entendent déroger au principe voulant que la cour appelée à contrôler une décision selon la norme actuelle du manifestement déraisonnable n'ait pas à déterminer la décision « correcte ». Dans chacun de ces pourvois, deux normes de contrôle étaient en cause : la norme de la décision correcte s'appliquait à une question de droit fondamentale — les déclarations de culpabilité des employés pouvaient-elles être remises en cause — et celle de la décision manifestement déraisonnable s'appliquait à une question relevant de l'expertise même du tribunal — les employés avaient-ils été congédiés pour un motif valable. Comme l'a estimé la juge Arbour, l'omission des arbitres de trancher correctement la question fondamentale de la remise en cause était suffisante pour conclure au caractère manifestement déraisonnable de leurs décisions. En effet, dans des circonstances comme celles de la présente espèce, il ne peut en être qu'ainsi : les décisions incorrectes que les arbitres ont rendues relativement à la question de droit fondamentale ont entièrement fondé leurs analyses juridiques, de même que leurs conclusions quant à savoir si les employés avaient été congédiés pour un motif valable. Pour résister à l'analyse selon la norme du manifestement déraisonnable, la décision doit avoir un fondement rationnel; ce critère ne peut être respecté lorsque, comme en l'espèce, ce qui fonde la décision du décideur — et la sous-tend de fait en entier — est une conclusion de droit qui aurait dû être tirée correctement, ce qui n'a pas été le cas. Cependant, l'affirmation qu'en pareils cas une décision sera manifestement déraisonnable — une conclusion qui découle

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that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *Paccar*, at p. 1004 — "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" — the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, are illustrative:

> Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed,

de l'applicabilité de deux normes de contrôle distinctes — diffère sensiblement de la proposition que, avant d'appliquer la norme du manifestement déraisonnable, la cour doive décider si la décision du tribunal est correcte ou non ou que, pour appliquer cette norme, la cour doive chercher, au cours de son analyse, à déterminer la décision correcte. En d'autres mots, pour les motifs exposés précédemment, l'application de la norme du manifestement déraisonnable ne saurait reposer sur la conclusion que la décision est incorrecte.

(ii) La norme de la décision manifestement déraisonnable et celle de la décision correcte, en pratique

Bien que notre Cour incline désormais à partager l'avis du juge La Forest dans *Paccar*, p. 1004 — « [l]es cours de justice doivent prendre soin [pour l'application de la norme du manifestement déraisonnable] de vérifier si la décision du tribunal a un fondement rationnel plutôt que de se demander si elles sont d'accord avec celle-ci » —, le problème de la tension entre la norme du manifestement déraisonnable et celle de la décision correcte n'a pas été entièrement résolu. Le glissement de l'une à l'autre ressort encore parfois de la manière dont est appliquée la norme de la décision manifestement déraisonnable.

Après avoir analysé un certain nombre de décisions récentes, les observateurs ont signalé l'intensité et le caractère fondamental du contrôle en se demandant si notre Cour appliquait la norme de la décision manifestement déraisonnable en faisant preuve, dans les faits, de déférence. Je cite, à titre d'exemple, les observations du professeur Lorne Sossin sur l'application de ce critère dans *Canada Safeway Ltd. c. SDGMR, section locale 454*, [1998] 1 R.C.S. 1079 :

> [TRADUCTION] Après avoir établi que la déférence s'imposait à l'égard de l'interprétation des dispositions législatives par le Conseil, la Cour a procédé à l'analyse approfondie de cette interprétation. Les juges majoritaires ont estimé que le Conseil avait mal interprété l'expression « mise à pied déguisée » et avait omis d'accorder suffisamment d'importance aux dispositions de la convention collective. Leurs motifs expliquent clairement la préférence d'une autre interprétation que celle

there is very little evidence of the Court according deference to the Board's interpretation of its own statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.

(L. Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 *S.C.L.R.* (2d) 37, at p. 49)

Professor Ian Holloway makes a similar observation with regard to *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644:

> In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she . . . reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law.*

(I. Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 *Man. L.J.* 28, at pp. 64-65 (emphasis in original); see also Allars, *supra*, at p. 178.)

At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review

retenue par le Conseil. Ils sont moins explicites quant à l'absence de fondement rationnel de cette dernière. En fait, la Cour ne fait guère preuve de déférence vis-à-vis de l'interprétation, par le Conseil, de sa propre loi constitutive ou de sa détermination du poids à accorder aux dispositions de la convention collective. *Canada Safeway* soulève la question habituelle : comment une cour de justice doit-elle manifester sa déférence, en particulier dans le domaine des relations de travail?

(L. Sossin, « Developments in Administrative Law : The 1997-98 and 1998-99 Terms » (2000), 11 *S.C.L.R.* (2d) 37, p. 49)

98 Le professeur Ian Holloway formule des observations semblables relativement à *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644 :

> [TRADUCTION] Dans ses motifs, [la juge McLachlin (maintenant Juge en chef)] a cité les extraits familiers de *SCFP*, mais elle a fondé sa décision sur la jurisprudence. Elle ne s'est pas demandé si, malgré le fait qu'elle différait des décisions rendues dans d'autres ressorts, la conclusion de la Commission des relations de travail de Terre-Neuve pouvait « rationnellement » s'appuyer sur les dispositions de la *Labour Relations Act* relatives à l'obligation du successeur. Elle s'est plutôt demandé si la Commission avait correctement interprété la loi, tout comme l'aurait fait une cour d'appel pour la décision d'un juge de première instance. En d'autres termes, elle a effectivement *établi une équivalence entre la norme du manifestement déraisonnable et celle de la décision fondée en droit*.

(I. Holloway, « "A Sacred Right" : Judicial Review of Administrative Action as a Cultural Phenomenon » (1993) 22 *R.D. Man.* 28, p. 64-65 (en italique dans l'original); voir également Allars, *loc. cit.*, p. 178.)

99 Dans certains cas, lorsqu'elle applique la norme de la décision manifestement déraisonnable, l'on peut reprocher à notre Cour de faire implicitement ce qu'elle rejette explicitement, soit modifier une décision qu'elle juge incorrecte, et non seulement une décision sans fondement rationnel. Dès lors, la ligne de démarcation entre la norme de la décision correcte, d'une part, et la norme de la décision manifestement déraisonnable, d'autre part, s'obscurcit. Il est fort possible qu'un tel risque soit inhérent au

under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

(c) *The Relationship Between the Patent Unreasonableness and Reasonableness Simpliciter Standards*

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness *Simpliciter*

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario*, *supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam*, *supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute, and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear",

contrôle selon une norme de raisonnabilité, quelle qu'elle soit, étant donné la nature du processus intellectuel que ce contrôle suppose. Néanmoins, l'existence de deux normes de raisonnabilité paraît avoir accentué la tension sous-jacente entre ces deux normes et la norme de la décision correcte.

c) *L'interaction entre la norme du manifestement déraisonnable et celle de la décision raisonnable simpliciter*

La différence conceptuelle entre le contrôle selon la norme de la décision correcte et le contrôle selon la norme du manifestement déraisonnable peut être intuitive et relativement facile à constater (bien que, en pratique, des éléments du premier empiètent parfois de manière inquiétante sur le second), toutefois la frontière entre le caractère manifestement déraisonnable et le caractère raisonnable *simpliciter* est encore moins claire, même sur le plan théorique.

(i) Le fondement théorique de la norme du manifestement déraisonnable et de la norme du raisonnable *simpliciter*

L'absence d'une frontière suffisamment claire entre ces deux normes est attribuable au fait que celle du manifestement déraisonnable est apparue avant l'adoption de l'analyse pragmatique et fonctionnelle (voir *S.C.F.P. c. Ontario*, précité, par. 161) et, plus particulièrement, avant (et non en même temps que) la formulation de la norme de la décision raisonnable *simpliciter* dans *Southam*, précité. Puisque la norme de la décision manifestement déraisonnable, qui traduit une attitude de déférence judiciaire, avait été conçue par opposition uniquement à la norme de la décision correcte, il suffisait, pour en circonscrire la portée, que notre Cour mette l'accent sur l'idée que l'interprétation d'une loi ou le règlement d'un litige appelle souvent plus d'une interprétation correcte et que, dans certains cas, un tribunal administratif spécialisé peut être plus à même qu'une cour de justice de choisir entre les interprétations possibles. Le cas échéant, à condition que la décision puisse « rationnellement s'appuyer sur une interprétation qu'on peut raisonnablement considérer comme étayée par la législation

the reviewing court should not intervene (*Nipawin*, *supra*, at p. 389).

Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, that I cited above:

> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

(*Ryan*, *supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin*, *supra*, and *CUPE*, *supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe*, *supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (para. 116).

Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to

pertinente », la cour doit s'abstenir de la modifier (*Nipawin*, précité, p. 389).

102 L'adoption de la norme du raisonnable *simpliciter* a cependant changé la donne, la validité d'interprétations multiples constituant également la prémisse de cette nouvelle variante du contrôle selon la norme de la décision raisonnable. Considérons par exemple l'extrait suivant de *Ryan*, cité précédemment, sur la norme de la décision raisonnable *simpliciter* :

> À la différence d'un examen selon la norme de la décision correcte, il y a souvent plus d'une seule bonne réponse aux questions examinées selon la norme de la décision raisonnable. [. . .] Même dans l'hypothèse où il y aurait une réponse meilleure que les autres, le rôle de la cour n'est pas de tenter de la découvrir lorsqu'elle doit décider si la décision est déraisonnable.

(*Ryan*, précité, par. 51; voir également par. 55.)

Il est difficile de distinguer ces propos de ceux tenus pour décrire la norme du manifestement déraisonnable, non seulement dans les arrêts ayant établi cette norme, comme *Nipawin* et *SCFP*, précités, mais aussi dans les arrêts plus récents où notre Cour l'a appliquée. Par exemple, dans *Ivanhoe*, précité, la juge Arbour fait observer que « la reconnaissance par le législateur et les tribunaux de la multiplicité de solutions qui peuvent être apportées à un différend constitue l'essence même de la norme de contrôle du manifestement déraisonnable, qui perdrait tout son sens si l'on devait juger qu'une seule solution est acceptable » (par. 116).

103 Comme la norme du manifestement déraisonnable et celle du raisonnable *simpliciter* se fondent toutes deux sur ce principe directeur, il a été difficile de concevoir qu'elles étaient distinctes du point de vue analytique, et non sur le seul plan sémantique. Les tentatives pour établir une distinction valable entre les deux normes ont principalement revêtu deux formes reflétant les deux catégories de définitions du caractère manifestement déraisonnable. L'une d'elles distingue entre manifestement déraisonnable et raisonnable *simpliciter* en fonction de l'importance relative du défaut. L'autre met l'accent sur le caractère « flagrant ou évident » du défaut et, partant sur le caractère plus ou moins envahissant

find it. Both approaches raise their own problems.

(ii) The Magnitude of the Defect

104 In *PSAC*, *supra*, at pp. 963-64, Cory J. described a patently unreasonable decision in these terms:

> In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational. . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly'" (see Cowan, *supra*, at pp. 27-28; see also G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle* (2002), at p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), at pp. 34-35; P. Garant, *Droit administratif* (4th ed. 1996), vol. 2, at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

> . . . admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest . . . that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense

du processus d'analyse nécessaire à sa mise au jour. Chacune comporte ses propres difficultés.

(ii) L'importance du défaut

Dans *AFPC*, précité, p. 963-964, le juge Cory a décrit comme suit la décision manifestement déraisonnable :

> Dans le Grand Larousse de la langue française, l'adjectif manifeste est ainsi défini : « Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente ». On y trouve pour le terme déraisonnable la définition suivante : « Qui n'est pas conforme à la raison; qui est contraire au bon sens ». Eu égard donc à ces définitions des mots « manifeste » et « déraisonnable », il appert que si la décision qu'a rendue la Commission, agissant dans le cadre de sa compétence, n'est pas clairement irrationnelle, c'est-à-dire, de toute évidence non conforme à la raison, on ne saurait prétendre qu'il y a eu perte de compétence.

Cette définition n'était peut-être pas problématique en soi, mais elle l'est devenue lorsque la norme de la décision raisonnable *simpliciter* a vu le jour, en partie à cause de ce que les observateurs ont appelé la [TRADUCTION] « difficulté tautologique de distinguer des normes de rationalité à partir du terme "clairement" » (voir Cowan, *op. cit.*, p. 27-28; voir également G. Perrault, *Le contrôle judiciaire des décisions de l'administration : De l'erreur juridictionnelle à la norme de contrôle* (2002), p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle : Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), p. 34-35; P. Garant, *Droit administratif* (4e éd. 1996), vol. 2, p. 193).

Mullan fait allusion aux difficultés tant pratiques que théoriques du maintien d'une distinction fondée sur l'importance du défaut, c'est-à-dire sur le degré d'irrationalité d'une décision :

> [TRADUCTION] . . . il est vrai que dans *AFPC*, le juge Cory a accolé l'épithète « clairement » au mot « irrationnelle » en faisant état d'un cas particulier de décision manifestement déraisonnable. Cependant, je serais fort étonné qu'il ait employé l'adverbe « clairement » pour autre chose qu'un effet de rhétorique. En fait, soutenir que seule la décision « clairement irrationnelle » est manifestement déraisonnable, à l'exclusion de celle qui est irrationnelle simpliciter, vide de sens la règle de droit.

of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.

(Mullan, "Recent Developments in Standard of Review", *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 246, at para. 9:

I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect, and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focussed on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *Paccar*, *supra*, at p. 1004, *per* La Forest J.; *Ryan*, *supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers*, *supra*, at pp. 1369-70, *per* Gonthier J.), or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin*, *supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead

Rattacher l'adverbe « clairement » à l'adjectif « irrationnelle » est certes une tautologie. Tout comme l'« unicité », l'irrationalité est ou n'est pas. Une décision ne peut être un peu irrationnelle. En d'autres termes, je mets au défi tout juge ou avocat d'illustrer concrètement la différence entre une décision simplement irrationnelle et une décision clairement irrationnelle! Quoi qu'il en soit, il y a lieu de s'inquiéter d'un régime de contrôle judiciaire qui permet le maintien d'une décision irrationnelle, même lorsque s'applique la norme commandant le degré le plus élevé de déférence.

(Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 24-25)

Sont également pertinentes à ce propos ces observations de la juge Reed dans *Hao c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2000] A.C.F. nº 296 (QL) (1re inst.), par. 9 :

Je fais remarquer que je n'ai jamais été convaincue que la norme de la « décision manifestement déraisonnable » différait sensiblement de celle de la « décision déraisonnable ». Le mot « manifestement » veut dire clairement ou de toute évidence. Si le caractère déraisonnable d'une décision n'est ni clair, ni évident, je ne vois pas comment cette décision peut être considérée comme déraisonnable.

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Même un bref examen des caractéristiques que notre Cour a attribuées aux décisions manifestement déraisonnables et aux décisions déraisonnables fait ressortir qu'il est extrêmement difficile, sinon impossible, de maintenir entre ces deux formes du critère de la décision raisonnable une distinction véritable fondée sur la gravité du défaut et l'importance de l'écart entre la décision et une décision raisonnable. Pour l'application de l'une et l'autre des normes, la cour doit prendre soin de vérifier « si la décision du tribunal a un fondement rationnel » (voir par exemple *Paccar*, précité, p. 1004, le juge La Forest; *Ryan*, précité, par. 55-56). L'on a affirmé de la décision manifestement déraisonnable qu'elle « ne saurait être maintenue selon une interprétation raisonnable des faits ou du droit » (*National Corn Growers*, précité, p. 1369, le juge Gonthier) ni « rationnellement s'appuyer sur une interprétation qu'on peut raisonnablement considérer comme étayée par la législation pertinente » (*Nipawin*, précité, p. 389). Notre Cour a ajouté par ailleurs de la décision déraisonnable qu'« aucun des raisonnements

that tribunal to reach the decision it did" (*Ryan*, *supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *Paccar*, *supra*, at pp. 1003-4, *per* La Forest J., and *Chamberlain*, *supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal . . . is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the . . . standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan*, *supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see D. K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser — *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness

avancés pour étayer la décision ne pouvait raisonnablement amener le tribunal à rendre la décision prononcée » (*Ryan*, précité, par. 53).

Suivant les normes actuelles du manifestement déraisonnable et du raisonnable *simpliciter*, le seul désaccord avec la décision du tribunal ne suffit pas pour justifier l'intervention de la cour (voir par exemple *Paccar*, précité, p. 1003-1004, le juge La Forest, et *Chamberlain*, précité, par. 15, la juge en chef McLachlin). Lorsqu'elle appliquera la norme de la décision manifestement déraisonnable, « la cour de justice fera preuve de retenue même si, à son avis, l'interprétation qu'a donnée le tribunal [. . .] n'est pas la "bonne" ni même la "meilleure" de deux interprétations possibles, pourvu qu'il s'agisse d'une interprétation que peut raisonnablement souffrir le texte de la convention » (*Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 341). Au regard de la norme de la décision raisonnable *simpliciter*, « une décision peut satisfaire à la norme du raisonnable si elle est fondée sur une explication défendable, même si elle n'est pas convaincante aux yeux de la cour de révision » (*Ryan*, précité, par. 55). Il me paraît n'y avoir aucune différence qualitative réelle entre ces définitions d'une analyse axée sur la recherche d'un fondement rationnel; comment, par exemple, une décision non « fondée sur une explication raisonnable » (et donc « simplement » déraisonnable) se distingue-t-elle d'une décision qui ne peut « raisonnablement s'appuyer » sur la législation pertinente (et qui est donc manifestement déraisonnable)?

En fin de compte, la question essentielle demeure la même pour les deux normes : la décision du tribunal est-elle conforme à la raison? Si la réponse est négative du fait que, par exemple, les dispositions en cause ne peuvent rationnellement appuyer l'interprétation du tribunal, l'erreur entraîne l'invalidation de la décision, que la norme appliquée soit celle du raisonnable *simpliciter* ou du manifestement déraisonnable (voir D. K. Lovett, « That Curious Curial Deference Just Gets Curiouser and Curiouser — *Canada (Director of Investigation and Research) v. Southam Inc.* » (1997), 55 *Advocate (B.C.)* 541, p. 545). Puisque les deux variantes de la norme de

are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Falzon, *supra*, at p. 33).

The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam*, *supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obvious-

la décision raisonnable possèdent le même fondement théorique, l'intervention de la cour de justice s'appuiera sur sa conclusion selon laquelle la décision du tribunal déborde des limites du raisonnable, et non sur de « subtiles nuances » entre le critère du manifestement déraisonnable et celui du raisonnable *simpliciter* (voir Falzon, *loc. cit.*, p. 33).

109 L'existence de ces deux variantes de la norme de la décision raisonnable contraint la cour chargée du contrôle à continuer à affronter les grandes difficultés d'ordre pratique que comporte en soi l'établissement d'une distinction réelle entre les deux normes. Une distinction proposée sur le fondement de la gravité relative du défaut comporte non seulement des difficultés d'ordre pratique, mais soulève également des questions de principe, en ce qu'elle suppose que la norme du manifestement déraisonnable, en exigeant que la décision soit « clairement », et non « simplement », irrationnelle, offre une marge de manœuvre dans l'appréciation des décisions qui ne sont pas conformes à la raison. À cet égard, je me permets de rappeler les propos de Mullan selon lesquels [TRADUCTION] « il y a lieu de s'inquiéter d'un régime de contrôle judiciaire qui permet le maintien d'une décision irrationnelle, même lorsque s'applique la norme commandant le degré le plus élevé de déférence » (Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 25).

(iii) Le caractère flagrant ou évident du défaut

110 Il convient d'examiner un autre critère appliqué pour distinguer entre le manifestement déraisonnable et le raisonnable *simpliciter*. Dans *Southam*, précité, par. 57, notre Cour a mis l'accent sur le caractère « flagrant ou évident » du défaut :

> La différence entre « déraisonnable » et « manifestement déraisonnable » réside dans le caractère flagrant ou évident du défaut. Si le défaut est manifeste au vu des motifs du tribunal, la décision de celui-ci est alors manifestement déraisonnable. Cependant, s'il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable.

111 À mon avis, l'insistance sur le caractère « flagrant ou évident » du défaut et, partant, sur la nature

ness" of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see J. L. H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above — i.e., attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam*, *supra*, at para. 56) is not clear enough (see D. W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469, at pp. 486-87). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards."

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education*, *supra*,

plus ou moins envahissante de l'examen nécessaire à sa découverte, pour distinguer entre le manifestement déraisonnable et le raisonnable *simpliciter*, a fait naître deux difficultés. La première est de circonscrire dans chacun des cas l'examen qui est assez envahissant sans l'être trop. La deuxième se retrouve dans l'ambiguïté de la définition du caractère « flagrant ou évident » dans ce contexte : est-ce le caractère évident du défaut, le fait qu'il ressorte à première vue de la décision, qui définit fondamentalement le contrôle selon la norme du manifestement déraisonnable (voir J. L. H. Sprague, « Another View of *Baker* » (1999), 7 *Reid's Administrative Law* 163, p. 163 et 165, note 5) ou s'agit-il plutôt du caractère évident du défaut, compte tenu de la facilité avec laquelle il peut être qualifié de grave après sa découverte? Cette dernière interprétation peut poser des problèmes semblables à ceux mentionnés précédemment — l'établissement d'une échelle de l'irrationalité. La première interprétation me paraît comporter ses propres difficultés, dont je fais état ci-après.

En ce qui concerne tout d'abord la difficulté d'appliquer *de facto* une distinction fondée sur le caractère « flagrant ou évident » du défaut, d'aucuns ont déploré que le critère de l'« examen assez poussé » (voir *Southam*, précité, par. 56) ne soit pas suffisamment clair (voir D. W. Elliott, « *Suresh* and the Common Borders of Administrative Law : Time for the Tailor? » (2002), 65 *Sask. L. Rev.* 469, p. 486-487). Comme le fait observer Elliott : [TRADUCTION] « [l]a nuance entre un "examen assez poussé" et un examen simplement poussé ou moins poussé, est subtile. Elle est trop subtile pour permettre aux cours de justice de différencier clairement les trois normes. »

Notre Cour a elle-même eu du mal à effectuer, dans tous les cas d'application de la norme du manifestement déraisonnable, un examen moins poussé par rapport à l'examen « assez poussé » qui caractérise la norme du raisonnable *simpliciter*. Même si l'on a affirmé qu'un examen moins envahissant constituait la caractéristique fondamentale de la norme du manifestement déraisonnable, dans un certain nombre d'arrêts récents, y compris *Conseil*

and *Ivanhoe*, *supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers*, *supra* (see generally Mullan, "Of Chaff Midst the Corn", *supra*; Mullan, *Administrative Law*, *supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *CUPE*, *supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

Southam itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed. An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

This brings me to the second problem: in what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is

de l'éducation de Toronto (Cité) et *Ivanhoe*, précités, l'on peut qualifier d'« assez » poussée, à tout le moins, l'analyse que notre Cour a effectuée en fonction de cette norme.

114 Même avant *Southam* et l'élaboration de la norme du raisonnable *simpliciter*, un degré d'incertitude régnait quant au caractère plus ou moins approfondi que devait revêtir le contrôle en fonction de la norme du manifestement déraisonnable. Cela ressort particulièrement de *National Corn Growers*, précité (voir généralement Mullan, « Of Chaff Midst the Corn », *loc. cit.*; Mullan, *Administrative Law*, *op. cit.*, p. 72-73). Dans cette affaire, alors que, se fondant sur son interprétation de *SCFP*, précité, la juge Wilson préconise la retenue, le juge Gonthier, au nom des juges majoritaires, se livre à un examen plutôt approfondi de la décision du Tribunal canadien des importations. Selon lui, « [d]ans certains cas, le caractère déraisonnable d'une décision peut ressortir sans qu'il soit nécessaire d'examiner en détail le dossier. Dans d'autres cas, il se peut qu'elle ne soit pas moins déraisonnable mais que cela ne puisse être constaté qu'après une analyse en profondeur » (p. 1370).

115 À lui seul, *Southam* n'a pas réglé définitivement la question de l'examen plus ou moins envahissant que commande la norme du manifestement déraisonnable. L'énoncé « s'il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable » (par. 57) paraît militer contre un examen en profondeur. Cependant, l'énoncé suivant laisse planer la possibilité que, dans certains cas, la norme de la décision manifestement déraisonnable commande un examen assez approfondi : « Si la décision contrôlée par un juge est assez complexe, il est possible qu'il lui faille faire beaucoup de lecture et de réflexion avant d'être en mesure de saisir toutes les dimensions du problème » (par. 57).

116 Ces réflexions nous amènent à l'examen de la deuxième difficulté : qu'entend-on par défaut flagrant ou évident? L'arrêt *Southam* reste ambigu sur ce point. Comme je l'ai exposé, d'une part, l'on entend par décision manifestement déraison-

flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident — i.e., clear, obvious, or immediate — is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law*, *supra*, at p. 72; see also *Ivanhoe*, *supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

nable la décision qui, à première vue, est entachée d'un défaut, alors que la décision déraisonnable est celle qui est affectée d'un défaut dont la découverte exige maintes recherches ou vérifications. Toutefois, dans *Southam*, notre Cour laisse entendre par ailleurs que le caractère « flagrant ou évident » d'un défaut manifestement déraisonnable ne tient pas à la facilité de sa détection mais bien à celle de sa qualification de grave une fois qu'il a été découvert. Revêt alors une importance particulière à cet égard l'énoncé selon lequel « une fois que les contours du problème sont devenus apparents, si la décision est manifestement déraisonnable, son caractère déraisonnable ressortira » (par. 57). On reconnaît ainsi (parfois seulement tacitement, il est vrai) que ce qui doit en fait ressortir — c'est-à-dire être clair, manifeste ou flagrant — c'est l'importance du défaut lors de sa mise au jour et admettre que, dans certains cas, [TRADUCTION] « il ne sera tout simplement pas possible de comprendre l'argumentation relative au caractère manifestement déraisonnable et d'y répondre sans procéder à une analyse et à une évaluation approfondies du dossier du tribunal et de son raisonnement » (voir Mullan, *Administrative Law*, *op. cit.*, p. 72; voir également *Ivanhoe*, précité, par. 34).

Dans le récent arrêt *Ryan*, par. 52, notre Cour a apporté plus de clarté à l'arrêt *Southam*, malgré la persistance d'une part d'ambiguïté :

> Dans *Southam*, précité, par. 57, la Cour explique que la différence entre une décision déraisonnable et une décision manifestement déraisonnable réside « dans le caractère flagrant ou évident du défaut ». Autrement dit, dès qu'un défaut manifestement déraisonnable a été relevé, il peut être expliqué simplement et facilement, de façon à écarter toute possibilité réelle de douter que la décision est viciée. La décision manifestement déraisonnable a été décrite comme étant « clairement irrationnelle » ou « de toute évidence non conforme à la raison » (*Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1993] 1 R.C.S. 941, p. 963-964, le juge Cory; *Centre communautaire juridique de l'Estrie c. Sherbrooke (Ville)*, [1996] 3 R.C.S. 84, par. 9-12, le juge Gonthier). Une décision qui est manifestement déraisonnable est à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir. [Je souligne.]

This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision", to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

(*Ryan*, *supra*, at para. 53)

Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

> whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record . . . Or can one go beyond the record to demonstrate — "identify" — why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?

(D. P. Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10.)

As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See, in this regard, the comments of Mullan in "Recent Developments in Standard of Review", *supra*, at p. 4.)

Cet extrait met l'accent non plus sur le caractère évident du défaut en ce qu'il ressort à première vue de la décision, mais sur celui de l'importance du défaut une fois qu'il est découvert. Un autre passage, cependant, insiste plutôt sur le caractère plus ou moins envahissant de l'examen qui s'impose pour découvrir le défaut comme critère de distinction entre le manifestement déraisonnable et le raisonnable *simpliciter* :

> Une décision peut être déraisonnable sans être manifestement déraisonnable lorsque le défaut dans la décision est moins évident et qu'il ne peut être décelé qu'après « un examen ou [. . .] une analyse en profondeur » (*Southam*, précité, par. 57). L'explication du défaut peut exiger une explication détaillée pour démontrer qu'aucun des raisonnements avancés pour étayer la décision ne pouvait raisonnablement amener le tribunal à rendre la décision prononcée.

(*Ryan*, précité, p. 53)

118 Cette ambiguïté a incité des observateurs comme David Phillip Jones à se demander encore, à la lumière de *Ryan*, si

> [TRADUCTION] ce qui rend la décision « manifestement déraisonnable » doit ressortir à première vue du dossier [. . .] Ou peut-on tenir compte d'autres facteurs que le dossier pour établir en quoi la décision est manifestement déraisonnable? Est-ce le caractère « flagrant ou évident du défaut » qui la rend manifestement déraisonnable ou cette norme exige-t-elle une extravagance viciant à tel point la décision qu'aucun degré de déférence judiciaire ne peut justifier son maintien?

(D. P. Jones, « Notes on *Dr. Q* and *Ryan* : Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law », exposé initialement présenté à l'Institut canadien d'administration de la justice, table ronde de l'Ouest, Edmonton, 25 avril 2003, p. 10.)

119 Comme nous l'avons vu, les réponses à ces questions sont loin d'aller de soi, même sur le plan théorique. Quand jugera-t-on excessif le mal que doivent se donner pour y répondre les cours de justice et les avocats s'efforçant d'appliquer non seulement la norme du manifestement déraisonnable, mais aussi celle du raisonnable *simpliciter*? (Voir à cet égard les observations de Mullan dans « Recent Developments in Standard of Review », *loc. cit.*, p. 4.)

120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch — i.e., interpretations that fall outside the range of those that can be "reasonably", "rationally" or "tenably" supported by the statutory language — and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning"; provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan*, *supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers*, *supra*, at pp. 1369-70, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators

À défaut d'une réforme en la matière ou d'une clarification des normes, la confusion « épistémologique » entourant la relation entre le manifestement déraisonnable et le raisonnable *simpliciter* persistera. Ainsi, tant les types d'erreurs que les deux variantes de la norme de la décision raisonnable permettent de déceler — soit les interprétations qui ne peuvent être tenues pour « raisonnables », « rationnelles » ou « défendables » compte tenu des dispositions en cause — que la manière dont les deux normes sont appliquées seront en pratique, si ce n'est nécessairement en théorie, essentiellement les mêmes.

Il n'existe pas de solution facile à ce problème délicat. En dépit des mesures prises pour préciser le contenu des catégories actuelles de décisions manifestement déraisonnables ou la relation existant entre elles, cette norme et celle de la décision raisonnable *simpliciter* continueront d'avoir une raison d'être commune : il arrive souvent que le législateur s'exprime de manière équivoque et qu'une disposition [TRADUCTION] « se prête à plus d'une interprétation »; tant que l'interprétation du tribunal administratif spécialisé [TRADUCTION] « ne dépasse pas les limites d'une conception raisonnable de l'interprétation qui s'impose, rien ne justifie la cour d'intervenir » (Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 18). Il demeurera donc difficile d'assurer l'étanchéité conceptuelle de ces normes et je m'interroge sur l'utilité, au bout du compte, des efforts théoriques que cet exercice exige. De toute évidence, la décision qui ne satisfait pas à la norme du manifestement déraisonnable ne répond pas non plus à celle du raisonnable *simpliciter*, mais il paraît difficile de concevoir un cas où l'inverse n'est pas également vrai : lorsqu'une décision n'est pas fondée sur une explication défendable (et est de ce fait déraisonnable) (*Ryan*, précité, par. 55), quelle est la possibilité de sa confirmation « selon une interprétation raisonnable des faits ou du droit » (sans qu'elle soit tenue pour manifestement déraisonnable) (*National Corn Growers*, précité, le juge Gonthier, p. 1369)?

Ainsi, la norme du manifestement déraisonnable et celle du raisonnable *simpliciter* exigent des cours de justice qu'elles accordent une « attention

in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 65, *per* L'Heureux-Dubé J., citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286, and *Ryan*, *supra*, at para. 49).

Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: i.e., this decision is irrational enough to be unreasonable, but not so irrational as to be

respectueuse » aux motifs des tribunaux administratifs en se prononçant sur la rationalité de leurs décisions (voir *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 65, la juge L'Heureux-Dubé, citant D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 286, et *Ryan*, précité, par. 49).

123 Il est peu probable que, en pratique, les efforts visant à distinguer ces deux variantes de la déférence judiciaire en qualifiant l'examen que commande l'une d'elles d'« un peu plus poussé » se révèlent plus fructueux que par le passé. Fonder la distinction sur l'aisance relative avec laquelle peut être découvert le défaut crée par ailleurs un dilemme plus théorique : pourquoi un défaut ressortant à première vue de la décision justifierait-il davantage la cour d'intervenir qu'un défaut caché? Même si un défaut peut être aisément décelé en raison de sa gravité, un défaut grave ne sera pas nécessairement facile à découvrir; par ailleurs, une erreur peut être d'emblée évidente ou manifeste, mais sans avoir d'effet sérieux.

124 Par contre, préciser que le caractère « flagrant ou évident » ne tient pas à la facilité de la détection du défaut, mais bien à la facilité avec laquelle, une fois mis au jour (à l'issue d'un examen superficiel ou poussé), le défaut peut être qualifié de grave pourrait bien amener les cours de justice à soumettre plus fréquemment les décisions qu'elles contrôlent en fonction de la norme du manifestement déraisonnable à un examen aussi approfondi que celui effectué au regard de la norme du raisonnable *simpliciter*, gommant ainsi davantage la différence, s'il en est, entre les deux.

125 Préciser que le caractère « flagrant ou évident » du défaut ne renvoie pas au fait qu'il ressort à première vue de la décision, mais plutôt à son importance, une fois découvert, donne également à penser qu'il est possible et opportun qu'une cour de justice tente de recourir à une échelle de l'irrationalité lorsqu'elle évalue la décision d'un tribunal administratif. Par exemple, telle décision est suffisamment irrationnelle pour être déraisonnable, mais elle ne

overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam*, *supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficultly caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible". While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible — whether its illegibility is evident on a cursory glance or only after a close examination — the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the

l'est pas assez pour être infirmée suivant la norme du manifestement déraisonnable. Un tel résultat conduit à se demander si le législateur a pu vouloir qu'une décision irrationnelle soit maintenue. Quoi qu'il en soit, une telle interprétation paraît difficile à concilier avec les exigences d'un régime juridique fondé sur la règle de droit.

Je reconnais que le cadre établi par notre Cour depuis l'adoption, dans *Southam*, précité, d'une troisième norme de contrôle, comporte certains avantages, du moins en théorie. L'existence d'une norme intermédiaire paraît permettre aux cours de justice de mieux adapter le degré de déférence à la situation considérée. Toutefois, j'estime qu'une leçon doit être tirée de notre expérience : les inconvénients du cadre actuel, y compris les difficultés conceptuelles et pratiques découlant du chevauchement entre la norme du manifestement déraisonnable et celle du raisonnable *simpliciter*, de même que la difficulté résultant de l'interaction paradoxale entre la norme du manifestement déraisonnable et celle de la décision correcte, paraissent l'emporter sur ces avantages.

Plus particulièrement, l'impossibilité de maintenir une distinction analytique viable entre les deux variantes de la norme de la décision raisonnable a fait obstacle, en pratique, à une application présumément plus fidèle à l'intention du législateur. En fin de compte, tenter d'établir une distinction entre une décision déraisonnable et une décision manifestement déraisonnable peut être aussi stérile que d'essayer de distinguer ce qui est « illisible » de ce qui est « manifestement illisible ». Même s'il est possible d'établir, dans l'abstrait, une distinction conceptuelle, la réalité fonctionnelle veut que, une fois le texte jugé illisible — que cette illisibilité ressorte d'un examen sommaire ou uniquement d'une analyse en profondeur —, le résultat demeure le même. Il serait vain de chercher à savoir si le texte est illisible *simpliciter* ou manifestement illisible; dans l'un et l'autre des cas, il ne peut être lu.

Il ne faut pas non plus perdre de vue les fondements théoriques et l'objectif ultime du contrôle judiciaire. Le contrôle judiciaire vise à maintenir l'ordre juridique normatif en s'assurant que les

decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Dr. Q*, *supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

> [In *Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault*, *supra,* at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 805-6). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 71:

> In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". . . . A third aspect of the rule of law is . . . that "the exercise of all public

décisions des tribunaux administratifs soient rendues conformément à la procédure établie et soient défendables quant au fond. Comme l'a expliqué la juge en chef McLachlin dans *Dr Q*, précité, par. 21, les deux fondements du contrôle judiciaire sont l'intention du législateur et la primauté du droit :

> [Dans *Pushpanathan*,] [l]e juge Bastarache affirme que « [l]a détermination de la norme de contrôle que la cour de justice doit appliquer est centrée sur l'intention du législateur qui a créé le tribunal dont la décision est en cause » (par. 26). Cependant, cette méthode tient aussi dûment compte des « conséquences qui découlent d'un octroi de pouvoir » (*Bibeault*, p. 1089) et, tout en sauvegardant « [l]e rôle des cours supérieures dans le maintien de la légalité » (p. 1090), renforce le principe selon lequel il ne faut pas recourir sans nécessité à ce pouvoir de surveillance. La méthode pragmatique et fonctionnelle implique ainsi l'examen de l'intention du législateur, mais sur l'arrière-plan de l'obligation constitutionnelle des tribunaux de protéger la légalité.

En somme, la cour appelée à déterminer la norme de contrôle applicable doit rester fidèle à la volonté du législateur d'investir le tribunal administratif du pouvoir de rendre la décision. Elle doit en outre respecter le principe fondamental selon lequel, dans une société où prime le droit, le pouvoir ne doit pas être exercé de manière arbitraire.

129

Comme notre Cour l'a signalé, « la règle de droit » est une « expression haute en couleur qui, sans qu'il soit nécessaire d'en examiner ici les nombreuses implications, communique par exemple un sens de l'ordre, de la sujétion aux règles juridiques connues et de la responsabilité de l'exécutif devant l'autorité légale » (*Renvoi : Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753, p. 805-806). Notre Cour a développé sa pensée sur le sujet dans *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 71 :

> Dans le *Renvoi relatif aux droits linguistiques au Manitoba*, précité, aux pp. 747 à 752, notre Cour a défini les éléments de la primauté du droit. Nous avons souligné en premier lieu la suprématie du droit sur les actes du gouvernement et des particuliers. En bref, il y a une seule loi pour tous. Deuxièmement, nous expliquons, à la p. 749, que « la primauté du droit exige la création et le maintien d'un ordre réel de droit positif qui préserve et incorpore le principe plus général de l'ordre normatif ». [. . .] Un troisième aspect de la primauté du droit

power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

"At its most basic level", as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

> . . . societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals . . . are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness.*

(See the Honourable Madam Justice B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis in original); see also MacLauchlan, *supra*, at pp. 289-91.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (i.e., does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers*, *supra*, courts have come to accept that "statutory provisions often do not yield a single, uniquely correct interpretation" and that an expert administrative adjudicator may be "better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language" in a

[. . .] tient à ce que l'« exercice de tout pouvoir public doit en bout de ligne tirer sa source d'une règle de droit ». En d'autres termes, les rapports entre l'État et les individus doivent être régis par le droit. Pris ensemble, ces trois volets forment un principe d'une profonde importance constitutionnelle et politique.

« À son niveau le plus élémentaire », notre Cour a-t-elle ajouté, au par. 70, « le principe de la primauté du droit assure aux citoyens et résidents une société stable, prévisible et ordonnée où mener leurs activités. Elle fournit aux personnes un rempart contre l'arbitraire de l'État. »

Parce que l'État ne peut agir arbitrairement, l'exercice du pouvoir doit être justifiable. Comme la Juge en chef l'a fait observer :

> [TRADUCTION] . . . les sociétés où prime le droit se caractérisent par une certaine *obligation de justification*. Dans une société démocratique, ce pourrait bien être la caractéristique générale de la primauté du droit dans laquelle sont subsumés les idéaux plus spécifiques. Dans une société caractérisée par une culture de la justification, l'exercice d'un pouvoir public n'est opportun que s'il peut être justifié aux yeux des citoyens sur les plans *de la rationalité et de l'équité.*

(Voir madame la juge B. McLachlin, « The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law » (1998-1999), 12 *C.J.A.L.P.* 171, p. 174 (en italique dans l'original); voir également MacLauchlan, *loc. cit.*, p. 289-291.)

Le contrôle judiciaire axé sur le fond vise à déterminer si la décision du tribunal administratif peut se justifier rationnellement, et celui axé sur la procédure (la décision satisfait-elle aux exigences de l'équité procédurale?), si elle est équitable.

Au cours des dernières années, notre Cour a reconnu que tant les cours de justice que les tribunaux administratifs ont un rôle important à jouer dans le maintien et l'application de la primauté du droit. Comme l'a souligné la juge Wilson dans *National Corn Growers*, précité, les cours de justice ont conclu que « souvent, les dispositions législatives ne se prêtent pas à une seule interprétation qui soit particulièrement juste » et qu'un tribunal administratif peut être « mieux en mesure que la cour

way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J. M. Evans et al., *Administrative Law* (3rd ed. 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

chargée du contrôle de dissiper les ambiguïtés dans le texte d'une loi et d'en combler les lacunes » d'une manière judicieuse dans son domaine spécialisé (p. 1336, citant J. M. Evans et autres, *Administrative Law* (3e éd. 1989), p. 414). L'interprétation et l'application du droit ne ressortissent donc plus uniquement aux cours de justice. Les tribunaux administratifs jouent un rôle vital, un rôle de plus en plus important. Comme la juge McLachlin l'a dit fort à-propos dans une récente allocution sur le rôle des cours de justice et des tribunaux administratifs dans le maintien de la primauté du droit : [TRADUCTION] « Une culture de la justification fait en sorte que l'analyse ne porte plus sur les institutions elles-mêmes, mais, plus subtilement, sur ce qu'elles sont en mesure de faire pour le progrès rationnel de la société civile. Bref, la primauté du droit peut s'exprimer par plusieurs voix, à condition que l'harmonie qui en résulte se fasse l'écho des valeurs d'équité et de rationalité qui la sous-tendent » (McLachlin, *loc. cit.*, p. 175).

In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps more capable) of choosing among reasonable decisions. It is not to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

132 En confirmant le rôle des tribunaux administratifs dans l'interprétation et l'application du droit, il convient cependant de rappeler une distinction importante : dire que l'Administration a un rôle légitime à jouer dans le règlement des litiges équivaut à affirmer que les tribunaux administratifs sont aptes (et peut-être plus aptes) à choisir entre plusieurs décisions raisonnables. Ce n'est pas conclure que le prononcé de décisions déraisonnables a place dans le système de justice. N'est-ce pas là l'effet de l'application d'une norme de la décision manifestement déraisonnable eu égard à une norme intermédiaire de la décision raisonnable *simpliciter*?

On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (i.e., irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts

133 À supposer que l'on puisse effectivement distinguer entre une décision déraisonnable et une décision manifestement déraisonnable, il arrivera qu'une décision déraisonnable (c'est-à-dire irrationnelle) doive être maintenue. Ceci se produira si la norme de contrôle est celle du manifestement déraisonnable lorsque la décision contestée est déraisonnable, sans l'être manifestement. Je le répète, je doute qu'un tel résultat puisse être concilié avec l'intention du législateur, l'analyse pragmatique et fonctionnelle devant, en théorie, refléter le plus fidèlement possible cette volonté législative. En matière

should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 367-68). As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Caley & Wray, Toronto.

Solicitors for the respondent the City of Toronto: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

d'interprétation législative, une cour de justice doit toujours être très réticente à imputer au législateur l'intention de laisser l'Administration accomplir un acte irrationnel, à moins que cette intention ne soit formulée sans aucune équivoque (voir *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 367-368). Sur le plan théorique, le principe constitutionnel de la primauté du droit, un principe fondamental d'interprétation toujours applicable dans ce contexte, le confirme : lorsqu'une cour de justice conclut que le législateur a voulu qu'il n'existe aucun recours contre une décision irrationnelle, il paraît très probable qu'elle a mal interprété l'intention du législateur.

Le droit administratif a connu un développement considérable au cours des 25 dernières années, soit depuis l'arrêt *SCFP*. Cette évolution, qui témoigne d'une grande déférence envers les décideurs administratifs et reflète l'importance de leur rôle, a soulevé certaines difficultés ou préoccupations. Il restera à examiner, dans une affaire qui s'y prête, la solution qu'il conviendrait d'apporter à ces difficultés. Les tribunaux devraient-ils passer à un système de contrôle judiciaire comportant deux normes, celle de la décision corrrecte et une norme révisée et unifiée de raisonnabilité? Devrions-nous tenter de définir plus clairement la nature et la portée de chaque norme ou repenser leur relation et leur application? Voilà peut-être une partie de la tâche qui attend les cours de justice : construire à partir de l'évolution récente tout en s'appuyant sur la tradition juridique qui a façonné le cadre des règles actuelles de droit en matière de contrôle judiciaire.

III. Dispositif

Sous réserve des observations formulées dans les présents motifs, je souscris au dispositif que la juge Arbour propose dans le présent pourvoi.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant : Caley & Wray, Toronto.

Procureurs de l'intimée la Ville de Toronto : Osler, Hoskin & Harcourt, Toronto.

Procureur de l'intervenant : Procureur général de l'Ontario, Toronto.

TAB 7

See paras. 26-28

Citation: CCAA and SHARP-RITE
2000 BCSC 122

Date: 20000121
Docket: A993276
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

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 SHARP-RITE TECHNOLOGIES LTD.

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HOLMES

Counsel for the Company:	Heather M.B. Ferris
Counsel for G.E. Capital Can Inc.:	David J. Sutherland
Counsel for RoyNat Inc.:	Douglas I. Knowles and Ben J. Ingram
Counsel for Canadian Western Bank:	David Greig
Counsel for Concurrent Mechanical Integration Inc.:	G. Allan Phillips
Date and Place of Hearing/Trial:	January 14 and 17, 2000 Vancouver, B.C.

[1] The Petitioner applies for confirmation and extension of the Interim Order of J.T. Edwards J. pronounced December 13, 1999, as extended to January 21, 2000, during the course of hearing. The Petitioner seeks to extend the Order to April 30, 2000.

[2] The Petitioner seeks liberty during the extension period to file a formal plan of compromise or arrangement ["Reorganization Plan] between the Petitioner and one or more classes of creditors and, if appropriate, its shareholders pursuant to the provisions of the *Companies Creditors Arrangement Act*, R.S.C. 1985 c. C-36 ("CCCA"), and the *Company Act*, R.S.B.C. 1996 c.62 ("BCCA").

[3] The Petitioner also seeks an order enabling it to borrow money, not to exceed $150,000 in total, for the purpose of protecting assets and carrying on business and to secure the loan by a first charge upon the whole of the assets of the Petitioner in priority to all other charges, liens and encumbrances.

[4] The applications are opposed by three secured creditors who seek to have the Interim Order set aside and the Petitioner's insolvency proceeded with pursuant to the *Bankruptcy and Insolvency Act*.

[5] They also seek seizure and sale of the machines they lease to the Petitioner, or lease payment for their use.

[6] Sharp-Rite provides a full range of machinery, milling and grinding services to a wide variety of industries, including aerospace. It has existed since 1979, and has three departments.

[7] The core business of the company is its Grinding Department located in Coquitlam B.C.

[8] The company also has a Tools Department which custom manufactures industrial cutting and forming tools. It also produces a proprietary line of tools.

[9] In 1997 the company commenced operation of a third department, the CNC Machinery Division located in Langley. This department has state of the art equipment capable of complex custom component machining. It was intended primarily to enable contract services to the aircraft manufacturing industry. This was a capital intensive expansion.

[10] In 1998 the CNC Department was moved to new premises resulting in substantial moving, re-installation expense, and lost opportunity revenue during the shut down. Concurrent in time the company experienced a serious decline in contracts from Boeing Aircraft. A loss in excess of $500,000 for the

1998 fiscal year resulted. The company has yet to recover from this loss.

[11] The three secured creditors who oppose the Petitioner's applications are lessors of machinery. The leases are "capital" leases as opposed to "operating leases". The leases are a form of financing that ultimately intend the Petitioner will become the owner of the equipment.

[12] RoyNat is owed in excess of $2,000,000 in respect of the lease of one CNC milling machine. In addition to the lease RoyNat holds a General Security Agreement ("GSA") with a first charge upon the company's unencumbered machinery and equipment and a charge second to the Royal Bank over accounts receivable and inventory.

[13] The Petitioner and RoyNat have now agreed to the return of the CNC machine. It is surplus to the company intent to downsize and consolidate its operations. RoyNat's application to set aside the stay order in respect of this equipment to permit its possession and recovery by RoyNat or recover payment for use is no longer in issue.

[14] RoyNat's claim against the Petitioner is now a contingent one that must abide the sale of the CNC machine to quantify.

[15] A question has also been raised regarding the validity of RoyNat's GSA. In the event their GSA is invalid the balance of RoyNat's claim would be unsecured.

[16] G.E. Capital has six pieces of CNC machinery and equipment on lease for a total value of approximately $1,000,000. After a seize and sell remedy any remaining balances would rank unsecured.

[17] Canadian Western Bank also holds a lease on a CNC milling machine with an unpaid balance of $626,000. Any balance after seizure and sale would rank unsecured.

[18] The machine leases of G.E. Capital and the Canadian Western Bank are capital leases rather than operational or usage leases. They were intended to be a form of financing.

[19] I am of the view the leases at issue do not fall within Section 11.3(a) of the CCAA. The company will not be obligated to pay usage during the stay period. I am fully in accord with the views of Bauman J. in ***Smith Brothers Contracting Ltd., Re*** 53 B.C.L.R. (3d) 264 where the issue was fully canvassed.

[20] The machines covered by the G.E. Capital and Canadian Western Bank leases are essential to the continued operation

of the company, which is quite different to the CNC machine leased by RoyNat.

[21] The company had the benefit of a review of its assets and operation by Campbell, Saunders Ltd., now the monitors, prior to the Initial Order. The conclusion supported by the review was that any forced liquidation of the company assets would result in significant shortfalls to all of the company's secured creditors and no payment to unsecured creditors.

[22] The monitor remains of the view "…that the company enter into arrangements with its creditors so that it could continue operations and either restructure its affairs to facilitate a turnaround of operations or failing that, sell the business as a going concern.

PRINCIPLES UNDER THE CCAA

[23] Brenner J. in ***Re Pacific National Lease Holding Corp.*** (August 1992) A922870 (S.C.) summarized the principles to consider in applications under the CCAA:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court;
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees;

(3) During the stay period the Act is intended to prevent maneuvers for positioning amongst the creditors of the company;

(4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure;

(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions;

(6) The Court has a broad discretion to apply these principles to the facts of a particular case.

[24] Applications after an Initial Order carry a statutory onus of proof upon the Petitioner. Section 11(6) of the CCAA provides:

(a) that circumstances exist that make the order appropriate;

(b) that the applicants have acted and continue to act in good faith.

[25] Prior to the enactment of the statutory test in Section 11(6) Gibbs J. opined in ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p. 315, that the continued protection of the company would no longer be appropriate where it was apparent an attempt at compromise

or arrangement "…is doomed to failure." Saunders J. in ***Re Starcom International Optics Corp.***, [1998] B.C.J. No. 506 held that principle continues a relevant consideration in considering the onus of proof required in Section 11(6).

[26] Counsel for RoyNat argues that any compromise or arrangement is doomed to failure as it will have voting control of its class of creditors and under no circumstance would it vote in favour of any plan proposed.

[27] This "predetermined position" of RoyNat must be viewed with some scepticism. RoyNat's discussions with the company and the Monitor, both prior to and after the Initial Order, belies this adamant view. No definitive plan for compromise or arrangement has been proposed.

[28] When a plan of compromise or arrangement is proposed it is doubtful that RoyNat will vote other than in its best commercial interest gauged at that time. I would expect, for example, any proposal of payment in full, or substantially in full, would most likely be enthusiastically supported. Commercial reality may dictate an even lesser recovery.

[29] Counsel for the represented secured creditors argue that no further time, or very little time, is required to present a plan and proceed to a vote. This is predicated upon a view

the plan is already known. The company intends simply to operate for a further few months to see if sales can be increased and cash flow smoothed, if not the company will be sold or liquidated.

[30] I do not accept that fairly represents the current situation.

[31] The company has only recently received the benefit of a responsible fiscal analysis, operational review, and appropriate professional guidance. The company has, and continues to implement significant management, expense and cost savings. It intends to downsize and return to its prior profitable core business.

[32] The company has realistically culled its accounts receivable and intends action for recovery as indicated. The prospect of increases in future business has been examined and a reasonable prospect for an increase of sales is indicated.

[33] The company has an apparent higher value as a whole than upon liquidation. Projections of cash flow, made on a reasonable basis, support an ability to achieve stabilization in the relative short run.

[34] Whether the company is capable of being restored to future profitable operation can likely be determined within

the next few months. In the event present management and available financing appear unlikely to sustain future operation, the company will likely be in the best position to maximize a return to creditors by sale of the company as a going concern.

[35] In the more unlikely event the first two alternatives fail, liquidation although postponed a few months is unlikely to differ substantially in monetary return.

[36] I accept that the company is in need of protection for a few months to accomplish needed reorganization, establish realistic future sales potential, stabilize cash flow, make an informed decision on the best method of proceeding and translate decisions into a viable plan for presentation to creditors for voting.

[37] There is no evidence to suggest the company is not acting in good faith and with due diligence. Opposition has not been based upon these grounds.

[38] Counsel for the secured creditors do take specific objection to several of the terms of the Initial Order if the confirmation and extension order is granted. Most of the objections are well grounded.

[39] The following changes are ordered:

Page 4, paragraph 3	The authority to pay obligations due or accrued due prior to filing is deleted
Pages 7 and 8; paragraphs (f), (g), (h), (i), (j), (l)	These provisions are inappropriate given the nature and size of the Petitioner's business. Many authorize the Monitor to perform tasks that are the responsibility of the company
Page 8, paragraph 10	Priority will be limited to remuneration, costs and expenses subsequent to the date of filing.
Page 9, paragraph 11(a) and (f)	Paragraph 11(a) will be deleted as no basis was shown to justify this extraordinary relief Paragraph 11(f) will be deleted. The Monitor will resign upon application and leave of the Court
Page 11, paragraph 20	The first sentence will be deleted

[40] In granting the priority to the Monitor and its counsel for remuneration costs and expenses subsequent to the date of filing I follow the decision of Tysoe J. in ***In the Matter of United Used Auto & Truck Parts Ltd. et al.,*** November 19, 1999, Vancouver Registry A992950. Counsel has advised that decision is presently under appeal.

FINANCING

[41] The Petitioner seeks leave to borrow up to $150,000 and create a super priority charge in favour of the lender from the current assets categories of accounts receivable and inventory. This form of financing during the stay period is known as Debtor in Possession (“DIP”).

[42] In ***Re: Westar Mining Ltd.*** (1992), 14 C.B.R. (3d) 88 Macdonald J. allowed DIP financing with security given against unencumbered assets and without necessity of postponing existing security.

[43] Tysoe J. reviewed the issue ***In the Matter of United Used Auto & Truck Parts Ltd. et al***, and concluded it should only be exercised in extraordinary circumstances. He found the matter somewhat analogous to consideration of a charge against a trust fund. He found the Court’s jurisdiction in the creation of a super priority charge to permit DIP financing should be sparingly used. I agree with his view.

[44] The comments of Farley J. in ***Re Royal Oak Mines Inc.,*** [1999] O.J. No. 709 (Q.L.) Ontario General Division, paragraph 24, in regard to necessity and the balancing of interests in considering the allowance of super priority for DIP financing at the Initial Order stage are equally applicable to

applications at this stage for confirmation and extension of an Initial Order.

[45] As Tysoe J. concluded in ***In the Matter of United Used Auto & Truck Parts Ltd. et al***, the balancing of interests should lead to cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to any creditor whose security is being subordinated.

[46] I accept the benefit here to all creditors, shareholders and employees clearly outweighs the potential prejudice to any creditor whose security may be subordinated.

[47] The accounts receivable and inventory are subject to a first charge by the Royal Bank. They have raised no objection to the proposed financing. In any event I understand they hold a guarantee of their debt, and the guarantor does not object to the proposed DIP financing and priority.

[48] RoyNat's GSA would be a second charge upon receivables and inventory involved. RoyNat’s claim in this matter however is contingent only, until it has sold the machinery it has retaken possession of and then determined what, if any balance, remains unpaid. There is also a question as to the validity of RoyNat's GSA as no advance was made as

contemplated in the security documents, and it may have been intended to operate as a guarantee only.

[49] I accept that the DIP financing will not only have a beneficial effect on the operation of the business, it is essential to the continuation of company operations. Absent the DIP financing the company will have no ability to operate, continue downsizing, reorganize, and prepare a plan of compromise.

[50] I find the Petitioner has met the onus upon it under Section 11(6) of the CCAA. I am satisfied on the whole of the evidence that circumstances exist that make it appropriate the Initial Order of J.T. Edwards J. of December 13, 1999 be confirmed and extended, subject to the variations and deletions ordered, to April 30, 2000.

[51] The Petitioner will be at liberty to file a formal plan of compromise or arrangement pursuant to the CCAA and BCCA on or before April 30, 2000.

[52] The Petitioner will have leave to obtain DIP financing, limited to $150,000 and to create as security a first charge with priority against all other charges against accounts receivable and inventory of the company.

"R.R. HOLMES J."

TAB 8

See para. 25

Alberta Court of Queen's Bench
Rio Nevada Energy Inc. (Re)
Date: 2000-12-18

Brian P. O'Leary and Allison Z.A. Campbell (Burnet Duckworth and Palmer), for Westcoast Capital Corp.;

Peter Pastewka and James Eamon (Gowling Lafleur Henderson), for Rio Nevada Energy Inc.;

Larry Boyd (Miller Thomson), for Joseph Dow and Ronald Antonio.

(Action No. 0001-17463)

December 18, 2000.

INTRODUCTION

[1] ROMAINE J.: — Rio Nevada Energy Inc. sought, and obtained, protection under the **Companies' Creditors Arrangement Act,** R.S.C. 1985, c. C-36, on October 31, 2000. Rio Nevada's principal creditor, Westcoast Capital Corporation, declared its intention at that time to bring an application for an order terminating the stay of proceedings granted under the **CCAA** order on the basis that any plan of arrangement proposed by Rio Nevada would be "doomed to failure". The stay of proceedings under the order was initially extended to November 17, 2000. On that date, Westcoast applied for an order terminating the stay and appointing a receiver-manager of the assets of Rio Nevada pursuant to Westcoast's security. Rio Nevada applied for an order extending the stay to December 17, 2000, and amending certain provisions of the initial order. I dismissed Westcoast's application and extended the stay under the initial order to December 15, 2000. These are the reasons for my decision.

FACTS

[2] Rio Nevada is a publicly listed oil and gas company incorporated under the laws of Canada. In September 1999, Rio Nevada entered into a prepaid gas purchase contract with Westcoast pursuant to which Rio Nevada was to deliver certain daily volumes of natural gas commencing in September 1999, and ending on October 31, 2004. Westcoast prepaid $3,118,000 plus GST to Rio Nevada in accordance with the terms of the gas purchase contract.

[3] As security under the gas purchase contract, Rio Nevada granted Westcoast a first ranking security interest and charge over all its assets. Upon default by Rio Nevada, Westcoast becomes able to appoint, or apply to the court to appoint, a receiver.

[4] Rio Nevada had some difficulty with two new wells drilled to meet the gas production requirements of the gas purchase contract in that it has not been able to

complete remedial work that would put these wells into production. Currently, the completion of remedial work on these wells awaits sufficient cold weather to allow access to them.

[5] Rio Nevada had gas production shortfalls from time to time during the term of the gas purchase contract, which it cured by purchasing gas from a gas marketer and delivering it to Westcoast to satisfy its contractual obligations. Rio Nevada also acquired the shares of a manufacturing and research and development firm, Concorde Technologies Inc. (which included the acquisition of the shares of Tierra Industries Ltd.) and granted security on its assets as part of the financing of this acquisition. Westcoast considers this acquisition without its consent to be a breach of its security interest over the assets of Rio Nevada. On October 23, 2000, Westcoast terminated the gas purchase contract and claimed liquidated damages. Westcoast indicated its intention to take steps to appoint a receiver of the assets of Rio Nevada in the event payment was not received within 10 days.

[6] Westcoast claims approximately $5,530,832 in liquidated damages under the gas purchase contract against Rio Nevada. Rio Nevada's liabilities to Westcoast and other secured, unsecured and statutory creditors aggregate approximately $10.6 million.

[7] Outtrim Szaba Associates Ltd., a petroleum engineering evaluations firm, has estimated the fair market value of Rio Nevada's oil and natural gas assets at $9,427,000 as at November 13, 2000. This estimate is based on an evaluation of Rio Nevada's reserves and cash flow as of the same date.

[8] Rio Nevada's aggregate liabilities of $10.6 million include debt from its acquisition of the shares of Concorde and Tierra. No evidence of the value of these shares is before the court, but their purchase price in August 2000, was approximately $5.25 million. Rio Nevada has additional miscellaneous assets worth approximately $250,000.

ISSUES

[9] 1) Should the stay of proceedings granted in the initial order be terminated because any plan of arrangement put forward by Rio Nevada is "deemed to failure"?

2) Should the stay granted under the initial order be extended?

ANALYSIS

[10] There is some disagreement between the parties as to the appropriate process to be followed in deciding these issues. Rio Nevada takes the position that the appropriate test is set out in s. 11(6) of the **CCAA** [see footnote 1], and that the case law relating to the

appropriate test in a "doomed to failure" application is merely a factor in applying s. 11 (6): **Starcom International Optics Corp., Re** (1998), 3 C.B.R.(4th) 177 (B.C.S.C.), at paragraph 22. Westcoast submits that, while s. 11(6) sets out the correct test for Rio Nevada's application to extend the stay, the correct test for deciding whether its application to terminate the stay should succeed is the test set out in the case law.

[11] The problem arises in part because much of the case law relating to applications to set aside a stay pre-dates the addition of s. 11(6) to the **CCAA** in 1997. However, although s. 11(6) applications to implement or extend a stay may often be met with opposition asserting that such a stay is doomed to failure, it is not necessary for these cross-applications to co-exist in every case. It is preferable to consider these issues separately in order to ensure the burden of proof on each applicant is applied appropriately, and the "doomed to failure" application should be considered first.

[12] The burden of proof in setting aside a CCAA stay by establishing that any plan of arrangement is "doomed to failure" rests on the applicant wishing to have **CCAA** proceedings terminated, in this case, Westcoast: **Bargain Harold Discount Ltd. v. Paribas Bank of Canada** [see footnote 2]; **Philips Manufacturing Ltd. v. Coopers Lybrand Ltd.** [see footnote 3].

[13] Rio Nevada does not have the burden of proving that a plan of arrangement put forward by it is not "doomed to failure". As commented by Doherty, J.A., in **Elan v. Comiskey** [see footnote 4], the nature of **CCAA** proceedings is such that many plans of arrangement will involve "variables and contingencies which will make the plan's ultimate acceptability to the creditors and the court very uncertain at the time the initial application is made". As a result, the debtor company does not bear the burden of establishing the likelihood of success from the outset. Although this is not Rio Nevada's initial application, it is only seventeen days into **CCAA** proceedings, and Rio Nevada has not yet proposed any firm or specific plan of arrangement.

[14] To meet the test set out in s. 11(6) for extension of a stay, Rio Nevada has the onus of proof and must satisfy the court that circumstances exist that make such an order appropriate and that it has acted in good faith and diligently.

[15] *Should the stay of proceedings granted in the initial order be terminated because any plan of arrangement put forward by Rio Nevada is "doomed to failure"?*

[16] There appear to be at least two standards applied by courts in previous cases in deciding whether a stay under the **CCAA** should be set aside on a "doomed to failure" basis.

[17] One standard, adopted by the courts in British Columbia, requires the applicant creditor to lead evidence to establish that a debtor company's attempt at a plan of arrangement is indeed doomed to failure: **Re: Philips,** supra, at page 28; **Sharp-Rite Technologies Ltd., Re** [see footnote 5]. As pointed out by Douglas Knowles and Alec Zimmerman in **Further Developments and Trends in the Companies' Creditors Arrangement Act: 1992** (Insolvency Institute of Canada), this standard is extremely difficult for a creditor to satisfy, particularly in the early stages of **CCAA** proceedings. I prefer, and adopt, the test that appears to have been applied by Austin, J., in **Bargain Harold Discount Ltd.,** supra, that to succeed, the applicant creditor must show that there is no reasonable chance that any plan would be accepted.

[18] In this case, there is no issue that Westcoast is a secured creditor of Rio Nevada. Although there is some dispute over the amount of liquidated damages owing under the gas purchase contract, this amounts to a difference of about $125,000. There is an issue of whether GST can be claimed as part of contractual damages that may affect the amount of the claim. However, it appears from the evidence that Westcoast's claim is at least $4,922,936, plus a September gas payment of $113,069.59 plus GST and an October gas payment for the period to termination of the contract in an approximate amount of $63,000 plus GST.

[19] Even taking into account the disputed amount of liquidated damages and the GST issue. Westcoast's claim is approximately $5,043,000, and accrues interest at between $55 - 57,000 per month.

[20] Westcoast submits that the market value of $9.4 million assigned to Rio Nevada's oil and gas assets by Outtrim Szaba is too high, and questions the qualifications of Outtrim Szaba to give this valuation opinion. Westcoast estimates the value of Rio Nevada's assets at $5,667,000, which it apparently arrived at by adding the value of Rio Nevada's Proved Developed Producing and Proved Developed Non-Producing reserves as set out in Outtrim Szaba's report and discounting at 15%. Westcoast ascribes no value to Rio Nevada's Proved Undeveloped or Probable Additional reserves, nor any value to the Concorde and Tierra shares or Rio Nevada's other miscellaneous assets. There is no independent evidence before me that this is an appropriate evaluation methodology for this company or that Outtrim Szaba's opinion is not appropriate in the circumstances.

[21] In support of its application to terminate the stay, Westcoast submits that its security position is being eroded on a daily basis, as Rio Nevada's reserves are being developed at a value of between $7,000 and $10,000 a day. Westcoast submits that this is

a situation of depleting resources, that interest is accruing and that professional fees will be incurred as part of the **CCAA** proceedings. If there is a real risk that a creditor's loan will become unsecured during the stay period, this is a factor to be taken into account in determining whether there should be a termination of the stay: **Elan Corp.,** supra. In this case, however, I am not satisfied on the valuation evidence that is before me that there is a substantial risk of encroachment on Westcoast's security. I am not satisfied that Westcoast's estimate of the value of Rio Nevada's assets should be preferred over the Outtrim Szaba opinion, nor that I should conclude at this point that no value should be ascribed to Rio Nevada's other assets. Assuming the market value of Rio Nevada's assets to be somewhere in a range between $5.6 million and $9.5 million, there is sufficient value and more and more to cover Westcoast's claim for the relatively brief period of the stay requested by Rio Nevada.

[22] Westcoast also submits that Rio Nevada has had more than enough time to attempt a sale of assets or a restructuring, as it has been making efforts to resolve its financial problems since mid-August 2000. However, Rio Nevada has had only seventeen days of protection under the **CCAA**, and the Monitor reports that Rio Nevada has had extensive discussions with potential purchasers and merger partners and is investigating the possibility of a re-financing. There is no suggestion of lack of diligence by Rio Nevada in attempting to formulate a reasonable reorganization plan.

[23] The actual market value of Rio Nevada will be determined by its ability to restructure and to sell assets. Given the report of the Monitor, some potential exists for a plan of arrangement to be proposed that will cover the Westcoast debt and other creditors, or perhaps even leave an operating company with value to cover other secured and unsecured debt and preserve the interests of non-creditor constituencies.

[24] Westcoast submits that the value of Rio Nevada's reserves has deteriorated significantly from the date of its previous reserve report, May 2000. However, given the relatively short stay period that is currently being requested, there is no evidence that the value of the reserves will continue to deteriorate to any great extent.

[25] Finally, Westcoast says that it has lost confidence in the management of Rio Nevada and would be unable to support a plan of arrangement put forward by it. There is, however, some evidence that Westcoast will not act against its commercial interest and that it will act reasonably in considering proposals put to it by Rio Nevada. As pointed out by Holmes, J., in **Re: Sharp-Rite Technologies,** supra, this type of submission by a creditor during a "doomed to failure" application must be viewed with some skepticism,

since commercial reality may dictate a change of position when the details of a plan of arrangement have been presented. This is not a case such as **First Treasury Financial Inc. v. Cargo Petroleums Inc.** [see footnote 6], where all the creditors, secured and unsecured, have lost confidence in current management, or where it is highly probably than any plan put forward would be defeated by all the creditors.

[26] It is appropriate to consider all affected parties in an application of this kind, including other secured and unsecured creditors: **Bargain Harold,** supra, at paragraph 35. Here, the remaining two secured creditors support the application for a stay, on the basis that if there is value in Rio Nevada, the **CCAA** proceedings are most likely to allow all creditors to realize on their positions.

[27] Taking into account all of the submissions and evidence, I am not satisfied that there is no reasonable chance that a plan of arrangement would be accepted.

[28] *Has Rio Nevada met the requirements of s. 11* (*6*) *of the CCAA such that the stay granted under s. 11* (*3*) *should be continued?*

[29] Section 11(6) requires Rio Nevada to establish three conditions prior to obtaining an order continuing the stay. They are:

a) that circumstances exist that make the order appropriate;

(b) that Rio Nevada has acted, and is acting, in good faith; and

c) that Rio Nevada has acted, and is acting, with due diligence.

[30] The evidence of Rio Nevada's efforts to refinance the Westcoast debt has not been contested, and I have already stated that, given the relatively short period of the stay under the **CCAA** to the date of these applications, there has been no lack of due diligence in that regard.

[31] The only evidence that may suggest lack of good faith by Rio Nevada is Westcoast's complaint that it was misled by Rio Nevada's management with respect to the status of well remediation, and also misled with respect to the acquisition of the shares of Concorde and Tierra. These are issues that relate more to Westcoast's decision to terminate the gas purchase contract than to Rio Nevada's conduct under **CCAA** proceedings, and are, at any event, in dispute between the parties. I am satisfied by the evidence put forward by Rio Nevada and by the Monitor that Rio Nevada has acted and is acting in good faith with respect to these proceedings.

[32] As to whether circumstances exist that make the continuation of the stay appropriate, there are a number of factors that must be taken into account. The

continuation of the stay in this case is supported by the basic purpose of the **CCAA,** to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court and to prevent manoeuvres for positioning among creditors in the interim; **Re Pacific National Lease Holding Corp.** [see footnote 7]; **Meridian Developments Inc. v. Toronto Dominion Bank** [see footnote 8]. Westcoast has not satisfied the court that an attempt at an acceptable compromise or arrangement is doomed to failure at this point in time. Negotiations for restructuring a sale or refinancing are ongoing, and there has been a strengthening of the management team. Rio Nevada continues in business, and plans are underway to remediate its two major wells, which will significantly increase the company's rate of production. A Monitor is in place, which provides comfort to the creditors that assets are not being dissipated and current operations are being supervised. The extension sought is not unduly long, and is supported by the secured creditors other than Westcoast. The costs of the **CCAA** proceedings are likely no less onerous than the costs of a receivership in these circumstances, and the relief sought under the **CCAA** less drastic to all constituencies than the order that would likely have to be made in a receivership.

[33] I find that Rio Nevada has established that continuation of the stay is appropriate, and that the conditions to granting such an order have been met.

Order accordingly.

Footnotes

1. "11(6) **Burden of proof on application** - The court shall not make an order under subsection … (4) [to extend a stay] unless

> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence."

2. C.B.R. (3d) 23 (Ont. S.C.), at page 30.

3. (1992), 15 B.C.A.C. 247; 27 W.A.C. 247; 9 C.B.R.(3d) 25 (C.A.), at page 28.

4. (1990), 1 C.B.R.(3d) 101 (C.A.) (sub nom, **Elan Corp. v. Comiskey)** I O.R.(3d) 289; 41 O.A.C. 282, at page 316.

5. [2000] B.C.T.C. 22; [2000] B.C.J. No. 135 (S.C.), at paragraph 25.

6. [1991] O.J. No. 429 (Gen. Div.).

7. August (1992), A 922870 (Ont. S.C.).

8. [1984] 3 W.W.R. 215; *53* A.R. 39 (Q.B.).

TAB 9

See paras. 40-44

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Shores Resort & Spa Ltd. (Re),* 2011 BCSC 1775

Date: 20111107
Docket: S117098
Registry: Vancouver

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

And

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

And

In the Matter of Pacific Shores Resort & Spa Ltd., Westerlea Sales Consulting Ltd., Aviawest Resorts Inc., Ocean Place Holdings Ltd., Fairfield Ventures Inc. and Parkside Project Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	D.K. Fitzpatrick
Appearing on behalf of the Monitor:	S. Dvorak
Counsel for Fisgard Capital Corporation:	A.A. Frydenlund S. Stephens
Counsel for Unsecured Loan Holders:	D. Toigo
Counsel for Water's Edge Rental Pool Creditors:	K.S. Campbell
Counsel for bcIMC Construction Fund Corp.:	C.D. Brousson
Place and Date of Hearing:	Vancouver, B.C. November 2 and 4, 2011
Place and Date of Judgment:	Vancouver, B.C. November 7, 2011

[1] **THE COURT:** This proceeding was commenced on October 21, 2011. On October 24, 2011, I granted an initial order pursuant to s. 11.02(1) of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended ("*CCAA*") which included an interim stay of proceedings and a nominal administration charge. At that time, two of the secured creditors, bcIMC Construction Fund Corporation and bcIMC Specialty Fund Corporation (collectively "bcIMC") and Fisgard Capital Corporation opposed the granting of the order. There was, however, insufficient time to fully hear the arguments against the granting of the order, notwithstanding that the statutory requirements of the *CCAA* had been met by the petitioners.

[2] This hearing was intended to stand as a comeback hearing under s. 11.02(2) of the *CCAA*, when the arguments of those secured creditors could be fully heard. At this time, the petitioners seek to extend the stay to December 11, 2011, and to increase the administration charge from $100,000 to $300,000.

[3] Further, the petitioners seek an order authorizing debtor in possession, or DIP, financing in the amount of $600,000 and the imposition of a director's charge in the amount of $700,000.

[4] bcIMC and Fisgard oppose the granting of the order sought, contending that it is not appropriate in the circumstances and that the petitioners are not acting in good faith and with due diligence; in other words, that the petitioners have not satisfied the test in respect of the granting of this further order as that test is formulated under s. 11.02(3) of the *CCAA*. Fisgard also applies to appoint a receiver over the security held by it relating to one of the developments.

[5] As at the time of the application for the initial order, the onus remains on the petitioners at this hearing to satisfy the requirements under s. 11.02(3) of the *CCAA*.

Background Facts

[6] The corporate group, or, as it is known, the Aviawest Group, began its operations in 1990 with the development of the Pacific Shores Resort near

Parksville, British Columbia. Over the last 21 years, the business has grown substantially and includes other resort properties around B.C. Generally speaking, the business of the Group includes sales of vacation ownership products, sales of deeded ownership products and management of those interests.

[7] At the peak of its business, the Group employed over 400 people on Vancouver Island. I am advised that over 8,000 families are vacation owners or fractional owners in its property portfolio.

[8] The corporate structure is fairly complex, but for the purposes of this application I will summarize it as follows:

a) the Pacific Shores resort is owned by the petitioner Ocean Place Holdings Ltd.;

b) the units of Pacific Shores Resort, along with the resort amenities, are managed by the petitioner Pacific Shores Resort & Spa Ltd. ("PSRS"). PSRS also operates a rental pool for the owners. There are other interested parties relating to this resort, including various owner associations and strata corporations, known as PSOE, PSFRA and PS Strata, who were represented at this hearing;

c) the Parkside Resort in Victoria was developed in 2009. It is owned by the petitioner Parkside Project Inc. in trust for a limited partnership, the general partner of which is the petitioner Fairfield Ventures Inc. There are other interested parties relating to this resort, including various owner associations and strata corporations, known as PV1, PV2 and PV Strata, who were also represented at this hearing;

d) the petitioner Aviawest Resorts Inc. ("Aviawest") operates a business that manages the Parkside Resort and also other resorts in Victoria, Sun Peaks, Ucluelet (known as the Water's Edge Resort) and Vancouver. It also sells vacation interests in the Parkside Resort and the other resorts listed. In addition, Aviawest operates rentals of

> certain vacation units in Parkside Resort and Water's Edge Resort. Aviawest sells memberships and points packages to purchasers in the Aviawest Resort Club, which is an independent company which is not part of this proceeding but who was represented at the application. Aviawest also provides management services to the Club. The points program is integrated with the various vacation properties which it manages.

[9] The Aviawest Group employs approximately 250 people at this time in respect of its various operations, with 115 employed at the Pacific Shores Resort and 80 at Parkside Resort.

[10] The causes of the Group's insolvency can be laid principally at the feet of the development of the Parkside Resort. There were significant delays and cost overruns relating to that project. In addition, the global economic downturn in 2008 has led to decreased sales, which has exacerbated the lack of working capital due to a loss of credit facilities with one of their lenders.

[11] There is a substantial amount of evidence detailing the assets of the Group and the outstanding debt against those assets. In respect of Parkside Resort, bcIMC has a first mortgage of $28.1 million, BCC Mortgage Investment Corporation has a second mortgage of $8.5 million, and bcIMC has a third mortgage of $20 million. There is also a fourth mortgage of $1.7 million. Finally, there are various priority claims, such as property taxes, and a substantial amount of unsecured debt totalling $6.6 million. The total of the priority claims and secured debt alone is $58 million.

[12] In respect of Pacific Shores Resort, Fisgard has a first mortgage of $8.7 million, and the bcIMC and BCC debt on the Parkside Resort is collaterally secured against this property as well. There are also priority claims and unsecured debt relating to this property. The total secured debt against this property is $82 million, although that includes the debt collaterally secured relating to the Parkside Resort.

[13] Aviawest also has assets, such as its points portfolio and receivables, and also has substantial debt totalling $13.3 million. That debt includes $7.6 million owed to unsecured noteholders who were represented at the hearing.

Arguments of the Secured Creditors

[14] bcIMC and Fisgard contend that the *CCAA* order should not be granted for a number of reasons, as follows:

1. there is no equity in the assets;

2. they have no faith in current management;

3. there is no plan, in that no lender will provide sufficient financing to pay off the secured creditors since there is no equity; and

4. they will not vote for any plan that requires them to accept less than what they are owed.

I will deal with each of these arguments in turn.

No equity in the assets

[15] The total value of the assets, accepting the appraisals of the petitioners, is $88.2 million, which does not include the going-concern value of the Group. The total debt is estimated by the petitioners at $90.2 million, although I note that the monitor puts that figure at $99.4 million.

[16] Much of the argument regarding the equity situation concerned the valuations relating to the Parkside Resort, which has secured debt of $58 million. The petitioners value the Parkside Resort at $63.7 million based on appraisals obtained by them in November 2010, which would indicate some value beyond the secured debt on that asset. There are also potential tax losses in Parkside Resort of $19 million.

[17] bcIMC says that the appraisals are suspect because the appraiser in fact had an interest in the Parkside Resort at the time. In response, Mr. Sweett, the appraiser, has filed a certificate attesting that he did not value his unit in the Resort and that he did the remainder of the appraisal given his familiarity with and expertise relating to the project before his purchase of that unit.

[18] bcIMC has introduced an appraisal of the Parkside Resort well below this first appraisal. In accordance with my order dated November 2, 2011, this appraisal was sealed given bcIMC's submission that it was highly confidential and that there could be potential detrimental effects if it was disclosed publicly.

[19] There are difficulties relating to this appraisal also. It is clear that it does not purport to provide a market value of the property, but rather an investment value to a specific investor, namely Delta Hotels, a subsidiary of bcIMC. In addition, the value indicated in this appraisal is contradicted in any event by bcIMC's own evidence in that they indicate that they have received an offer to assume their first mortgage on the Parkside Resort for the sum of $20 million.

[20] The petitioners point to other evidence of value which confirms to some extent the values in their appraisals, including assessment values and their relationship to sale prices, historical prices of the ownership interests and negotiated listing prices determined with lender input.

[21] The Monitor has also conducted a limited review of the sales of Parkside Resort units and has concluded that the values in the appraisal of the petitioners are generally supported, with the proviso that the time within which those units could be sold and the cost that would be incurred during that time would erode the overall values as at this time.

[22] For the purposes of this application and with that proviso, I accept that the value of the Parkside Resort interests as advanced by the petitioners is as set out in their appraisals.

[23] With respect to Fisgard, it is apparent that they are well secured given the value of the Pacific Shores Resort, which is estimated by the petitioners to be $16.5 million. The $5.5 million liquidation value that was referred to by Aviawest was a liquidation value and not a going-concern value, which is particularly relevant given Fisgard's own stated intention to continue the operations of the Resort even within a receivership.

[24] There is no doubt that the petitioners are insolvent and that they face substantial challenges ahead in terms of any restructuring. However, for the purpose of this application, it is evident to me that there are substantial assets that will be a potential source of refinancing or sale with respect to both Parkside Resort and Pacific Shores Resort.

No faith in management

[25] In this respect, bcIMC says that management has shown no record of success and that there has been financial mismanagement and cash flow and financial recordkeeping irregularities. Fisgard adopts these same contentions.

[26] bcIMC says that it has not received any interest payments since 2009, although it appears that they have been receiving 100% of payments from sales and applying those proceeds to principal, which has resulted in their debt being reduced by $35 million over the last two years. I have been advised that just prior to the filing, bcIMC received approximately $1 million toward its loan, although I understand that Fisgard disputes that payment, saying that the payment was improperly diverted to bcIMC.

[27] It is clear to me that there have been substantial dealings between bcIMC and the petitioners since the loans were initially advanced and also throughout the ensuing period when financial difficulties became apparent to all concerned. I have been advised that there were a substantial number of meetings to discuss matters and also the appraisals now presented by the petitioners were provided to bcIMC some time ago.

[28] Both parties seem to have been working together to resolve the problems, and I have not been advised that bcIMC raised any issues relating to management's abilities until now. To that extent, the lack of success on the part of the petitioners has come as no surprise to bcIMC at this time.

[29] In fact, even as early as some months ago when the appraisal evidence was known, bcIMC took no action. bcIMC's opposition and the demands for payment in relation to this proceeding only arose after the petitioners indicated their intention to seek protection under the *CCAA* in mid-October. This opposition relates to bcIMC's position that they do not object to the petitioners seeking protection provided that it is done on their terms, all in accordance with a "with prejudice" offer that they sent some days ago which gives them full control over how long these proceedings would extend and on what terms (including that no DIP financing would be sought or obtained).

[30] There are some issues concerning rental monies from Water's Edge Resort. It appears that rental monies were previously used by Aviawest contrary to an agreement, which required that those monies be held in a segregated trust account. I am advised that this has been rectified and that the segregated accounts are now in place. There may be consequences arising from this situation, although that will be sorted out in the fullness of time. In any event, counsel for Water's Edge Resort did not submit that the order should be refused for this reason.

[31] I also would note that in *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 57 (Ont. Sup. Ct. J.) at para. 4, Justice Farley stated that the good faith requirement relates to conduct within the proceedings, not that relating to past activities.

[32] The Monitor has been working diligently with the petitioners during the short time of its engagement since October 24. Accordingly, its review of the matters has been limited. Nevertheless, the Monitor has concluded that the petitioners are acting in good faith and with due diligence. I also accept that the current

management team has a great deal of expertise in this business that would be fundamental to any restructuring that may occur.

[33] In conclusion, I do not accept the submissions of bcIMC and Fisgard that there is any justification for their lack of faith in management.

There is no plan

[34] bcIMC says that there is no plan or any credible outline of a plan that makes any sense. To a large extent, this argument is that any plan is "doomed to failure" and accordingly, these proceedings should be terminated.

[35] This contention is addressed in the affidavit of James Pearson, who is the chief executive officer of the petitioners. Key elements of the plan at this time include:

a) the sale of some redundant assets, which would reduce cash flow requirements;

b) the sale and lease back of certain assets to increase working capital;

c) restructuring the income stream from the PSOE and the Club;

d) the refinance of the debt with bcIMC regarding Parkside Resort, which would in part allow some proceeds of sale to provide working capital;

e) restructuring the secured debt with Fisgard;

f) continuing sales of fractional interests and commercial units;

g) renegotiating arrangements with existing interest groups regarding the management and operation of the vacation interests;

h) resuming the points business; and

i) making a proposal to unsecured creditors regarding a share in the future income stream.

[36] In addition, I am advised by counsel for the petitioners that they have now talked to six potential investors who are either hotel entrepreneurs or financiers.

[37] Both the petitioners and bcIMC have referred me to *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577. In that case, the Court disapproved of the granting of an initial order where there was no stated intention by the debtor to propose an arrangement or compromise to its creditors. I note, however, that this situation is markedly different than the situation addressed in that case. As Tysoe J.A. stated at para. 31, it is not a prerequisite that a draft plan be filed at the time of the stay. What is required, however, is that the creditor have a *bona fide* intention to do so while having the protections of the stay under the *CCAA*.

[38] Given the evidence of the petitioners, I am satisfied that the Group has a *bona fide* intention to present a plan. I am not convinced that, as bcIMC states, it is simply a "hope and a prayer".

[39] I am of the view that, similar to the facts under consideration in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, 273 B.C.A.C. 271, this is a situation where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of the parties. The *CCAA* proceedings have only begun, and I have no doubt that any plan will evolve over time given the usual negotiations that one would expect to occur between the petitioners and the major stakeholders while the stay is in place.

Secured creditors will not vote in favour of any plan

[40] This argument is also part of the "doomed to failure" argument of bcIMC and Fisgard. I have been referred by bcIMC and Fisgard to *Hunters Trailer & Marine Ltd. (Re)*, 2000 ABQB 952, 5 C.B.R. (5th) 64, as authority for the proposition that unless there is equity in the assets beyond that owed to secured creditors, a *CCAA* order is only appropriate if the secured creditors are supportive of it.

[41] To the contrary, at para. 19 of that case, the Court states quite clearly that a recalcitrant creditor should not necessarily prevent the granting of an order under the *CCAA*. This approach is consistent with the comments of Madam Justice Newbury

in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:

> [27] ... I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner.

[42] Further, bcIMC's insistence that it will not cooperate in terms of a refinancing simply does not make sense in light of what has already occurred in relation to bcIMC's debt and the positions and actions they have taken in relation to their debt. Firstly, they have already made the "with prejudice" offer to accept an amount under their first mortgage position only, which would give rise to a loss of approximately $20 million. Secondly, they have investigated the potential sale of their debt, which gave rise to an offer of $20 million.

[43] Both of these circumstances indicate to me that they are open to negotiations with the petitioners and that those negotiations may possibly result in a refinance of their debt that would allow the Group to go forward on some restructured basis.

[44] bcIMC and Fisgard are well known and sophisticated lenders doing business in this jurisdiction. As was stated by the court in *Rio Nevada Energy Inc. (Re)* (2000), 283 A.R. 146 (Q.B.) at para. 25, this is some evidence that bcIMC and Fisgard will not act against their commercial interests and that they will reasonably consider proposals. This distinguishes the case of *Royal Bank of Canada v. Fracmaster Ltd.*, 1999 ABCA 178 at para. 12, 244 A.R. 93, where there was evidence that the lender had valid commercial reasons to vote against the proposal.

DIP Financing

[45] The petitioners seek DIP financing in the amount of $600,000, which is just shy of the $620,000 which the cash flow indicates will be required to see them through to December 11.

[46] The petitioners have in hand a term sheet from Fisgard which allows for funding to a maximum of $2.5 million. If the DIP financing is ordered, the parties are generally agreed that it will be restructured so as to separate the funding to Parkside Resort and Pacific Shores Resort given the different debt structures on those properties. There would also have to be some general funding for head office expenses.

[47] There also appears to be the possibility that PSOE and the Club will recommence paying the amounts that would normally have been billed to them by the petitioners but for the prepayments that were made in anticipation of services continuing. If so, that will provide an additional $323,000 by December 11.

[48] The granting of DIP financing is to be considered in accordance with s. 11.2 of the *CCAA*, which are relatively new provisions that came into force in September 2009:

> Interim Financing
>
> **11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> Priority – secured creditors
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> Priority – other orders
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> Factors to be considered
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (*a*) the period during which the company is expected to be subject to proceedings under this Act;

> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[49] I will address each of the factors listed in s. 11.2(4):

a) at this time the petitioners are seeking to continue the stay for a further five weeks until December 11, 2011, which is not an inordinate amount of time given the ambitious task ahead of them. Nevertheless, in my view it is essential that they be given this breathing room to explore restructuring options. The parties and the Monitor can assess their progress by that time to determine whether a continuation from that time forward is appropriate.

b) regarding management, as I have stated above, in my view the current management of the business is acting in good faith and with due diligence. They appear to be in the best position to potentially come to a solution given their expertise and the complexities involved. They have taken immediate steps to address cash flow difficulties in terms of the operational costs. I would also add that no party has submitted that the present management team be replaced by, for example, a Chief Restructuring Officer or that the Monitor should be granted further powers to address any deficiencies in that respect.

c) it goes without saying that bcIMC does not support current management. However, a substantial number of other stakeholders do support the management team, including BCC, who has a significant financial stake in the matter given its second mortgage on Parkside Resort. Fisgard does

not support management either. However, I am of the view that this position should be discounted substantially given that it is fully secured on Pacific Shores Resort.

d) the DIP financing is necessary in the circumstances to allow the Group's operations to continue. Without it, this proceeding cannot go forward. In that respect, it will enhance the prospects of a viable compromise or arrangement.

e) I have already discussed the nature and value of the Group's assets. Allowing the Group to continue can only serve to maintain the existing goodwill in the Group's business. It is well acknowledged that a receivership would have disastrous consequences in relation to the ability to market the units.

f) material prejudice is the most substantial argument of bcIMC and Fisgard in opposition to the DIP financing. I accept that the imposition of the charge may prejudice them in the event that the assets are not sufficient to pay their first mortgages, although that seems more unlikely in respect of Fisgard. Nevertheless, the materiality of the charge is questionable, particularly since the secured lenders have expressed an intention to continue the operations of Pacific Shores and Parkside Resorts respectively – which would in turn result in any receiver obtaining priority borrowings and which would erode the security in the same manner as DIP financing. The DIP financing will allow operations to continue, which will maintain the goodwill and enhance values in the meantime. In these circumstances, I am satisfied that the benefits of DIP financing outweigh any potential prejudice to the secured creditors, particularly bcIMC: see *United Used Auto & Truck Parts Ltd. (Re)* (1999), 12 C.B.R. (4th) 144 (B.C.S.C.), Tysoe J. at para. 28.

I would note that material prejudice to secured creditors is only one factor and is to be considered in equal measure with the others listed in

s. 11.2(4). It is not, as submitted by Fisgard, the case that as a matter of law the court cannot impose DIP financing over the objections of a secured creditor if there is prejudice to that secured creditor, particularly in light of the statutory test.

g) I would note that the Monitor in its first report, dated October 31, 2011, agrees that the current offer of Fisgard is the most favourable to the petitioners and the Monitor supports the granting of an Order approving DIP financing and the imposition of a DIP charge for that purpose.

Conclusions

[50] I wish at this time to address the argument of Fisgard that a *CCAA* proceeding is not appropriate in respect of these Resorts since they are real estate developments.

[51] There are numerous cases which have considered this issue including *Cliffs Over Maple Bay*; *Encore Developments Ltd. (Re)*, 2009 BCSC 13, 52 C.B.R. (5th) 30; and *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145, 52 C.B.R. (5th) 47, to name a few. Yet those cases are clearly distinguishable from the present circumstances. In those cases, there were undeveloped or partially completed real estate projects and the courts found that it was more appropriate for the secured creditors to realize on those assets in the usual manner.

[52] In *Forest & Marine*, at para. 26, the Court of Appeal clearly drew the distinction between that situation and one where there is an active business being carried on within a complicated corporate group. The latter situation is exactly what we are dealing with here.

[53] Despite the setbacks in their business, the petitioners wish to continue their operations within the *CCAA* for the purpose of developing and presenting a plan to their creditors. This is consistent with the fundamental purpose of the *CCAA* as has been expressed in many cases of this court and our Court of Appeal: see, for

example, *Sharp-Rite Technologies Ltd. (Re)*, 2000 BCSC 122 at para. 23; and *Cliffs Over Maple Bay* at paras. 27-29.

[54] The petitioners say they have a proven track record in terms of sales and that they remain in the best position to maintain operations while they seek a more permanent solution to their financial troubles. They say that this will be advantageous for a number of reasons: the business is complex; the businesses are linked together such that each depends on each other, such that the whole will be weakened by a receivership; the buying of fractional interests is driven by the relationship with Aviawest; a stay will protect other stakeholders beyond the first secured creditors; and management has the skills to continue the sales of fractional interests.

[55] These points concerning the complexity and interconnectedness of the petitioner parties, which I accept, meet the suggestion by bcIMC and Fisgard that somehow the proceeding should be bifurcated – although this argument is, for the most part, made by each of them against the other in that each says that their main security should be released from the proceedings and that the other businesses and properties can remain within the *CCAA* proceedings. There was also a suggestion by bcIMC that Aviawest should be released from the *CCAA* proceedings, although it is not clear to me what benefit might be gained in that respect.

[56] In my view, this is a highly integrated group and the protections under the *CCAA* must be for the entire group in order that they can seek a solution to their financial problems as a whole. It may be that individual solutions will be found for particular assets or debts, but that can be accommodated within the *CCAA* proceedings as currently sought by the petitioners for that integrated group.

[57] I do not wish to end without noting the obvious. There are a substantial number of stakeholders involved: the petitioners themselves and the related corporate entities, the secured creditors, the unsecured creditors, the owner groups and strata corporations, the thousands of homeowners, and the hundreds of employees. Many of the hundreds of parties holding unsecured debt in Aviawest are

retirees who have invested their life savings into the enterprise, although it is also apparent that many pensioners have also invested through bcIMC.

[58] There can be no doubt that a receivership will result in a complete obliteration of every financial interest save for the first and possibly second secured lenders. On this point there is no disagreement, save for Fisgard's somewhat inexplicable argument that a receivership of Pacific Shores Resort would prejudice no one. The prejudice to the other stakeholders in relation to that resort is palpable in the event of a receivership.

[59] In conclusion, it is my opinion that the petitioners have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that the making of a further order extending the stay is appropriate. The order will go as sought, including that the administration charge is increased to $300,000 and that a director's charge is imposed to a maximum of $700,000 in respect of potential obligations that might be incurred post-filing.

[60] In addition, I am satisfied that the requested DIP financing order is appropriate in the circumstances and that it can be structured as has already been discussed between the parties.

[61] Fisgard's application to appoint a receiver is dismissed.

"The Honourable Madam Justice S.C. Fitzpatrick"

TAB 10

See pages 23-24

Unofficial English Translation

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-000668-939
(500-05-008364-927)

DATE: June 16, 1993

CORAM: THE HONOURABLE CLAUDE VALLERAND, J.A.
MARIE DESCHAMPS, J.A.
JACQUES DELISLE, J.A.

PIERRE MICHAUD
and
PHILIPPE MICHAUD
APPELLANTS - Respondents
v.

STEINBERG INC.
RESPONDENT– Petitioner
and
PAUL BERTRAND
RESPONDENT – Impleaded party

THE COURT, ruling on the appeal of a judgement rendered on March 24, 1993 by the Superior Court for the District of Montreal (the honourable André Denis), who, among other things, sanctioned an arrangement proposed by the respondent to its creditors under the Companies' Creditors Arrangement Act;

After review of the file, hearing and deliberation;

For the reasons set out in the opinions of Mr. Justice Claude Vallerand, Madam Justice Marie Deschamps and Mr. Justice Jacques Delisle;

ALLOWS the appeal;

SETS ASIDE the judgement in first instance**;**

REFUSES sanctioning of the arrangement;

RETURNS the file to the judge in first instance so that he issues, if necessary, the appropriate orders**;**

WITH COSTS.

CLAUDE VALLERAND, J.A.

MARIE DESCHAMPS, J.A.

JACQUES DELISLE, J.A.

Mtre James A. Woods and
Mtre Christian Immer
Counsel for the Appellants

Mtre Raynold Langlois, Q.C. and
Mtre Guy Turner
Counsel for the Respondent

Mtre Max R. Bernard
Counsel for the Banking Syndicate of Steinberg Inc.

Date of hearing: May 12, 1993

OPINION OF JUDGE VALLERAND

I have had the benefit of studying the opinion of my colleagues. Like them, I have nothing to say with regard to the composition of the classes, which is both equitable as stated by my colleague Delisle and respectful of the commonality of interest as judged by my colleague Deschamps with whom I also share the opinion that the determination of the commonality of interest sometimes goes beyond the simple review of the treatment proposed for each.

Regarding clauses 5.3 and 12.6, I share the reservations and concerns that they provoke with my colleague. It would not be appropriate to swallow the ambiguities and invite litigation to which these clauses might give rise. I am therefore of the opinion that they should be dealt with as proposed by my colleague.

Finally, regarding clause 12.9 - the waiver of all recourses against the company's directors and others – I subscribe to what has been written by my colleagues. However, like my colleague Deschamps and the case law to which she refers, I would go further than simply criticizing the overly broad wording of the clause in question as our colleague Delisle does.

Admittedly, such a clause is not contrary to public order and its acceptance or refusal by the creditors comes within their will. Subject to the condition, however, that such will can be manifested with full respect for the rights of all, as required by the Act. At the risk of repeating it, the classes of creditors must be made up in an equitable manner that takes into account the commonality of interest so as not **to produce confiscation and injustice (SOVEREIGN LIFE ASSURANCE CO. v. DODD,** cited by Judge Deschamps). The Act provides for classes of creditors **of the debtor company** made up in accordance with their commonality of interest. Not isolating the interests particular to those who are creditors of both the company and its officers would carry a substantial risk of these interests being despoiled. If only because if the company is, in principle, insolvent, its officers and employees are not. The creditors of the company only will consider the arrangement proposed to them in light of the alternative: accept it and perhaps recover part of their claim; refuse it and lose everything. It is otherwise for those who also have a claim against the officers of the company. They will consider the proposed arrangement, each according to the relative benefit he derives from it with respect to each of his claims, which are very different in every respect.

This being said, compliance with the principles governing the setting up of the classes of creditors would require that one establish a class of creditors of the company who also have a claim against its officers and sometimes, or even often, a distinct category for each of them since the interests of each may vary with regard to the

respective qualities and amounts of his claim against the company and his claim against its officers.

This is the price of avoiding the creditors of the officers and employees being despoiled, drowned in a sea of creditors of the company only, with whom they have hardly any, or even no, common interest. However, one will find oneself with one or several classes of "dual capacity" creditors who, often quite ready to accept the arrangement insofar as it concerns their claim against the company, will nevertheless reject it due to the release of their claim against the officers and will thus obstruct the will of the company's creditors, the only persons with whom the Act is concerned.

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.

CLAUDE VALLERAND, J.A.

OPINION OF JUDGE DESCHAMPS

I have taken cognizance of the opinion of Judge Delisle. I share his conclusion on the aspect of the classification of unsecured creditors used by the respondent for the purposes of voting on the arrangement proposed to the creditors under the Companies' Creditors Arrangement Act[1] [the "Act"], but by taking a different route. As regards the inclusion in this arrangement of clauses that the appellants claim are foreign to the spirit of the Act, I am of the opinion that clauses 5.3 and 12.6 could not be sanctioned as drafted and that clause 12.9 does not fit within the framework of an arrangement.

1- Classification of the creditors

The Act provides, in section 6, that the votes of the creditors of a company, for the purposes of approval of an arrangement, must be counted by classes. This section provides as follows:

> 6. Where a majority in number representing three-quarters 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 …

Section 4 specifically provides that the unsecured creditors may be summoned by classes:

> 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 or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> [underlining added]

In this file, all the unsecured creditors voted together, in a single class, despite the fact that sub-classes had been created and that different offers had been made for each of the sub-classes.

[1] R.S.C. c. C-36.

The unsecured claims total $275,116,000. The unsecured creditors are mainly the respondent's suppliers, the creditors having litigious claims and the Caisse de dépôt et de placement du Québec [the "Caisse"]. The respondent divided these creditors into six sub-classes and made a different offer to each of them:

1. claims of $1,000 or less: payment in full of their claim from a cash fund of $2,500,000 to be advanced by a banking syndicate if the arrangement is sanctioned [the "Fund"].

2. claims from $1,001 to $5,000: participation in the Fund.

3. claims from $5,001 to $40,000: participation in the Fund, but to a lesser extent than those of the preceding sub-class, in addition to a stake in the proceeds of realization from a portfolio of lawsuits commenced by the respondent.

4. claims of more than $40,000: a stake in the proceeds of realization from the portfolio of lawsuits.

5. litigious claims: same offer as to the creditors in the fourth sub-class.

6. the Caisse: a stake in the share capital.

In addition, the creditors in sub-classes 2, 3, 4 and 5 are offered an additional stake by the issuance of shares in their favour in accordance with terms different from those offered to the Caisse.

On January 12, 1993, the arrangement was proposed to the unsecured creditors. If all these creditors, in a proportion of 83% in number and of 91% in value, approved the arrangement, which constitutes a favourable vote for the purposes of the Act, that would not have been the result if the vote had been calculated in light of sub-classes. Had the calculation been made according to sub-classes, one notices that the votes of the third [$5,001 to $40,000] and fifth [litigious claims] sub-classes would not have attained the threshold opening the way to sanctioning by the Superior Court.

According to the appellants, the examination of the classification of the creditors constitutes a prior step to the consideration of the fair and equitable character of the arrangement. At this stage, the judge must verify the strict application of the Act.

The appellants argue that the class of unsecured creditors consists of creditors having distinct interests, which is illustrated by the fact that the offer varies dramatically from one sub-class to another. According to them, the differences are so important that there is no commonality of interest between the different creditors and that they should have been called upon to vote separately, as provided for by section 4 of the Act.

The respondent replies that the examination of the classification does not constitute a prior condition, but is only one of the elements that the Superior Court judge

must examine in the analysis of the arrangement as a whole. According to it, the first judge has discretion in this regard that must be respected by the Court of Appeal. The respondent states that the judge in first instance was justified in taking into account all the circumstances of the file and, in particular, the clear majority of creditors who voted in favour of the arrangement. It argues that the creditors must be classified according to their legal interests and the means of realization available to them and not according to the offer that was made to them. As the unsecured creditors have in common the fact that they have no security and that in the event of bankruptcy no dividend would be available, the respondent argues that it was within its rights to call upon all the sub-classes of unsecured creditors to vote together.

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The principles invoked by the parties in support of their positions have their source in the same cases but each party interprets them in his own way.

One can extract from the case In re Alabama, New Orleans, Texas and Pacific Junction Railway Company[2] the rules that should guide a judge called upon to sanction an arrangement. Lord Lindley stated them as follows:

> The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting **bona fide**, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.[3]

This dictum of Lord Lindley is frequently repeated by the courts[4] (4) and highlights the three distinct steps to follow when an arrangement is being sanctioned by the Superior Court:

1. Verification of the formalities provided for in the Act;

2. Verification of respect of the rights of the minority by the majority;

3. Assessment of the fair and reasonable character of the arrangement.

The steps proposed by Lord Lindley clarify the discussion relating to the criterion for intervention by a court of appeal.

In the analysis of the fair and reasonable character of an arrangement, the respondent is correct in asserting that the Superior Court judge has wide-ranging

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[2] [1891] 1 Ch. D. 213.
[3] Supra note 2 at 239.
[4] Re Campeau Corp., (1992) 10 C.B.R. (3d) 104 (Div. Gen. Ont.); Re Northland Properties Ltd, (1988) 73 C.B.R. (N.S.) 175 (B.C.S.C.); Re Dairy Corporation of Canada Ltd, (1934) 3 D.L.R. 347 (Ont. S.C.).

discretionary power because his very role is to assess all of the circumstances that may lead to an arrangement.

However, it cannot be this way for the analysis of compliance with the Act. Indeed, the examination of the method followed to summon the creditors or of the percentage required for the purpose of approving the arrangement are elements that leave little room for discretion. For example, a judge could not rely on his discretion to modify the percentage levels set out in section 6 of the Act.

Similarly, it is difficult to conceive that the examination of the making up of the classes, which is generally the subject of the contestation at the second step, can give rise to an assessment that takes into consideration the arrangement as a whole, as contended by the respondent. Before verifying whether it is acceptable, the making up of the classes must be examined.

The first two steps mentioned by Lord Lindley must therefore be examined in a distinct way. They are elements which may be considered as prior conditions, as was done by Judge Middleton in Re Dairy Corporation of Canada Ltd., one of the first reported Canadian disputes under the Act:[5]

> Upon this motion I think it is incumbent upon the Judge to ascertain if all statutory requirements that are in the nature of conditions precedent have been strictly complied with and I think the Judge also is called upon to determine whether anything has been done or purported to have been done which is not authorized by this statute. Beyond this there is, I think, the duty imposed upon the Court to criticize the scheme and ascertain whether it is in truth fair and reasonable.
>
> (Underlining added)

The issue of the classification of the creditors has drawn the attention of the courts on numerous occasions. All the cases submitted by the parties are inspired by Sovereign Life Assurance Co. v. Dodd,[6] with, however, more or less coherent results.[7]

In the Sovereign Life case, the Court of Appeal of England had to rule on the right of a creditor to set up compensation for a debt due by a company before the approval of a plan of arrangement by the creditors. The plan had been approved by the required majorities of the creditors consisting of insured persons whose indemnities were due and holders whose policies had not yet expired. The comments of Lord Esher highlight the importance of the classification of creditors. Here is how he expressed himself:

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[5] Supra note 4.
[6] (1891) 4 All E.R. 246.
[7] Re Keddy Motors Inns Ltd, (1992) 13 C.B.R. (3d) 245 (N.S.C.A.) and Fairview Industries Ltd et al. (No. 3), (1991) 109 N.S.R. 2d 32 (N.S.S.C.), where even the criterion of community of interests is departed from.

> "The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes."[8]
>
> (underlining added)

On the same subject, in the same matter, Lord Bowen wrote the following:

> "The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term "class" as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. That being so, in considering the deed of arrangement made with the company which took over the business of the plaintiff company, we must so construe it as not to include in one class those persons whose policies had already ripened into debts and those whose policies might not ripen into debts for some years. The position of a person like the defendant, to whom an ascertained sum of $2,000 was due from the company, was quite different from the position of those policy-holders whose future was entirely uncertain. It was not, therefore, right to summon to a meeting, as members of one and the same class of creditors, those who had an absolute bar to a claim by the company against them and those who had not."[9]
>
> (underlining added)

In establishing the classes of creditors, a company must therefore seek to group together the creditors having between them not identical or equal interests, but common interests. The criterion of identity of interests was specifically rejected by the Alberta Court of Queen's Bench in the case of Norcen Energy Resources Ltd. v. Oakwood Petroleums.[10] The following comments of Judge Forsyth can be adopted without reserve:

> "These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under

[8] Supra note 6 at 249-250.
[9] Supra note 6 at 251-252.
[10] (1988) 72 C.B.R. 20.

> a proposed plan. To accept the "identity of interest" proposition as a starting point in the classification of creditors necessarily results in a "multiplicity of discrete classes" which would make any reorganization difficult, if not impossible, to achieve."[11]

The grouping may be made according to commercial interests,[12] security interests or priorities of which certain creditors have the benefit,[13] the offer made to different creditors[14] or according to any other commonality, provided that the interests of the minority creditors are not "confiscated". Judge Kingstone expressed himself in this way in the case of In re Wellington Building Corporation Limited,[15] a judgement that closely follows the Dairy case and follows the same philosophy:

> "It was never the intention under the Act, I am convinced, to deprive creditors in the position of these bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company which would permit the holders of junior securities to put through a scheme inimicable to this class and amounting to confiscation of the vested interest of the bondholders."

The appellants argue that the arrangement proposed by the respondent does not permit the different creditors to consult each other because they have no commonality of interest. They point out that the creditors whose claims have been classified as litigious claims (including themselves for nearly $2 million), and who have been offered only a possible dividend coming from the realization of the litigation portfolio and the issuance of shares, have nothing in common with the creditors for less than $1,000 who will be paid at 100%. The creditors whose claims are litigious refused the arrangement in a proportion of 93%.

The respondents reply that the unsecured creditors could legitimately be grouped in one class because they have the same legal interest in that their claims are not guaranteed and none of them would receive any dividend should the respondent be liquidated under the Bankruptcy Act.[16]

The simple fact that the unsecured creditors have the same legal interest is not sufficient to include them in the same class since that would deny the meaning of the words "or any class of them" (unsecured creditors) in section 4 of the Act. This interpretation would also ignore all the case law outlined above. Nor is the Court satisfied with the argument to the effect that the arrangement brings more to the creditors than a forced liquidation. Indeed, it is obvious that any arrangement must theoretically bring more to the creditors than would a liquidation. That is not to say that

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[11] Supra note 10 at 28.
[12] Nova Metal v. Comiskey, (1990) 1 C.B.R. 3d 101 (Ont. C.A.).
[13] In re Wellington Building Corporation Limited, (1934) 16 C.B.R. 48 (Ont. S.C.), NsC Diesel Power Inc., (1990) 79 C.B.R. 1.
[14] La Lainière de Roubaix v. Glen Cove Co., (1926) S.C. 91 (Scott).
[15] Supra note 13 at 54 and comments of Judge Bowen in Sovereign, supra note 9.
[16] R.S.C. c. B-3.

any arrangement must be sanctioned; it still must comply with the conditions set out in the Act, not include any element oppressing the minority and be reasonable.[17]

To note that two sub-classes do not meet the thresholds set out in section 6 of the Act is not in itself decisive because the classification must not be done according to the possible outcome of a vote, which would clearly be a manipulation of the classes.

The study of the proposed arrangement reveals that if 1,200 creditors whose claims total approximately $416,000[18] are paid in full, this constitutes only a small percentage of the $275,116,000[19] representing the total of the unsecured claims, that is, 0.15%. Even if the different treatment given to the creditors for less than $1,000 presents an attractive argument, it is not wise to stop there.

If the creditors for less than $1,000 are set aside because they are quantitatively marginal, there remain elements of the offer that are common to a large number of creditors.

The creditors in the second and third sub-classes certainly have points in common since they are being offered both a participation in the Fund and shares. Those of the fourth and fifth sub-classes are all being offered a stake in the portfolio of lawsuits and shares.

There is, in these groupings, a definite community of interests. The distinction is at the level of participation in the Fund as opposed to the portfolio of lawsuits. However, if the Fund theoretically could have been put at the disposal of all the unsecured creditors in the same proportion, the benefit would have been so diluted that it would have lost its practical interest. Therefore, participation in the Fund should not be used to conclude that there is a conflict between the interests of the creditors in sub-classes 2, 3, 4 and 5.

The Caisse has little in common with the other creditors. It has not been argued that its vote could have been decisive and the results filed in the record do not seem to support such an argument. In addition, no one has claimed that the offer made to it should have been made to the other creditors.

The case law did not impose on the respondent a grouping according to similarity of offer. It had to classify the creditors according to interests that were not so dissimilar that they prevent effective consultation or that they unduly oppress the minority interests. On one hand, the treatment offered to sub-class 3 is similar to that offered to sub-class 2 and, on the other, the offer made to sub-class 5 is the same as that made to sub-class 4. The fact that sub-classes 3 and 5 did not attain the minimum thresholds does not constitute oppression or a confiscation of their rights. They were not

[17] Supra note 2, Alabama.
[18] Affidavit of P. Bertrand, December 22, 1992, paragraph 19, a.f. at 426.
[19] List of creditors attached to the arrangement a.f. at 269.

sufficiently different that they could not consult each other with a view to a vote with sub-classes 2 and 4.

It was therefore not necessary to consider each sub-class independently for voting purposes, which, moreover, would have had the effect of unduly multiplying the classes.[20]

2. Inclusion in the arrangement of clauses foreign to the spirit of the Act

The appellants contest the inclusion in the arrangement of clauses 5.3, 12.6 and 12.9, considering them to be foreign to the spirit of the Act and arguing that they cannot be imposed on creditors within the framework of an arrangement proposed under the Act. The arguments relating to clauses 5.3 and 12.6 are somewhat different from those relating to clause 12.9 because the former concern the effect of the arrangement on the rights of the creditors whereas the latter deal with the impact of the arrangement on the obligations of third parties.

Clauses 5.3 and 12.6 provide as follows:

> [translation] "5.3 The Plan of arrangement approved by the Creditors and sanctioned by the Court constitutes a contract binding the Company to each of the Creditors of each of the classes respectively and, except where it does not in any manner modify the already existing obligations of the Company, and except…"
>
> [translation] 12.6 "**Consents, renunciations and agreements**
> At the time of the Sanction, every Creditor shall be deemed to have consented to all the provisions contained in the Plan in its entirety. In particular, each of the Creditors shall be deemed
>
> a) to have executed, signed and delivered to the Company all consents, renunciations, releases and assignments, statutory or otherwise, required to put in place and carry out the Plan;
>
> b) to have renounced to any default of the Company mentioned in any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company, that occurred at any time before the date of the Sanction; and
>
> c) in the event that there is any conflict between any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company at the date of the Sanction (other than those concluded by the Company or taking effect at the date of the Sanction) and

[20] Comments of Judge Forsyth in Norcen, supra note 10 and comments of Judge Kingstone in Wellington, supra note 13.

> the provisions of the Plan, to have consented to the provisions of the Plan taking precedence over those of such contracts or agreements and the latter are amended accordingly."

The appellants argue that the legal foundation of the arrangement is the Act and not the general theory of obligations and that consequently, one can only include in an arrangement clauses that comply with the parameters of the Act.

Upon reading the contested clauses, one notes that the respondent is trying to clarify the legal consequences of the acceptance of the arrangement by the creditors.

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.

To include in an arrangement concepts like those of "contract" (clause 5.3) or of "consent", "renunciation" or "release" amounts to importing therein concepts that are not only foreign but that are contrary to the spirit of the Act.

The text of section 6, reproduced above, provides that if the arrangement is approved by a numerical majority representing 75% in value of the claims of all classes and is sanctioned by the Court, the arrangement **binds** all the creditors, which means that those dissenting do not consent to the arrangement but see it imposed on them.

If the arrangement is imposed on the dissenting creditors, it means that the rules of civil law founded on consent are set aside, at least with respect to them. One cannot impose on creditors, against their will, consequences that are attached to the rules of contracts that are freely agreed to, like releases and other notions to which clauses 5.3 and 12.6 refer. Consensus corresponds to a reality quite different from that of the majorities provided for in section 6 of the Act and cannot be attributed to dissenting creditors.

It is not illegal or prohibited for a company to take advantage of a meeting summoned under the aegis of the Act to conclude, with its creditors, agreements that are parallel to the arrangement or superimposed on it. In this sense, a company may ask its creditors to consent to benefits for it that go beyond the framework of the Act such as being "…deemed…to have renounced to any default of the Company mentioned in any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company, that occurred at any time before the date of the Sanction".[21] This clause is very wide-ranging and may cover defaults that would not be related to the arrangement. These agreements may be valid under the Civil Code and can be set-up against the creditors

[21] Clause 12.6(b) of the arrangement.

who consent to them. However, they do not have to be sanctioned by the Superior Court to be enforceable and cannot be set-up against the creditors who do not consent to them. As a corollary, the Superior Court doe not have to affix its seal to them since the civil law does not require its intervention.

Under the Act, the sanctioning judgment is required for the arrangement to bind all the creditors, including those who do not consent to it. The sanctioning cannot have as a consequence to extend the effect of the Act. As the clauses in the arrangement founded on the rules of the Civil Code are foreign to the Act, the sanctioning cannot have any effect on them.

What should a judge faced with these clauses do? Should he refuse to sanction? I believe that he has no choice, because sanctioning would amount to undermining the effect of his judgment. The judgment of the Superior Court must have a final and uniform character. It cannot have a different effect in respect of certain clauses from that which it has in respect of other clauses without leading to confusion as much for the company as for the creditors. Such a judgment would not serve any of the parties involved. I therefore believe that the judge, called upon to sanction an arrangement, cannot give his approval to such clauses.

The second aspect of the appellants' contestation concerns the release by the creditors in favour of the directors, officers, employees and advisors of the respondent. The contested clause states the following:

> [translation] "12.9 **Release**
>
> With effect from the Sanction, each Creditor shall be presumed to have definitively renounced to any lawsuit, to any action and to any recourse that he may have or may have had against the directors, officers, employees and advisors of the Company."

The appellants argue that such a clause does not come within the framework of the Act and should not be included in the arrangement. According to them, the release in respect of the directors "is quite exorbitant and constitutes a serious infringement upon their rights".

The respondent argues that the directors have dedicated all their energy to the respondent since the filing of the proceedings and that it would be unfair and inequitable to put responsibility for the current situation on their shoulders. It compares the planned reorganization to the sale of a business and argues that at the time of a sale it is neither unfair nor exorbitant to provide for a release.

The respondent argues that the clause covers a potential liability that is personal to it because the beneficiaries of the clause are not third parties and that, moreover, it

must indemnify its directors and officers both under an internal by-law and under section 123.87 of the Companies Act.[22]

The respondent's position cannot be accepted. One notes that the release provided for in the arrangement covers more wide-ranging obligations than those provided for in the Companies Act or in respondent's internal by-law. Whereas the arrangement imputes a renunciation to any recourse against the directors, officers, employees and advisors, section 123.87 of the Companies Act and the internal by-law only cover the fault of directors and officers sued by a third party for acts done in the performance of their duties.

The judge in first instance opted in favour of the validity of the clause in the following terms:

> [translation] "It is obvious that Steinberg wishes to avoid a legal situation that would allow creditors to do through the back door what is prohibited through the front door. Steinberg's proposal is a proposal that involves the company and its directors. If the company found itself with judgments against its directors for which it had to assume responsibility, it is obvious that those judgments could have an important impact on the plan of arrangement. Once again, it is a global proposal that Steinberg is making to its creditors and it is that proposal which has been accepted under reserve of the restrictions contained in article 9.01 of rule 108 and under reserve of the comments that the Court will draw up in the case of the workers' union. The Michauds' argument is not accepted."

It is difficult to approve the assertion to the effect that the arrangement is a proposal made by the respondent and its directors to respondent's creditors. Even though the Companies Act considers the directors as the agents of the respondent,[23] they are not its alter egos for the purposes of the Act.

The Act offers the respondent a way to arrive at a compromise with its 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.

The case of Browne v. Southern Canada Power Co. Ltd.[24] provides an example of a dispute arising between a creditor and two guarantors, in that instance the president and the secretary-treasurer of the debtor. They argued that their position had become more onerous due to the modification of the debt due by the debtor further to an arrangement made under the Act. The decision of our Court was unanimous.

Judge Barclay wrote:

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[22] R.S.Q. c. C-38.
[23] Supra note 22, section 123.83.
[24] (1941), 23 C.B.R. 131 (Q.C.A.).

> "The very special remedies authorized by law for the exclusive benefit of a debtor company are not available to third parties."

Judge Walsh expressed himself more explicitly:

> "The Companies' Creditors Arrangement Act, however, intervened in the case of the City Gas Company to grant the company favoured treatment; this Act does not extend its favours to others, who had guaranteed the debt. The appellants cannot claim the benefit of delay that the Act affords to their company, because they became immediately liable by the default of the debtor, with whom they had bound themselves jointly and severally; and they did not demand the benefit of discussion. The appellants cannot set up exceptions personal to their debtor, and The Companies' Creditors Arrangement Act is an exception that favours the company only; nothing was shown to extend its scope to the appellants."

And finally Judge McDougall (ad hoc):

> "Such arrangement enured to the benefit of the company not to that of its guarantors."

The possibility of extending the effect of a stay requested under the Act to directors, officers, employees, agents and consultants was studied recently in the case of Phillip's Manufacturing Ltd.[25] In that case, the debtor did not claim that the Act allowed the directors and others to benefit from the stay, but relied on the Court's inherent powers. The stay was refused to all parties except the debtor.

If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the Act, he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.

The Act 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.

Moreover, it is doubtful that the sanctioning of the arrangement can be considered definitive regarding the release given to the directors, as another party, the Syndicat des travailleurs unis de l'alimentation et du commerce, also contested the validity of clause 12.9 of the arrangement. The judge in first instance referred the Syndicat's contestation to another judge of the Superior Court. It is difficult to conceive of the clause being valid as regards the appellants but possibly held invalid as regards the Syndicat.

[25] B.C.S.C. [1991] B.C.J. no. 2932.

However, for the purposes of the present appeal, this clause is considered as departing from the Act. The file should be returned to the judge in first instance in order that he grant, if necessary, the orders allowing the respondent to amend its proposal.

For these reasons, I would propose to grant the appeal in part, to declare that clauses 5.3 and 12.6 could not be sanctioned as drafted, to declare that the release contained in clause 12.9 does not fit the framework of an arrangement and to return the file to the judge in first instance to issue the appropriate orders, the whole with costs.

MARIE DESCHAMPS, J.A.

OPINION OF JUDGE DELISLE

The appellants, brothers Pierre and Philippe Michaud, appeal against a judgement rendered on March 24, 1993 by the Superior Court for the District of Montreal that, among other things, sanctioned the definitive arrangement proposed by the respondent to its creditors under the Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36) hereinafter referred to as the "CCAA".

That arrangement had previously been approved by the respondent's creditors at a meeting held on January 12, 1993 after having undergone, on earlier dates, various amendments required by the creditors. The approval of the creditors, in accordance with their classification proposed in the arrangement, satisfied the requirements set out in section 6 of the CCAA: a numerical majority, representing three-quarters in value, of the creditors present and voting either in person or by proxy.

The class grouping the unsecured creditors, as defined in section 2 of the CCAA, covered about 3,000 creditors, including the two appellants, having claims in excess of $400,000,000. Among the 1,591 of these creditors, having total claims of $375,715,931.13, who were present at the meeting of January 12, 1993 and who voted either in person or by proxy, 1,213 of these creditors, having claims for $325,677,341.20, accepted the arrangement proposed by the respondent (a.f. 7).

The appellants argue that the judge in first instance committed an error by not declaring the nullity of the arrangement for the following reasons:

a) it did not provide for separate votes by sub-classes of the unsecured creditors; and

b) the illegality of its clauses 5.3,12.6 and 12.9.

The appellants, without success, raised the same arguments before the court of first instance at the time of the presentation of the respondent's motion for sanctioning of its arrangement.

The analysis of the issues raised by the appellants against such a sanctioning should be carried out in light of, firstly, the purpose of the CCAA and, secondly, the principles governing the role of the court seized of a motion for the sanctioning of an arrangement proposed under this statute.

PURPOSE OF THE CCAA

In the case of **Multidev Immobilia Inc. v. Société Anonyme Just Invest**, [1988] R.J.Q. 1928 (S.C.), Mr. Justice Parent recalled the goal aimed at when the statute was enacted (p. 1930):

> [translation] "It is in order here to recall that the Companies' Creditors Arrangement Act was enacted during the Depression to allow companies in financial difficulty, debtors under bonds or other outstanding debt security, to make agreements with their creditors, to settle their problems outside the mechanisms provided for in the Bankruptcy Act and the Liquidations Act. It is a statute of "equity" which promotes arrangements between such a company and all its creditors."

The first purpose of the CCAA was thus to offer companies that satisfied its terms of application an alternative to certain other statutes having more radical effects, the ultimate objective being to allow such companies to survive financial difficulties, with the agreement of their creditors.

Over the years, this curative character of the CCAA was confirmed by the case law, so that today there is unanimous recognition of the statute's raison d'être:

> **"The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business…" Hongkong Bank v. Chef Ready Foods (1991) 4 C.B.R. (3d) 311 (B.C.C.A.) (p. 315)**
>
> **"… The Act envisions that the rights and remedies of individual creditors, the debtor company and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation:…"**
>
> **Nova Metal Prods v. Comiskey (Trustee of)**, [1991] 1 C.B.R. (3d) 101 (O.C.A.) (p.122)
>
> [translation] **"The statute wants to permit a debtor company to submit a reorganization plan to all its creditors…"**
>
> **Banque Laurentienne du Canada v. Groupe Bovac Ltée** (1991) R.L. 593 (C.A.) (p.613)

Precisely because of the goal sought, the CCAA should be interpreted liberally. A company that has recourse to this statute should be able to attain its objective.

It is from this perspective that a court seized of a motion for sanctioning of an arrangement should exercise its role.

ROLE OF THE COURT ON A MOTION FOR SANCTIONING OF AN ARRANGEMENT

The case law on the subject is well established. The following principles emerge from it:

a) the first duty of the court is to assure itself that the arrangement has been accepted by the creditors in accordance with the requirements of section 6 of the CCAA: a numerical majority representing three-quarters in value of the creditors or of a class of creditors, as the case may be, present and voting either in person or by proxy at a meeting duly called for that purpose; **In re Dorman, Long & Co., In re South Durham Steel and Iron Co.**, [1934] 1 Ch. 635 (p.655); **Re Northland Properties Ltd**, [1989] 73 C.B.R. 9N.S.) 175 (p.182);

b) the court must thereafter assure itself of the reasonable character of the arrangement; it must be beneficial to both parties present; **In re Alabama, New Orleans Texas and Pacific Junction Railway Co**., [1891] I Ch. 213 (C.A.) (p.243); **In re English Scottish and Australian Chartered Bank**, [1893 3 Ch. 385 (C.A.) (p.408); in the first of these cases, Lord Bowen defines what must be understood as a reasonable arrangement (p.243):

"A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it…"

c) the court should not substitute its own assessment of the arrangement to that of the creditors: **Re Langley's Ltd**, [1938] O.R. 123 (O.C.A.) (p.142); **Carruth v. Imperial Chemical Industries Ltd**, [1937] A.C. 707 (p.770);

d) however, the court must assure itself, and this is surely the most important part of its role, that a minority of creditors is not the object of coercion on the part of the majority or forced to accept unconscionable conditions:

"…In reviewing the arrangement, the Court is placed under an obligation to see that there is not within the apparent majority some undisclosed or unwarranted coercion of the minority who may not have voted or who may have been opposed…"

Re Gold Texas Resources Ltd, British Columbia Supreme Court, A883238, (judgement of February 14 1989; Judge McLachlin);

"…The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable…"

Re Keddy Motors Inns Ltd., [1992] 13 C.B.R. (3d) 245 (N.S.C.A.) (p.258).

It is now appropriate to move on to the grounds invoked by the appellants in support of their appeal.

THE ARRANGEMENT DOES NOT GRANT A SEPARATE VOTE TO EACH CLASS OF UNSECURED CREDITORS

The CCAA essentially provides for two classes of creditors: unsecured and secured. However sections 4 and 5 clearly imply that within one class it is possible to create categories:

> **"4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them…"**
>
> **"5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them…"**

In the present case, the arrangement provides, in its section 5.4, for four classes of creditors:

> **[translation] "The Plan of arrangement proposes the establishment of four (4) classes of creditors: the Secured Creditors, the Crown and the Municipalities, the Unsecured Creditors and the SDI."**

It is for the sake of convenience that the "SDI" and "the Crown and the Municipalities" classes were created, because these creditors could have been, as the case may be, listed in one or the other of the other two classes.

The "unsecured creditors" class is, in sections 8.3 to 8.3.5, divided into six sub-classes:

a) creditors having a claim of $1,000 or less;

b) creditors having a claim of more than $1,000 and less than $5,000;

c) creditors having a claim of more than $5,000 and less than $40,000;

d) creditors having a claim of more than $40,000;

e) persons having litigious claims, whose claim has not been valued definitively at the Date of Payment, as this expression is defined in section 1.1 of the arrangement;

f) the Caisse de dépôt et de placement du Québec and the Société des alcools du Québec.

Despite this creation of sub-classes of unsecured creditors, section 5.4.1 of the arrangement provides that:

> [translation] **“5.4.1 The division into sub-classes, if applicable, has been made only for the sake of convenience and to facilitate the explanations but has no effect on the calculation of votes.”**

This is precisely what the appellants are complaining about.

As mentioned above, it is inferred from sections 4 and 5 of the CCAA that it is permissible to sub-classify a class of creditors. But then, one of two things:

- either the terms of the arrangement are substantially the same for the whole of the class covered and this way of proceeding is only for the purpose of adequately grouping the creditors, thus permitting, on the one hand, more rational interventions toward each class of them and, on the other hand, more relevant discussions between persons having similar claims; in this case, no one can complain about the fact that the votes are computed as if there was only one class;

- or the terms of the arrangement differ from one class to the other, while considering, for the purpose of computing the votes, only the global result; it is then appropriate to seriously analyze the reason for and the consequences of this way of proceeding; if the objective sought (which may not be obvious), achieved in practical terms, is to confiscate the rights of the minority creditors for the benefit of the majority creditors, then the arrangement cannot be qualified as fair or reasonable (**Re Dairy Corp. of Can. Ltd.** [1934] 3 D.L.R. 347 (O.S.C.) (p.349); on the other hand, if the sub-classification is only to group creditors who can anticipate results identical to those proposed to the other classes, but having to get there by different routes with, perhaps, as the only inconvenience, a question of time, then there is nothing unconscionable in there being a global computation of the votes.

In the present case, the appellants, claiming to have a right to a claim of almost $2,000,000, were classified in the class of “persons having litigious claims, whose claim has not been valued definitively at the Date of Payment”.

It appears from the relevant sections of the arrangement (8.3.3, 8.3.4 and 8.3.2) that the fate reserved for these persons is similar to that proposed for the class grouping the creditors having a claim of more than $40,000.

Although the arrangement does not specify it (it did not have to do so), it is obvious that if the claim of such a person is definitively valued before the Date of Payment, the creditor will automatically fall into one of the three classes mentioned above, defined according to the value of the claim.

The appellants therefore not being treated differently from the other creditors, section 5.4.1 of the arrangement is not coercive in their regard.

The only class of unsecured creditors to who is reserved a payment really different from that proposed to the other classes of such creditors is the class grouping the creditors having a claim of $1,000 or less, proved at the Date of Payment.

The amount of money that such class involves, $416,000, is so unimportant relative to the total amount of the claims, in excess of $400,000,000, that I fully endorse the views expressed on this subject by the judge in first instance:

> **[translation]"…Much is made out of the fact that the unsecured creditors for less than $1,000 would be paid cash on the nail. The Court sees nothing abnormal in this proposal, which is no doubt aimed at eliminating a group of small creditors and thus saving time, energy and money dealing with theses claims that are, all in all, unimportant. It is obvious that these creditors are already won over to the plan of arrangement since they will be paid in full. The Court cannot see in this sub-categorization any Machiavellian plan aimed at obtaining a majority of the creditors' votes. Moreover, it must be acknowledged that these creditors have little importance for the vote in value of the mass."**

The following table, attached to the arrangement, illustrates the equitable treatment proposed to the different classes of unsecured creditors, in general, and to that class which includes the appellants, in particular (a.f. 270):

4.– Unsecured Creditors

	1 to $1,000	1,001 to $5,000	5,001 to $40,000	$40,000 & +	CDPQ
Common Shares	NO	YES	YES	YES	YES
%	-	26% (A)	26% (A)	26% (A)	14%
Redemption 5 years	-	YES	YES	YES	NO
AND					
Money - $2.5M Payment	YES 100% of claims	YES Prorata of 50% of balance of $2.5M fund	YES Prorata of 50% of balance of $2.5M fund	NO	NO
OR					
Lawsuits $17.5M plus 50% of excess collected	NO	NO	YES	YES	NO

(A) Represents the same 26% for the unsecured creditors taken globally.

Therefore, I reject the first argument in appeal invoked by the appellants.

CLAUSES 5.3 AND 12.6

These clauses provide, respectively, as follows:

[translation] **"5.3 The Plan of Arrangement approved by the Creditors and sanctioned by the Court constitutes a contract binding the Company to each of the Creditors of each of the classes respectively and, except where it does not in any manner modify the already existing obligations of the Company, and except**

a) for the Banking Syndicate whose rights are governed by the credit agreement existing at the date hereof that will be amended by the agreement attached to the Plan and for the short-term Lenders by the renewable credit agreement existing at the date hereof;

b) for the SDI whose rights are governed by the loan agreement existing at the date hereof that will be modified by an amendment to be entered into between the Company and the SDI and by the letter dated December 11, 1992 which appears in Schedule B hereto;

c) for the Litigious Claims under reserve of paragraph 8.3 below;

d) for Toronto-Dominion (California), Inc. (now Toronto-Dominion (Texas), Inc.) ("T-D Texas") whose rights are governed by the loan agreement dated May 1, 1991 between T-D Texas, Saint-Lawrence, Smitty's and Steinberg and the guarantee of Steinberg in favour T-D Texas dated May 1, 1991, the whole as qualified by the agreement dated December 17, 1992 between the said parties and subordination agreements dated May 1, 1991 between SDI, the Caisse, T-D Texas and Steinberg,

the sanctioned Plan is substituted for the contracts previously made with each of them, constituting novation, the amount of the Dividend being substituted to the amounts due by virtue of the Claims of each of the Creditors and the payment in full of the Dividend being equivalent to a full and final release in favour of the Company."

[translation] **"12.6 Consents, renunciations and agreements**

At the time of the Sanction, every Creditor shall be deemed to have consented to all the provisions contained in the Plan in its entirety. In particular, each of the Creditors shall be deemed

a) to have executed, signed and delivered to the Company all consents, renunciations, releases and assignments, statutory or otherwise, required to put in place and carry out the Plan;

b) to have renounced to any default of the Company mentioned in any provision, express or implied, provided for in any contract or

> **agreement, written or verbal, existing between such Creditor and the Company, that occurred at any time before the date of the Sanction; and**
>
> **c) in the event that there is any conflict between any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company at the date of the Sanction (other than those concluded by the Company or taking effect at the date of the Sanction) and the provisions of the Plan, to have consented to the provisions of the Plan taking precedence over those of such contracts or agreements and the latter are amended accordingly."**

The appellants are not very communicative in their factum about this ground of appeal, limiting themselves to writing:

> **[translation] "The effect of a plan of arrangement is stated by the CCAA. One cannot and should not attempt to insert clauses attempting to do more. The admissions that are attempted to be inserted can have dramatic effect on certain creditors in their relations with third parties. One cannot force them to admit that they have performed the acts stated in paragraph 12.6. For the reasons stated above, the Plan of Arrangement has its effect by the Act."**

One must distinguish between the two clauses.

I do not see anything in clause 12.6 that justifies refusing to sanction the arrangement. However, I agree that this clause is susceptible of conveying a wrong message. It is not further to a consent deemed to have been given by all the creditors that the arrangement produces the effects enumerated in paragraphs a), b) and c) of this clause, but rather, on the one hand, by the effect that the CCAA grants, in its section 6, to an arrangement sanctioned by the authority having jurisdiction and, on the other hand, by the priority granted by the same statute, in its section 8, over any stipulation previously agreed to by the parties:

> **"6. …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 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."**
>
> **"8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class**

of them and has full force and effect notwithstanding anything to the contrary contained in that instrument."

Clause 5.3 raises difficulties. It spreads an erroneous perception of an arrangement, which the judge in first instance took up in his judgement.

The first and last words of this clause provide as follows:

[translation] **"5.3 The Plan of Arrangement approved by the Creditors and sanctioned by the Court constitutes a contract binding the Company to each of the Creditors of each of the classes…**

…

…

the sanctioned Plan is substituted for the contracts previously made with each of them, constituting novation, the amount of the Dividend being substituted to the amounts due by virtue of the Claims of each of the Creditors and the payment in full of the Dividend being equivalent to a full and final release in favour of the Company."

The judge in first instance took up this idea:

[translation] " A plan of arrangement is first and foremost an offer by a company to its creditors that will become a contract upon acceptance by the latter. For this contract to become enforceable, notably against those who oppose it or abstain, there must be, on the one hand, acceptance by the statutory majority provided for in the CCAA (and that is the case) and the sanction by the court."

It is true that an arrangement is an offer that, to be submitted to the authority having jurisdiction to sanction it, must be accepted by the creditors in the proportions required by the CCAA, but it is not correct, with respect, to qualify the resulting legal situation as a "contract binding the parties". The consequence of the sanctioning of an arrangement is to render it enforceable by the sole effect of the law, not to make compulsory the stipulations flowing from a contract.

This distinction has its importance. It was emphasized by Mr. Justice Jacobs of the Australian New South Wales Court of Appeal in the case of **Hill v. Anderson Meat Industries Ltd**, [1972] 2 N.S.W.L.R. 705 (p.706):

"What has been submitted to this Court is that by the terms of the scheme, particularly cl. 3 which I have set out, the debt owing by the packing company to Mrs. Hill was extinguished. Next, because a guarantee is an accessory obligation, upon the extinguishment of the principal indebtedness the guarantee goes also, as a result of the fact that there is no principal debt to which the accessory liability can attach. It is conceded,

> **as of course it must be, that these principles do not apply where the obligation is extinguished by operation of law, as for instance in the case of bankruptcy or the winding up of a company, but it is submitted that the obligation in the present case is not extinguished by operation of law but rather is extinguished by the terms of the scheme which impose not only upon those creditors who assent to it, but upon all creditors, the effect of the document which constitutes the scheme. In this way it is submitted that the cases which are referred to by Street J. are distinguishable.**
>
> **The argument is not substantially different from that which was propounded before the judge at first instance. He rejected it upon the ground that there is in fact a discharge of the obligation by operation of the law. I agree with this conclusion. Mrs. Hill was never party to the release of the obligation. The release came through the operation of a law which bound her as though she were a party. This seems to me in principle to be within that line of authority which so clearly establishes that the extinguishment of a principal obligation, when it is brought about by operation of law, does not result in a discharge of the surety."**

Despite the erroneous concept contained in clause 5.3 of the arrangement, I am not of the opinion that it is necessary to intervene. The error is not such that it should result in refusal to sanction the arrangement.

It appears, on the one hand, from the juxtaposition of the first and last paragraphs of clause 5.3 and, on the other, from the very purpose of the arrangement, that the novation stipulated therein is limited to the amount of the Dividend, which is substituted to any other amount due to each of the creditors by virtue of his claim. Even so, that clause only expresses the effects of the CCAA. The word "novation" must not, here, be understood as a situation resulting from a contractual process, but as the result, by the effect of a statute, of the sanctioning of an arrangement.

It is not because the judge in first instance sanctioned that clause, without having clarified it, that he extended the effects of the statute.

Therefore, the ground of appeal based on the illegality of clauses 5.3 and 12.6 is rejected.

CLAUSE 12.9

That clause provides as follows:

> [translation] **"12.9 Release**
>
> **With effect from the Sanction, each Creditor shall be deemed to have definitively renounced to any lawsuit, to any action and to any recourse that he may have or may have had against the directors, officers, employees and advisors of the Company."**

The judge in first instance, among other things, wrote the following about this clause and the arguments raised with regard to it by the appellants, then called 'the Michauds":

> **[translation] "The Michauds maintain that the effect of this release is to extend the effects of the plan of arrangement to third parties, which would be illegal. The Court does not agree with this assertion. As we shall see further on in this judgement, the plan of arrangement constitutes an offer by the debtor to all of its creditors to freeze at a point in time the whole of a legal situation and to enable the company to continue carrying on its activities or certain of its activities in the best interests of the company and its creditors. Steinberg filed an extract from by-law 108 of the By-law relating to the general conduct of the affairs of Steinberg Inc. Section 9 of such by-law provides as follows:**
>
> **9.01 The company shall assume the defence of its directors and/or officers sued by a third party for acts in the performance of their duties and the company shall pay, if need be, the damages resulting from such acts, unless the directors and/or officers have committed gross misconduct or a personal fault separable from the performance of their duties.**
>
> **It is obvious that Steinberg wishes to avoid a legal situation that would allow creditors to do through the back door what is prohibited through the front door. Steinberg's proposal is a proposal that involves the company and its directors. If the company found itself with judgments against its directors for which it had to assume responsibility, it is obvious that those judgments could have an important impact on the plan of arrangement. Once again, it is a global proposal that Steinberg is making to its creditors and it is that proposal which has been accepted under reserve of the restrictions contained in article 9.01 of rule 108 and under reserve of the comments that the Court will draw up in the case of the workers' union. The Michauds' argument is not accepted."**

In their factum, the appellants argue as follows against this clause 12.9 of the arrangement (a.f. 21 and 27):

> **[translation] "In the context of a C-36, and more particularly in the context of a plan of arrangement that has the effect of coordinating the formal liquidation of the assets of Steinberg, a release of the directors who led Steinberg to insolvency is quite exorbitant and a serious infringement of the rights of the appellants and every other person under Quebec's jurisdiction.**
>
> **...**
>
> **...**
>
> **...**

> **In this instance, it is not a suspension but rather a release in favour of the directors. Thus, a recourse against third parties is eliminated. Nothing in statute C-36 or in the inherent powers of the Superior Court authorizes it to sanction release clauses in favour of third parties to the company. Since this clause did not comply with statute C-36, in accordance with the criteria in the Re Dairy case, supra, the appellants respectfully maintain that the Court should have refused to sanction it."**
>
> For its part, the respondent maintains:
>
> a) that it is not in a process of liquidation, but rather of reorganization; it invokes, in this regard, the judgement rendered in this file by the Superior Court on June 26, 1992;
>
> b) that it would be unfair and inequitable to put responsibility for its current situation on the shoulders of the directors;
>
> c) that the possible claims to which the appellants refer are only pure speculation and hypothetical;
>
> d) that it has an interest in inserting this clause since, both under section 9 of its By-law 108 and section 123.87 of the Companies Act (R.S.Q. c. C-38), it could be required to indemnify its directors, officers and agents;
>
> e) that the clause is not contrary to public order and comes within freedom of contract.

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 act 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. From this latter perspective, I can easily understand that this person wishes, by means of a clause provided for in its arrangement, directed at the persons whom it must indemnify, to shelter itself from their recourses in warranty.

Here, however, that is not what the respondent has done in clause 12.9 of its arrangement. Rather, it requests that its creditors renounce any right of action against its directors, officers, employees and advisors:

> **[translation] "With effect from the Sanction, each Creditor shall be deemed to have definitively renounced to any lawsuit, to any action and to any recourse that he may have or may have had against the directors, officers, employees and advisors of the Company."**
>
> The question is whether that clause should be sanctioned.
>
> This question must receive a negative answer.

The clause, as drafted, contains no restriction. It prevents the respondent's creditors from suing the persons therein referred to for any reason whatsoever, even for "a personal fault separable from the performance of their duties" (though this is an exception provided for in section 123.87 of the Companies Act and section 9.01 of the respondent's By-law 108).

The judge in first instance should have realized the excessive impact of this clause and intervened.

CONCLUSIONS

I would reject the grounds of appeal based, on the one hand, on the invalidity of the vote of the unsecured creditors and, on the other hand, on the illegality of clauses 5.3 and 12.6 of the arrangement, I would accept the ground of appeal based on the invalidity of clause 12.9 of the arrangement and, for this reason, quash the judgement in first instance and return the file to the judge in first instance to, if necessary, issue the appropriate orders, with costs in both Courts.

JACQUES DELISLE, J.A.

TAB 11

See paras. 34-36, 47-48

SUPERIOR COURT

(Commercial Division)
(*Companies' Creditors Arrangement Act*)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-020963-035

DATE: MARCH 19, 2004

PRESIDING: THE HONOURABLE PAUL CHAPUT, J.S.C.

IN THE MATTER OF THE PLAN OF ARRANGEMENT AND REORGANIZATION OF:

CABLE SATISFACTION INTERNATIONAL INC.
Debtor
v.
RICHTER & ASSOCIÉS INC.
Interim Receiver/Monitor/Petitioner

JUDGMENT

---

[1] The Interim Receiver/Monitor ("Monitor") petitions the Court to sanction a plan of arrangement and reorganization of Cable Satisfaction International Inc. (Csii). The petition is filed pursuant to section 6 of the *Companies' Creditors Arrangement Act* (C.C.A.A.) and section 191 of the *Canada Business Corporations Act* (C.B.C.A.).

Context

[2] The Initial Order was made on July 4, 2003 at the request of Csii. That order was subsequently amended.

[3] A first plan of arrangement was prepared, but never voted on by the creditors.

[4] Following a letter of Commitment between The Catalyst Capital Group (Catalyst), who is a creditor of Csii to the extent of over US$52.9 million, and Cabovisão – Televisão por Cabo S.A., a subsidiary company of Csii in Portugal, Csii was to submit its plan of arrangement to its creditors by January 16, 2004.

[5] That plan was filed but not submitted to the creditors.

[6] On November 14, 2003, the Board of Csii terminated all of its employees.

[7] On November 20, 2003, the Court appointed Petitioner as interim receiver to Csii and as Monitor replacing the Monitor initially appointed.

[8] After the appointment of the interim receiver, the Court granted a motion to establish the Claims Process and the Information Circular with the proposed plan was completed and sent out to the creditors.

[9] On February 17, 2004, the Court issued an order setting out the conditions for the procedure leading up to the meeting of creditors.

[10] The meeting of creditors to vote on the proposed plan was held on March 16, 2004.

[11] As is explained in the Information Circular :

> The Plan contemplates a series of steps leading to the overall capital reorganization of Csii including the following transactions to occur on the Effective Date.

[12] And :

> Following the implementation of the Plan, the equity of Csii will be held as follows (assuming no exercise of Warrants and without any adjustments as a result of fractional or *de minimis* holdings):
>
> - 70% by the Investor Group and Participating Rightholders, as part of the New Investment;
> - 28% by Affected Creditors; and
> - 2% by Existing Shareholders.

[13] Prior to the meeting of creditors, on March 12, the representative of the Noteholders who are creditors to the extent of US$ 155 million under 12 ¾% notes due March 1, 2010, issued by Csii pursuant to a trust indenture, advised the attorneys that

he would table on behalf of the Noteholders before the creditors an amendment to the Plan.

[14] On the same day, the Monitor announced the proposed amendment by press release. Csii published a press release on March 15, advising that it had not approved the proposed amendment and did not know if the creditors would approve it.

[15] The purpose of the amendment was to eliminate the 2% participation of the shareholders and increase the share of the Noteholders to 30%.

[16] At the meeting, the creditors voted to accept the amendment and then voted to accept the Amended and Restated Plan ("the Amended Plan").

[17] The Monitor asks the Court to sanction the Amended Plan.

[18] On behalf of Csii, its attorneys have filed a Contestation to the Monitor's motion to sanction the Amended Plan.

[19] The Contestation raises three reasons why the Amended Plan should not be sanctioned by the Court:

Absence of Consent of Csii

[20] Csii alleges that a plan of arrangement proposed under the C.C.A.A., just as a proposal in bankruptcy, must be viewed as a contract. If it is to be altered or modified, the consent of the debtor company must be obtained.

Unfairness of the Amended Plan

[21] According to Csii, it would be unfair to the shareholders to sanction the Amended Plan which eliminates their participation in the reorganization of the company, since the proxies, in particular those of 97% of the Noteholders representing 87% in value, contained instructions to vote for the Plan as proposed.

Lack of Procedural Fairness

[22] Csii takes the position that, given the proxies to vote in favour of the Plan, the representative of the Noteholders had no authority to propose amendments to the Plan.

Discussion

Sanction Requirements

[23] As to the principles governing an application for sanction of a plan pursuant to the C.C.A.A., Delisle, J. of the Quebec Court of Appeal writes in the case of *Michaud v. Steinberg Inc*.:[1]

> OBJECTIF DE LA L.A.C.C.
>
> Dans l'affaire Multidev Immobilia Inc. c. Société Anonyme Just Invest, [1988] R.J.Q. 1928 (C.A.), monsieur le juge Parent a rappelé le but visé de l'adoption de la loi (p. 1930):
>
> > «Il y a lieu de rappeler ici que la loi sur les arrangements avec les créanciers des compagnies a été adoptée au cours de la dépression, pour permettre à des compagnies en difficultés financières, débitrices aux termes d'obligations ou autres titres de créance en circulation, de conclure des ententes avec leurs créanciers, pour régler leurs problèmes en dehors des mécanismes prévus par la Loi sur la faillite et la Loi sur les liquidations. C'est une loi d'"équité" qui favorise des arrangements entre une telle compagnies et tous ses créanciers.»
>
> Le premier but de la L.A.C.C. était donc d'offrir aux compagnies qui rencontraient ses conditions d'application une alternative à certaines autres lois aux effets plus radicaux, l'objectif final étant de permettre à ces compagnies de survivre à des difficultés financières, avec l'accord de ses créanciers.
>
> Au cours des années, ce caractère curatif de la L.A.C.C. a été confirmé par la jurisprudence, de sorte qu'aujourd'hui il y a reconnaissance unanime de la raison d'être de la loi :
>
> > "The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business…" Hongkong Bank v. Chef Ready Foods (1991) 4 C.B.R. (3d) 311 (C.A.C.B.) (p. 315)
> >
> > …The Act envisions that the rights and remedies of individual creditors, the debtor company and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation:…" Nova Metal Prods v. Comiskey (Trustee of), [1991] 1 C.B.R. (3d) 101 (C.A.O.) (p. 122)
> >
> > «La loi veut permettre à une compagnie débitrice de soumettre à l'ensemble de ses créanciers un plan de réorganisation…» Banque Laurentienne du Canada c. Groupe Bovac Ltée (1991) R.L. 593 (C.A.) (p. 613)

[1] 500-09-000668-939, June 16, 1993 (C.C.A.), p. 3 to 7.

À cause précisément de l'objectif visé, la L.A.C.C. doit recevoir une interprétation libérale. La compagnie qui a recours à cette loi doit être en mesure d'atteindre sa fin.

C'est dans cette optique que le tribunal, saisi d'une requête en homologation d'un arrangement, doit exercer son rôle.

RÔLE DU TRIBUNAL SUR UNE REQUÊTE EN HOMOLOGATION D'ARRANGEMENT

La jurisprudence est bien campée sur le sujet. Les principes suivants s'en dégagent:

a) le premier devoir du tribunal est de s'assurer que l'arrangement a été accepté par les créanciers conformément aux exigences de l'article 6 L.A.C.C.: il faut une majorité numérique représentant les trois quarts en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, présents et votant soit en personne, soit par fondé de pouvoirs à une assemblée dûment convoquée à cette fin: In re Dorman, Long & Co. In re South Durham Steel and Iron Co., [1934] 1 Ch. 635 (p. 655); Re Northland Properties Ltd., [1989] 73 C.B.R. (N.S.) 175 (p. 182];

b) le tribunal doit ensuite s'assurer du caractère raisonnable de l'arrangement; il faut que celui-ci soit bénéfique aux deux parties en présence; In re Alabama, New Orleans Texas and Pacific Junction Railway Co. [1891] 1 Ch. 213 (C.A.) (p. 243); In re English Scottish and Australian Chartered Bank, [1893] 3 Ch. 385 (C.A.) (p. 408); dans le premier de ces arrêts, Lord Bowen définit ce qu'il faut entendre par un arrangement raisonnable (p. 243):

> "A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it…"

c) le tribunal n'a pas à substituer sa propre appréciation de l'arrangement à celle des créanciers: Re Langley's Ltd., [1938] O.R. 123 (C.A.O.) (p. 142); Carruth v. Imperial Chemical Industries Ltd., [1937] A.C. 707 (p. 770);

d) le tribunal doit cependant s'assurer, et c'est sûrement là la partie la plus importante de son rôle, qu'une minorité de créanciers n'est pas l'objet de coercition de la part de la majorité ou forcée d'accepter des conditions exorbitantes ("unconscionable"):

> "…
>
> In reviewing the arrangement, the Court is placed under an obligation to see that there is not within the apparent majority some undisclosed or unwarranted coercion of the minority who may not have voted or who may have been opposed…" Re Gold Texas Resources Ltd., Brisith Columbia Supreme Court, A883238, (jugement du 14 février 1989; la juge McLachlin)

> "…The court's role is to ensure that the creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable…" Re Keddy Motors Inns Ltd., [1992] 13 C.B.R. (3d) 245 (C.A.N.E.) (p. 258)

Il y a maintenant lieu de passer aux moyens invoqués par les appellants au soutien de leur appel.»

[24] As summarized by Chief Justice McEachern of the B.C. Court of Appeal in *Northland Properties Limited v. Excelsior Life Insurance Co. of Canada*:[2]

> "The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:
>
> (1) There must be strict compliance with all statutory requirements (it was not suggested in this case that the statutory requirements had not been satisfied);
>
> (2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.;
>
> (3) The plan must be fair and reasonable.

[25] The same principles apply to an application in the case of a reorganization under Section 191 C.B.C.A. *In re Doman Industries Ltd.*,[3] Tysoe, J. writes :

> "It was common ground between counsel on this application that the test to be applied by the Court under s. 191 of the *CBCA* is similar to the test applied in deciding whether to sanction a reorganization plan under the *CCAA*; namely:
>
> (1) there must be compliance with all statutory requirements;
>
> (2) the debtor company must be acting in good faith;
>
> (3) the capital restructuring must be fair and reasonable.

[26] The statutory requirements under the C.C.A.A. include various matters such as: the status of the company as a "debtor company"; the amount of its indebtedness; compliance with Court orders, especially that dealing with the calling of the creditors meeting; the determination of the classes of creditors; the procedure for calling the meeting of creditors and the voting.

[27] As appears from the Contestation filed, an issue is raised as to the legality of the proposal to amend the plan and the voting of the creditors on the Amended Plan.

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[2] (1988), 73 C.B.R. (N.S.) 175 (B.C.C.A.), p. 3 and 4.
[3] 41 C.B.R. (4th) 42 (B.C.S.C.), 45.

[28] Save for that issue, on the basis of the documents filed and the testimony of the Monitor, it appears that the statutory requirements have been met.

[29] Also, it is to be noted that the Amended Plan does contain a provision for the payment of the Crown claims as required by section 18.2 C.C.A.A. In addition, the Monitor has informed the Court that no such claims have become payable since the Court issued the Initial Order.

Contestation

[30] The intent of the Contestation is that the Court refuses to sanction the Amended Plan, since it takes away the advantage which the shareholders would receive under the Plan.

[31] It was raised during the pleadings that Csii cannot appear before the Court to plead in favour of the shareholders.

[32] It is doubtful that Csii has the required legal interest to attend before the Court to argue what should be done in the interest of the shareholders. No doubt, as provided in section 122 C.B.C.A., the directors and officers of a corporation must act in the best interest of the corporation. But, in the present case, it is not the directors or officers who are before the Court, but Csii through its attorneys.

[33] However, at the outset of the hearing, no preliminary exception was taken to the filing of the Contestation by Csii and the Contestation was pleaded.

- - - - -

[34] The Contestation raises that the consent of Csii should have been obtained to the proposed amendment to the Plan, as a plan under the C.C.A.A. is to be considered a contract.

[35] That is not the case. As is provided in section 4 of the C.C.A.A., the arrangement or compromise is a proposal. It is a plan of terms and conditions for the arrangement or compromise to be presented to the creditors for their consideration and eventual acceptance.

[36] In the case of *Michaud*,[4] Delisle, J. commented that the binding force of the arrangement or compromise arises from the law itself through the sanction of the Court, and not from the effect of mutually agreed upon the terms as in a contract.

> «S'il est vrai qu'un arrangement est une offre qui, pour être soumise à l'autorité compétente pour homologation, nécessite son acceptation par les créanciers dans les proportions exigées par la L.A.C.C., il n'est pas exact, avec respect, de

[4] Above, note 1, p. 18.

qualifier la situation juridique qui en résulte de "contrat liant les parties". La conséquence de l'homologation d'un arrangement est de le rendre exécutoire par le seul effet de la loi, non de rendre obligatoires des stipulations découlant d'un contrat.»

- - - - -

[37] The proxy to be completed by the Noteholders for the vote at the creditors' meeting contains the following:

> **Section 2 – To be completed by Noteholder**
>
> **THE NOTEHOLDER** _____**(insert name),** hereby revokes all proxies previously given and nominates, constitutes, and appoints Mr. Robert Chadwick of Goodmans LLP, counsel to the Noteholder committee, of failing him, such person as Mr. Robert Chadwick may designate, or instead _____(**insert name, if applicable**), as nominee of the Noteholder, with power of substitution, to attend on behalf of and act for the Noteholder at the Meeting of Affected Creditors to be held in connection with CSII's Plan and at any and all adjournments or postponements thereof, and to vote the Voting Claim of the Noteholder as follows:
>
> **A. (mark one only):**
>
> VOTE FOR approval of the Plan; or
>
> VOTE AGAINST approval of the Plan
>
> and
>
> **B. vote at the nominee's discretion and otherwise act thereat for and on behalf of the Noteholder in respect of any amendments or variations to the above matter and to any other matters that may come before the Meeting of Affected Creditors or any adjournment or postponement thereof.**

[38] And the Information Circular did notify the creditors that the proxy holders could be called upon to vote on amendments to the proposed plan at the meeting of creditors.

> "The forms of proxy accompanying this Circular are to be used in connection with the Meeting. Such forms of proxy confer discretionary authority upon the individuals named therein with respect to amendments or variations to matters identified in the Notice of Meeting and with respect to other matters which may properly come before the Meeting including amendments or variations to the Plan. Any material amendments to the Plan known prior to the Meeting will, to the extent practicable, be disclosed by press release and by notice to the service list; however, amendments to the Plan may be made at any time prior to the termination of the Meeting. Accordingly, Affected Creditors are urged to attend the Meeting in person."

[39] The Monitor has testified 97% of the proxies tabulated were marked: "VOTE FOR approval of the plan".

[40] It is argued on behalf of Csii that the required majority of the proxies did indicate the intention of the creditors to vote for the plan that provided for a 2% distribution to the shareholders, and the Court should sanction the Plan as tabled at the meeting of creditors prior to the amendment.

[41] The Court cannot accept that argument.

[42] Nothing in the C.C.A.A. precludes creditors from proposing an amendment to the plan to be considered at the meeting of creditors. It clearly provides that a proposed plan may be modified before or at the meeting of creditors.

> **6.** Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> > **(a)** on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
> >
> > **(b)** in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act* or 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.
>
> **7.** Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

[43] The notice that the Noteholders would propose the amendment was given to the Monitor and press released by him on March 12. The meeting of creditors was scheduled on March 15.

[44] No doubt that is a short notice. But it was possible for any one of the creditors or any other interested party to request from the Monitor or by Court Order an adjournment of the meeting. Also, the adjournment could have been requested at the meeting at the time the amendment was proposed.

[45] That is not the case. It appears from the results of the voting that the creditors did consider the proposed amendment and did vote for it.

[46] To accept the position of Csii that the Court should sanction the Plan as proposed before the amendment would mean that it sanctions a plan on which the creditors have not voted. The plan submitted for sanction must necessarily be the one voted on by the creditors. The Court cannot force on the creditors a plan which they have not voted to accept.

- - - - -

[47] The Monitor did testify that if either the Plan or the Amended Plan is not implemented, the only alternative available is the liquidation of Csii. In that case, the creditors will have a greater loss than under the Plan or the Amended Plan.

[48] As regards the interests of the creditors, at this stage there appears to be no other viable option than to carry forward with the arrangement.

[49] From the representations made, the Court understands that the shareholders are not investing nor participating in the arrangement or the reorganization.

[50] The Amended Plan does take away the 2% participation which had been proposed for the shareholders. However, the creditors who will suffer an important shortfall have decided that since the shareholders bring nothing to the efforts being made to revitalize the company, they should get nothing.

[51] In the present case, the reorganization proposed in the Plan is also sought under section 191 C.B.C.A. Sub-section (7) of that section reads as follows:

> (7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

[52] On a reorganization, Martel comments as follows[5]:

> «Lorsqu'une société fédérale est insolvable et qu'elle fait une proposition à ses créanciers en vertu de la *Loi sur la faillite et l'insolvabilité* ou une transaction ou un arrangement avec ceux-ci sous l'autorité de la *Loi sur les arrangements avec les créanciers des compagnies*, elle peut à cette occasion apporter des modifications à ses statuts par voie de réorganisation en vertu de l'article 191 de la *Loi canadienne sur les sociétés par actions*. L'ordonnance rendue par le

[5] La compagnie au Québec, Éditions Wilson & Lafleur Martel Ltée, 2004, p. 19-87 - 19-88.

> tribunal en vertu des deux premières de ces lois peut effectuer dans les statuts de la société toute modification prévue à l'article 173, incluant des modifications au capital-actions, sans qu'aucune résolution des actionnaires ne soit requise. De plus, le tribunal qui rend l'ordonnance peut autoriser, en en fixant les modalités, l'émission de titres de créance (obligations, débentures ou billets) convertibles ou non en actions de toute catégorie ou assorties de l'option d'acquérir de telles actions; il peut aussi ajouter d'autres administrateurs ou remplacer ceux qui sont en fonction.
>
> La réorganisation ordonnée par le tribunal s'effectue par le dépôt de clauses de réorganisation (formule 14) auprès du Directeur, et de la délivrance par celui-ci d'un certificat de modification.
>
> Non seulement les actionnaires ne sont-ils pas appelés à voter sur la réorganisation, mais en plus ils ne bénéficient pas du droit de dissidence. Le raisonnement derrière cette entorse à la protection statutaire des actionnaires est que, puisque la société est insolvable, leurs actions ne valent rien et il ne leur appartient pas de faire échec à une proposition ou un arrangement avec les créanciers qui sera à l'avantage de la société et, éventuellement, si la société parvient à survivre et à redémarrer grâce à cette démarche, au leur.»
>
> (*references omitted*)

[53] And, in the case of an arrangement proposed under the C.C.A.A., the shareholders of the debtor company cannot expect any advantage from the arrangement. As the company is insolvent, the shareholders have no economic interest to protect. More so when, as in the present case, the shareholders are not contributing to any of the funding required by the Plan. Accordingly, they have no standing to claim a right under the proposed arrangement. As Paperny, J. wrote in *Re Canadian Airlines*:[6]

> [Paragraph 143] "Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of a liquidation of insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where the creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak Mines Ltd., supra*, par. 4, *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen Div. [Continental List]) and *T. Eaton Company, supra."*

[6] 20 C.B.R. (4th) 1, (A.C.Q.B.).

(*emphasis added*)

> [Paragraph 170] "[…] "Where secured creditors have compromised their claims and unsecured creditors are accepting 13 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion, it is not unfair that shareholders receive nothing."
>
> (*emphasis added)*

[54] In the end, the Amended Plan does not appear to be unfair and should be sanctioned.

[55] (As regards the other conclusions sought in the Motion, there was no contestation.)

[56] **FOR THESE REASONS, THE COURT:**

[57] **GRANTS** the motion pf Petitioner to sanction the Second Amended and Restated Plan of Arrangement and Reorganization of Cable Satisfaction International Inc. (the "Motion");

[58] **DECLARES** that the time for service of the Motion is hereby abridged and that Cable Satisfaction International Inc., all creditors and shareholders have been properly notified;

[59] **DECLARES** that capitalized terms used in the Motion and not otherwise defined herein shall have the meaning set out in the Second Amended and Restated Plan of Arrangement and Reorganization, Exhibit M-19 (the "Amended Plan");

[60] **SANCTIONS** the Amended Plan pursuant to Section 6 of the *Companies' Creditors Arrangement Act*;

[61] **DIRECTS** and **AUTHORIZES** Richter & Associés Inc., acting for and on behalf of Cable Satisfaction International Inc., to complete all of the corporate and financial transactions contemplated under the Amended Plan, including, without limitation, (i) all acts required in section 3.1 of the Amended Plan, and (ii) the incorporation of a new wholly-owned subsidiary under the laws of the Netherlands;

[62] **DECLARES** that the compromises and the reorganization of share capital effected by the Amended Plan (including section 6 thereof) are approved, binding and effective upon all Affected Creditors, shareholders of Cable Satisfaction International Inc. and other Persons affected by the Amended Plan;

[63] **APPROVES** the form of articles of reorganization, Exhibit M-21, providing for the reorganization of Cable Satisfaction International Inc.'s share capital, including the appointment of the New Board as contemplated by Section 9.4 of the Amended Plan;

[64] **APPROVES** the releases and discharges as at the Effective Date of Cable Satisfaction International Inc. and other Persons in accordance with the provisions of Section 9.1 and 9.3 of the Amended Plan;

[65] **DISCHARGES** as at the Effective Date all charges against assets of Cable Satisfaction International Inc. by any Order;

[66] **DISCHARGES,** as at the Effective date, the Monitor and the Interim Receiver from all duties (except, in the case of the Monitor, the adjudication of Claims which then remain unresolved and any other duties specified by the orders rendered herein) and **RELEASES** the Monitor and the Interim Receiver from any and all claims as at the Effective Date;

[67] **STAYS** any and all steps or proceedings, including, without limitation, administrative orders, declarations or assessments commenced, taken or proceeded with against any of the Persons released pursuant to Section 9.1 and 9.3 of the Amended Plan and to the extent provided therein;

[68] **DECLARES** the Shareholders Agreement terminated as at the Effective Date;

[69] **DECLARES** the Trust Indenture terminated and Cable Satisfaction International Inc. released from its obligations thereunder upon the Effective Date;

[70] **DECLARES** all issued and outstanding options (including any options issued pursuant to the Stock Option Plan), warrants (including warrants issued pursuant to the Existing Warrant Indenture) and rights to acquire shares of Cable Satisfaction International Inc. cancelled as at the Effective Date without payment of any consideration, and **DECLARES** the Stock Option Plan and Existing Warrant Indenture terminated as at the Effective Date;

[71] **CONFIRMS** that all executory contracts to which Cable Satisfaction International Inc. is a party are in full force and effect notwithstanding the Proceedings, or the Amended Plan and its attendant compromises, and that no Person party to any such executory contract shall be entitled to terminate or repudiate its obligations under such contract by reason of the commencement of the Proceedings or the content of the Amended Plan, or the compromises effected under the Amended Plan (excluding, for greater certainly, the agreement referred to in paragraphs 67, 68 and 69 above and the Lease Agreement);

[72] **GIVES EFFECT** from and after the Effective Date to the waivers, permanent injunction and other provisions contemplated by Section 9.2 of the Amended Plan;

[73] **DECLARES** that all the transactions contemplated in the Amended Plan will be effective as of the Effective Date unless otherwise provided in the Amended Plan and are authorized and approved under the Amended Plan and by this Court, where appropriate, as part of the orders rendered herein, in all respects and for all purposes

without any requirement of further action by the Affected Creditors or the shareholders or directors of Cable Satisfaction International Inc.;

[74] **DECLARES** that following the Effective Date, all Charges in respect of the Claims of the Affected Creditors will be released and all instruments or other documents related thereto, if any, will be terminated and cancelled. If any affected Creditors refuses to provide a discharge in respect of registered Charges to Cable Satisfaction International Inc. on terms acceptable to Cable Satisfaction International Inc., Cable Satisfaction International Inc. will seek an Order from the Court (or any court of competent jurisdiction in the jurisdiction where such Charges are registered) for the discharge of the Charges of such Affected Creditor from title to the affected property;

[75] **DECLARES** that on the Effective Date, each Affected Creditor whose Claim is affected by the Amended Plan shall be deemed to have consented and agreed to all of the provisions of the Amended Plan in their entirety. In particular, each Affected Creditor whose Claim is affected by the Amended Plan shall be deemed:

a) to have executed and delivered to Cable Satisfaction International Inc. all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Amended Plan in its entirety;

b) to have waived any non-compliance by Cable Satisfaction International Inc. with any provision, express or implied, in any agreement or other arrangement, written or oral, referred to in Section 9.2 of the Amended Plan existing between such Affected Creditor and Cable Satisfaction Inc. that has occurred on or prior to the Effective Date, and where provided for in the orders rendered herein, after the Effective Date as provided herein; and

c) to have agreed that, if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor and Cable Satisfaction International Inc. at the Effective Date (other than those entered into by Cable Satisfaction International Inc. on, or with effect from, the Effective Date) and the provisions of the Amended Plan, the provisions of the Amended Plan take precedence and priority and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly;

[76] **DECLARES,** to the extent provided in the Amended Plan that the terms and conditions of the Amended Plan and procedures for the exchange of Common Shares and Rights are fair to those to whom securities will be issued;

[77] **ORDERS** that:

a) the Amended Initial Order remains in full force and effect and that the Stay Termination Date (as defined in paragraph 22 of the Initial Order) is hereby extended until the earlier of the Effective Date and April 30, 2004; and

b) the appointment of Richter & Associés Inc. as Interim Receiver under the Interim Receiver Order remains in full force and effect until the earlier of the Effective Date and April 30, 2004;

[78] **DECLARES** that the orders rendered herein shall supersede and/or complete any previous Order;

[79] **DECLARES** the orders rendered herein executory notwithstanding any appeal or application seeking leave therefrom;

[80] **WITHOUT COSTS.**

_____
PAUL CHAPUT, J.S.C.

Me Mortimer Freiheit, Me Guy Martel
STIKEMAN ELLIOTT
For Cable Satisfaction Inc.

Me Martin Desrosiers, Me Sandra Abitan and Me David Tardif-Latourelle
OSLER HOSKIN & HARCOURT
For Richter & Associés Inc.

Me Denis Ferland and Me Vincent Mercier
DAVIES WARD PHILLIPS & VINEBERG
For Catalys Capital Group

Mr. Robert Chadwick
COUNSEL
For Goodman's UP

Me Louise Lalonde
GOWLING LAFLEUR HENDERSON
For Banking Syndicate

Date of hearing: MARCH 17, 2004

TAB 12

See para. 53

Court of Queen's Bench of Alberta

Citation: Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act), 2007 ABQB 504

Date: 20070731
Docket: 0501 17864
Registry: Calgary

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

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company

Applicants

Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] This application involves the most recent development in the lengthy and complicated Calpine insolvency. That insolvency has required proceedings both in this jurisdiction under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and in the United States under Chapter 11 of the U.S. Bankruptcy Code. The matter is extremely complex, involving many related corporations and partnerships, highly intertwined legal and financial obligations and a number of cross-border issues. The resolution of these proceedings has been delayed by several difficult issues with implications for the insolvencies on both sides of the border. The above-noted applicants (collectively, the "Calpine Applicants") and the U.S. debtors applied to this Court and to the United States Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which they say will break the deadlock.

[2] Both Courts approved the settlement. These are my reasons for that approval.

Background

[3] Given the complexity of the matter, it will be useful to set out some background. On December 20, 2005, the Calpine Applicants obtained an order of this Court granting them

protection from their creditors under the CCAA. That order appointed Ernst & Young Inc. as Monitor. It also provided for a stay of proceedings against the Calpine Applicants and against Calpine Energy Services Canada Partnership ("CESCA"), Calpine Canada Natural Gas Partnership ("CCNG") and Calpine Canadian Saltend Limited Partnership ("Saltend LP"). The Monitor's 23rd Report dated June 28, 2007 refers to the latter three parties collectively as the "CCAA Parties" and to those parties together with the Calpine Applicants as the "CCAA Debtors". Where I have quoted terms and definitions from the Report, I adopt those terms and definitions for purposes of these Reasons. On the same day, Calpine Corporation and certain of its direct and indirect U. S. subsidiaries filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code. The Monitor refers to Calpine Corporation ("CORPX"), the primary party in the U. S. insolvency proceedings, and its U.S. subsidiaries collectively as the "U.S. Debtors".

[4] During the course of the CCAA proceedings, a number of applications were made relating to the relationship of the CCAA Debtors and Calpine Power L.P. (the "Fund"), leading ultimately to the short and long-term retolling of the Calgary Energy Centre and the sale of the interest of Calpine Canada Power Ltd. ("CCPL") in the Fund to HCP Acquisition Inc. ("Harbinger") in February 2007, a sale that closed simultaneously with Harbinger's takeover of the publicly-held units in the Fund.

[5] In addition to these issues, progress in the restructuring and the realization of maximum value for assets was made more difficult by various cross-border issues. The Report sets out the following "material cross-border issues that needed to be resolved between the CCAA Debtors and the U.S. Debtors":

a. The Hybrid Note Structure ("HNS") and whether Calpine Canada Energy Finance ULC ("ULC1"), including the holders of the 8 ½% Senior Notes due 2008 (the "ULC1 Notes") issued by ULC1 and fully and unconditionally guaranteed by CORPX, had multiple guarantee claims against CORPX;

b. The sale by Calpine Canada Resources Company ("CCRC") of its holdings of U.S.$359,770,000 in ULC1 Notes (the "CCRC ULC1 Notes") and the effect of the U.S. Debtors' so-called Bond Differentiation Claims ("BDCs") on such a sale;

c. Cross-border intercompany claims between the CCAA Debtors and the U.S. Debtors;

d. Third party claims made against certain CCAA Debtors that were guaranteed by the U.S. Debtors;

e. The priority of the claim of Calpine Canada Energy Limited ("CCEL") against CCRC;

f. A fraudulent conveyance action brought by the CCAA Debtors in this Court (the "Greenfield Action");

g. Potential claims by the U.S. Debtors to the remaining proceeds repatriated from the sale of the Saltend Energy Centre;

h. Cross-border marker claims filed by the U.S. Debtors and the CCAA Debtors and the appropriate jurisdiction in which to resolve those claims; and

i. Marker claims filed by the ULC1 Indenture Trustee.

[6] In the Report, the Monitor describes the settlement process that led to this application as follows:

10. The CCAA Debtors and the U.S. Debtors concluded that the only way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the issues referred to above. The [CCAA Debtors and the U.S. Debtors] realized that without a global agreement, they could have faced lengthy and costly cross-border litigation.

11. Over the last five months, the Monitor and the CCAA Debtors held numerous discussions with the U.S. Debtors regarding a possible global settlement of the outstanding material and other issues. In addition, during various stages of discussion with the U.S. Debtors, the CCAA Debtors and the Monitor sought input from the major Canadian stakeholders as to the format and terms of a settlement.

12. While the settlement discussions between the U.S. Debtors and the CCAA Debtors were underway, the ad hoc committee of certain holders of ULC1 Notes reached terms of a separate settlement between the holders of the ULC1 Notes and CORPX (the "Preliminary ULC1 Settlement"). The terms of the Preliminary ULC1 Settlement were agreed to on April 13, 2007 and publicly announced by CORPX on April 18, 2007.

13. As a result of the above discussions and negotiations, [a settlement outline (the "Settlement Outline")] was agreed to on May 13, 2007 and publicly announced by CORPX on May 14, 2007. The Settlement Outline incorporates the terms of the Preliminary ULC1 Settlement. ...

14. The parties have negotiated the terms of [a global settlement agreement memorializing the terms of the Settlement Outline (the "GSA")] ...

17. The [GSA] is subject to the following conditions:

    a. The approval of both this Court and the U.S. Bankruptcy Court;
    b. The execution of the [GSA]; and
    c. The CCRC ULC1 Notes being sold.

[7] As the Monitor notes, the GSA resolves all of the material issues that exist between the Calpine Applicants and the U. S. Debtors. The Report describes the "key elements" of the GSA as follows:

a. The [GSA] provides for the ULC1 Note Holders to effectively receive a claim of 1.65x the amount of the ULC1 Indenture Trustee's proof of claim . . . against CORPX which results in a total claim against CORPX in the amount of US$3.505 billion (the "ULC1 1.65x Claim"). The 1.65x factor was agreed between the U.S. Debtors and the ad hoc committee of certain holders of the ULC1 Notes. As a result of the [GSA], the terms of the HNS can be honoured with no material adverse economic impact to the U.S. Debtors, CCAA Debtors or their creditors;

b The withdrawal of the BDCs advanced by the U.S. Debtors. . . ;

c. An agreement between the U.S. Debtors and the CCAA Debtors as to the cooperation in the sale of the CCRC ULC1 Notes;

d. The priority of claims against CCRC are clarified, including the claim of CCEL against CCRC being postponed to all other claims against CCRC;

e. The acknowledgement by the U.S. Debtors of certain guarantee claims advanced by creditors in the CCAA proceedings and the agreement by the U.S. Debtors that the quantum of these guarantee claims will be determined by the Canadian Court. The [GSA] contemplates that U.S. Debtors and their official committees will be afforded the right to fully participate in any settlement or adjudication of these guarantee claims. Pursuant to the [GSA], the U.S. Debtors acknowledge their guarantee of the following CCAA Debtors' creditors' claims:

    i. The claims of Alliance Pipeline Partnership, Alliance Pipeline L.P., and Alliance Pipeline Inc. (collectively "Alliance") for repudiation of certain long-term gas transportation contracts held by CESCA;

ii. The claims of NOVA Gas Transmission Ltd. (“NOVA”) for the repudiation of certain long-term gas transportation contracts held by CESCA;

iii. The claims of TransCanada Pipelines Limited (“TCPL”) for the repudiation of certain long-term gas transportation contracts held by CESCA;

iv. The claims of Calpine Power L.P. [the “Fund”] for the repudiation of the tolling agreement between [the Fund] and CESCA (the “CLP Toll Claim”);

v. The claims of [the Fund] and Calpine Power Income Fund (“CPIF”) relating to a potential fee resulting from the alleged transfer of the Island co-generation facility (the “Island Transfer Fee Claim”); and

vi. The claims of [the Fund] for heat rate indemnity relating to the Island co-generation facility (the “Heat Rate Penalty Claim”); and

f. The withdrawal of virtually all U.S. and CCAA Debtor Marker Claims;

g. The settlement of the Greenfield Action;

h. The withdrawal of the UL1 Indenture Trustee Marker Claim;

i. The withdrawal of the claims filed by the Indenture Trustee of the Second Lien Notes against the CCAA Debtors;

j The resolution of the quantum of the cross-border intercompany claims...;

k. The settlement of the ULC2 Claims as against CCRC (as between the CCAA Debtors and the U.S. Debtors) and also confirmation of the ULC2 guarantee by CORPX;

l. The payment of all liabilities of ULC2, including the amounts due on the ULC2 Notes. For example, the ULC2 Indenture Trustee has advised that it believes a make-whole payment is applicable if ULC2 repays the holders of the ULC2 Notes prior to the final payment date as set out in the Indenture (the “ULC2 Make-Whole Premium”). The CCAA Debtors and the U.S. Debtors dispute that the ULC2 Make-Whole Premium is applicable. However, the [GSA] contemplates that if the issue is not resolved by the date of distribution to the ULC2 direct creditors, an

amount sufficient to satisfy the claim may be set aside in escrow pending the determination of the issue;

m. An agreement on the allocation of professional fees relating to the CCAA proceedings amongst the CCAA Debtors and agreement as to the quantum of certain aspects of the Key Employee Retention Plan. . .;

n. Resolution of all jurisdictional issues between Canada and the U.S.; and

o. An agreement as to the allocation of the proceeds from the sale of Thomassen Turbines Systems, B.V. ("TTS").

[8] The Monitor describes and analyzes the terms and effect of the GSA in great detail in the Report. It concludes that the GSA is beneficial to the CCAA Debtors and their creditors, providing a medium for an efficient payout of many of the creditors, resolving all material disputes between the CCAA Debtors and the U.S. Debtors without costly and time-consuming cross-border litigation, settling the complex priority issues of CCRC and providing for the admission by the U.S. Debtors of the validity of guarantees provided to certain creditors of the CCAA Debtors. It is important to note that the Monitor unequivocally endorses the GSA.

The Applications

[9] The Calpine Applicants sought three orders from this Court. First, they sought an order approving the terms of the GSA and directing the various parties to execute such documents and implement such transactions as might be necessary to give effect to the GSA. Second, they sought an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, they sought an extension of the stay contemplated by the initial CCAA order to December 20, 2007.

[10] The application was made concurrently with an application by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the two applications proceeding simultaneously by videoconference. No objection was taken to the latter two orders sought from this Court and I have granted both. I also gave approval to the GSA with brief oral reasons. I indicated to counsel at the hearing that these more detailed written reasons would be forthcoming as soon as possible. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

[11] The controversial point in the applications, both to this Court and to the U.S. Court, was approval of the GSA. The parties standing in opposition to the GSA are the Fund, the ULC2 Indenture Trustee and a group referring to itself as the "*Ad Hoc* Committee of Creditors of Calpine Canada Resources Company" (the "Ad Hoc Committee"). (HSBC Bank USA, N.A., as ULC1 Indenture Trustee, also filed a technical objection, but it has since been withdrawn.) The bench brief of the Ad Hoc Committee states that it "is comprised of members of the *Ad Hoc* Committee of Bondholders of Calpine Canada Energy Finance II ULC ... and Calpine Power,

L.P.”. Thus, the Ad Hoc Committee consists of the Fund and certain unknown ULC2 noteholders. There was some objection to the status of the Ad Hoc Committee to oppose the GSA independently of the Fund, but that objection was not strenuously pursued and I do not need to address it. However, I note that the Fund thus makes its arguments through both the Ad Hoc Committee and its separate counsel, and the ULC2 noteholders make theirs through both the ULC2 Indenture Trustee and the Ad Hoc Committee. I will refer to those parties opposing the GSA collectively as the “Opposing Creditors” hereafter. The Opposing Creditors object to the GSA on a number of grounds and there is much overlap among their positions.

[12] The primary objection is that the GSA amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analysed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:

a) the GSA must be reviewed as a whole, and it is misleading and inaccurate to focus on one part of the settlement without viewing the package of benefits and concessions in its overall effect. The Opposing Creditors have discounted the benefits to the Canadian estate of the resolution of $7.4 billion in claims against the CCAA Debtors by arguing that these claims had no value. As the Report notes:

> . . .While the Monitor believes it is unlikely that the CCAA Debtors would have been unsuccessful on all the issues [identified earlier in these Reasons as material cross-border issues], there was a real risk of one or more claims being successfully advanced against CCRC by the U. S. Debtors or the ULC1 Trustee and, had this risk materialized, the recovery to the CCRC direct creditors and CESCA creditors would have been materially reduced.

b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. The Monitor has opined that the GSA allows for the maximum recovery to all the CCAA Debtors’ creditors. According to the Monitor’s conservative calculations, virtually all the Canadian creditors, including the Opposing Creditors, likely will be paid the full amount of their claims as settled or adjudicated, either from the Canadian estate or as a U.S. guarantee claim. If claims are to be paid in full, they are not compromised. If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

The Ad Hoc Committee's Objections

[13] The Ad Hoc Committee asserts that the GSA expropriates assets with a value of approximately U.S.$650 million to the U.S. Debtors that would otherwise be available to Canadian creditors, leaving insufficient value in the Canadian estates to ensure that the Canadian creditors are paid in full. The Ad Hoc Committee argues that the Canadian creditors will receive less than full recovery and that, therefore, their claims have been compromised.

[14] This submission is misleading. The $650 million refers to two elements of the GSA: a payout to the U.S. Debtors of $75 million from CCRC in exchange for the withdrawal of the U.S. Debtors BDCs, settlement of the U.S. Debtors' claims against the Saltend proceeds and the postponement of CCEL's claim against CCRC and the elimination of CCRC's unlimited liability corporation claim against its member contributory, CCEL, which the Opposing Creditors complain effectively denies access to an intercompany claim of $575 million. I do not accept that the GSA "expropriates" assets to the U.S. Debtors, who had both equity and creditor claims against the Canadian estates that they relinquished as part of the GSA. The GSA is a product of negotiation and settlement and required certain sacrifices on the part of both the U.S. Debtors and the CCAA Debtors. The Ad Hoc Committee's piecemeal analysis of the GSA ignores the other considerable benefits flowing to the Canadian estate from the GSA, including the subordination of CCEL's $2.1 billion claim against CCRC. As recognized by the Monitor, this postponement permits the CESCA shortfall claim to participate in the anticipated CCRC net surplus, failing which the recovery by creditors of CESCA (notably including the Fund) would be materially reduced. The Ad Hoc Committee also fails to mention that an additional $50 million of claims against CESCA advanced by the U.S. Debtors have been postponed to the claims of other CESCA creditors.

[15] The Ad Hoc Committee argues that the U.S. Debtors' claims that have been withdrawn are "untested" and "unmeritorious". Certainly, the claims have not been tested through litigation. However, it is the very nature of settlement to withdraw claims in order to avoid protracted and costly litigation. While the Ad Hoc Committee may consider the U.S. Debtors' claims unmeritorious, their saying so does not make it so. The fact remains that the U.S. Debtors have agreed, as part of the GSA, to withdraw claims that would otherwise have to be adjudicated, likely at considerable time and expense.

[16] As part of the GSA, the U.S. Debtors agree to cooperate in the sale of the CCRC ULC1 Notes. The Ad Hoc Committee is of the view that that cooperation "should have been forthcoming in any event". Nevertheless, the U.S. Debtors previously have not been prepared to accede to such a sale, insisting instead on asserting their BDCs. The sale is acknowledged to be critical to resolution of this insolvency and the present willingness of the U.S. Debtors to cooperate therein is of great value.

[17] The Ad Hoc Committee also takes issue with the recovery available under the GSA to the creditors of CESCA, arguing that those creditors face a potential shortfall of at least $175 million. The cited shortfall of $175 million is again misleading, failing to take into account that

the Fund, to the extent that its claims are adjudicated to be valid and there is a shortfall in CESCA, will now have the benefit of acknowledged guarantees of these claims by the U.S. Debtors as a term of the GSA. The Monitor thus reports its expectation that the Fund's claims will be paid in full. There exists, therefore, only the potential, under the Monitor's "low" recovery scenario, of a shortfall in CESCA of $25.1 million. Those creditors who may be at risk of such a shortfall are not the Opposing Creditors, but certain trade creditors to the extent of approximately $2 million, who are not objecting to the GSA, and certain gas transportation claimants to the extent of approximately $23 million, who appeared before the Court at the hearing to support the approval of the GSA on the basis that it improves their chances of recovery.

[18] The shortfall, if any, to which the creditors of CESCA will be exposed will depend upon the quantum of the CLP Toll Claim. As yet, this claim remains, to use the Ad Hoc Committee's word, untested. Assessments of its value range from $142 million to $378 million. The Monitor's analysis, taking into account the guarantees by the U.S. Debtors contemplated by the GSA, indicates that if this claim is adjudged to be worth $200 million or less, all of the CESCA creditors will be assured of full payment whether under the "high" or "low" scenarios. Alternatively, under the Monitor's "high" recovery scenario, all creditors of CESCA will receive full payment even if the CLP Toll Claim is worth as much as $300 million.

[19] Further, as I indicated in my oral reasons, even if the Fund does not receive full payment of the CLP Toll Claim through the Canadian estate, the GSA cannot be said to be a compromise of that claim. The GSA contemplates adjudication of the CLP Toll Claim rather than foreclosing it. While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights. This point is discussed further later in these Reasons.

[20] The Ad Hoc Committee points out that, according to the Report, the GSA results in recovery for CCPL of only 39% to 65%. As the Fund is CCPL's major creditor, the Ad Hoc Committee argues that this level of anticipated recovery constitutes a compromise of the Fund's claim in this respect.

[21] The response to this argument is two-fold. First, the Report indicates that the CCPL recovery range is largely dependent upon the quantum of the Fund's Heat Rate Penalty Claim. The Monitor has taken the conservative approach of estimating the amount of this claim at the amount asserted by the Fund; the actual amount adjudicated may be less, resulting in greater recovery for CCPL. Further, the Monitor notes that, as part of the GSA, CORPX acknowledges its guarantee of the Heat Rate Penalty Claim. Therefore, the Monitor concludes that "[t]o the extent there is a shortfall in CCPL, based again upon the Monitor's expectation that CORPX's creditors should be paid 100% of filed and accepted claims, [the Fund] should be paid in full for the Heat Rate Penalty Claim regardless of whether a shortfall resulted in CCPL". As discussed above, the possibility of a shortfall in the asset pool against which claims may be made is not equivalent to a compromise of those claims. The Monitor reports that only $25,000 of CCPL's creditors may face a risk of less than 100% recovery after consideration of the CORPX

guarantees under the “low” scenario, and those only to the extent of a $15,000 shortfall and that the CCAA Debtors are considering options to pay out these nominal creditors in any event.

[22] The Ad Hoc Committee argues that CORPX’s guarantees are not a satisfactory solution to potential shortfalls because resort to the guarantees may result in the issuance of equity rather than the payment of cash. This, however, is by no means certain at this point. Parties who must avail themselves of CORPX’s guarantees will participate in the U.S. bankruptcy proceedings and will be entitled to a say in the ultimate distribution that results from those proceedings. The Opposing Creditors complain that recovery under the guarantees is uncertain as to timing and amount of consideration. However, the GSA removes any hurdle these creditors may have in establishing their rights to guarantees. Without the acknowledgment of guarantees that forms part of the GSA, those creditors who sought to rely on the guarantees faced an inefficient and expensive process to establish their rights in the face of the stay of proceedings in place in the U.S. proceedings. While it is true that the expectation of full payment under the GSA with respect to guarantee claims rests on the Monitor’s expectation that these claims will be paid in full, the U. S. Debtors in a disclosure statement released on June 20, 2007 announced their expectation that their plan of reorganization in the U.S. proceedings would provide for the distribution of sufficient value to pay all creditors in full and to make some payment to existing shareholders.

[23] The Ad Hoc Committee also argues that the GSA purports to dismiss claims filed by the ULC2 Indenture Trustee on behalf of the ULC2 noteholders without consent or adjudication. They further take the position that this alleged dismissal is to occur prior to any payment of the claims of the ULC2 noteholders, such payment being subject to further Court order and to a reserved ability on the part of the CCAA Debtors to seek to compromise certain of the ULC2 noteholders’ claims.

[24] Again, this is an inaccurate characterization of the effect of the GSA. First, as noted above, the GSA contemplates setting aside in escrow sufficient funds to satisfy the claims of the ULC2 noteholders pending adjudication. Thus, there is no compromise. With respect to the timing issue, it is important to remember that these claims are not being dismissed as part of the GSA. They remain extant pending adjudication and, if appropriate, payment from the funds held in escrow.

[25] Finally, while the Ad Hoc Committee does not object to the sale of the CCRC ULC1 Notes, it argues that there is no urgency to such sale and that it should not occur until after there has been a determination of the various claims. As counsel for the Calpine Applicants pointed out, this is a somewhat disingenuous position for the Ad Hoc Committee to take, given its previous expressions of impatience in respect of the sale.

[26] I am satisfied that the potential market for the CCRC ULC1 Notes is volatile and that, now that the impediments to the sale have been removed, it is prudent and indeed necessary for the CCRC ULC1 Notes to be sold as soon as possible. The present state of the market has created an opportunity for a happy resolution of this CCAA filing that should not be allowed to

be lost. In addition to alleviating market risk, the GSA will ensure that interest accruing on outstanding claims will be terminated by their earlier payment.. This is not a small benefit. As an example, interest accrues on the ULC2 Notes at a rate of approximately $3 million per month plus costs. The earlier payment of these notes that would result from the operation of the GSA thus increases the probability of recovery to the remaining creditors of CCRC.

[27] As the Ad Hoc Committee made clear during the hearing, it wants the right to vote on the GSA but wants to retain the benefit of the GSA terms that it finds advantageous. It suggests that the implementation of the GSA be delayed "briefly" for the calling of a vote and the determination of the ULC2 entitlements and the Fund's claims with certainty, in accordance with a litigation timetable that has been proposed as part of the application. The "brief" adjournment thus suggested amounts to a delay of roughly 3 ½ months, without regard to allowing this Court a reasonable time to consider the claims after a hearing or the timing considerations of the U. S. Court.

The Fund's Objections

[28] As noted in its brief, the Fund "fully supports" the position of the Ad Hoc Committee. However, it says it has additional objections.

[29] The Fund objects particularly to the settlement of the Greenfield Action. It argues that the GSA contemplates settlement of the Greenfield Action without payment to CESCA and that, as CESCA's major creditor, the Fund is thereby prejudiced.

[30] Firstly, the settlement of this claim under the GSA was between the proper claimant, CCNG and the U.S. Debtors. It was not without consideration as alleged. The GSA provides that $15 million of the possible $90 million priority claim to be paid to the U. S. Debtors out of the Canadian estate will be netted off in consideration for the Greenfield settlement.

[31] The Fund submits that there are conflict of interest considerations arising from the settlement of the Greenfield matter between the CCAA Debtors and the U.S. Debtors. This argument might have greater force if the Fund were actually compromised or prejudiced in the GSA. However, as I have already noted, the Fund and the remaining creditors of CESCA benefit from the GSA when it is considered on a global basis. It may be that there is a risk that the Fund will be unable to secure complete recovery. However, as discussed above, this does not represent a compromise of the Fund's claims. Further, as I indicated in my oral reasons, the fact that the Fund may bear some greater risk than other creditors does not, in itself, make the GSA unfair.

[32] The Fund also complains of a potential shortfall in respect of its claims against CCPL. They argue that, even if they are able to have recourse to CORPX's guarantee in respect of any shortfall in the Canadian estate, they are prejudiced because they may receive equity rather than cash. I have previously addressed some of the issues relating to the possibility that the Fund may have to have recourse to the now-acknowledged guarantees of their disputed claims as part of the U.S. process to obtain full payment. This possibility existed prior to the negotiation of the GSA

and in fact, the possibility of resort to the guarantees may have been of greater likelihood if the $7.4 billion of claims against the Canadian estate that the GSA eliminates had been established as valid to any significant degree. Without the provision of the GSA that enables the claims of the Fund that give rise to the guarantees being resolved in this Court, the Fund would have faced the possibility of adjudication of those claims in the U.S. proceedings. The Fund now will be entitled to participate with other guarantee claimants in the U.S. and will be entitled to a vote on the proposal of the U.S. Debtors to address those claims. I am not satisfied that the Fund is any worse off in its position as a result of the GSA in this regard.

[33] The Fund further argues that it is not aware of any CORPX guarantee in respect of its most recent claim. A claim was filed against the Fund in Ontario on May 23, 2007 relating to CCPL's management of the Fund. The Fund made application before me on July 24, 2007 for leave to file a further proof of claim against CCPL. I have reserved my decision on that application. The Fund asserts that since there is no CORPX guarantee in respect of this claim, they face a shortfall of $10.5 million on the "high" scenario basis or $19.5 million on the "low" scenario basis on this claim. This claim has not yet been accepted as a late claim. It arose after the GSA was negotiated and, therefore, could not have been addressed by the negotiating parties in any event. It is highly contingent, opposed by both the Fund and the CCAA Debtors, and raises issues of whether the indemnity between CCPL and the Fund is even applicable. Even if accepted as a late claim, it would not likely be valued by the CCAA Debtors and the Monitor at anything near its face value. This currently unaccepted late claim is not properly a factor in the consideration of the GSA.

The ULC2 Trustee's Objections

[34] The ULC2 Trustee objects, first, to its exclusion from the negotiation process leading up to the GSA. It states in its brief that "[a]s the ULC2 Trustee was not provided with the ability to participate or seek approval of the proposed resolution of the ULC2 Claims, it cannot support the [GSA] unless and until it is clear that the terms thereof ensure that the ULC2 Claims are provided for in full and the [GSA] does not result in a compromise of any of the ULC2 Claims". Although the ULC2 Trustee may not have participated in the negotiation or drafting of the GSA, it did comment on the issues addressed in the settlement. The problem is that these issues have not been resolved to the satisfaction of the ULC 2 Trustee.

[35] The ULC2 Trustee argues that the GSA provides it with one general unsecured claim in the CCAA Proceedings against ULC2 in an amount alleged to satisfy the outstanding principal amount of the ULC 2 Notes, accrued and unpaid interest and professional fees, costs and expenses of both the Ad Hoc ULC2 Noteholders Committee and the ULC2 Trustee and one guarantee claim against CORPX. It argues that the quantum contemplated by the GSA is insufficient to satisfy the amounts owing under the ULC2 Indenture because it does not take proper account of interest on the ULC2 Notes.

[36] In addition, the ULC2 Trustee takes the position that the GSA fails to provide for the ULC2 Make-Whole Premium. It objects to being required, under the terms of the GSA, to take this matter to the U.S. Bankruptcy Court rather than to this Court.

[37] I am unable to conclude that the GSA compromises the rights of the ULC2 noteholders in the manner complained of by the UCL2 Trustee. First, the GSA contemplates that the ULC2 Trustee will be paid in full, whatever its entitlement is. If the quantum of that entitlement cannot be resolved consensually, the CCAA Debtors have committed to reserve sufficient funds to pay out the claims once they have been resolved.

[38] While the GSA reorganizes the formal claims made by the ULC2 Trustee, the reorganization does not prejudice the ULC2 noteholders financially, as the effect of the reorganized claims is the same and the ULC2 Trustee's right to assert the full amount of its claims remains.

[39] With respect to the requirement that the ULC2 Trustee take the matter of the ULC2 Make-Whole Premium to the U.S. Court, I am satisfied that the United States Bankruptcy Court of the Southern District of New York is an appropriate forum in which to address that and its related issues, given that New York law governs the Trust Indenture and the Trust Indenture provides that ULC II agrees that it will submit to the non-exclusive jurisdiction of the New York Court in any suit, action or proceedings. Granted, there may be arguments that could be made that this Court has jurisdiction over these issues under CCAA proceedings, but s. 18.6 of the CCAA recognizes that flexibility and comity are important to facilitate the efficient, economical and appropriate resolution of cross-border issues in insolvencies such as this one. I note that the GSA assigns responsibility for a number of unresolved claims which could be argued to have aspects that are within the jurisdiction of the U.S. Court to this Court for resolution. I am satisfied that I have the authority under s. 18.6 of the CCAA to approve the assignment of these issues to the U.S. Court even over the objections of the ULC2 Trustee.

[40] The ULC2 Trustee also objects to the timing of the payment of $75 million to the U.S. Debtors and to the withdrawal of certain oppression claims relating to the sale of the Saltend facility, submitting that the payment and withdrawal should not occur prior to the payment of the claims of the ULC2 noteholders. There was some confusion over an apparent disparity between the Canadian form of order and the U.S. form with respect to the order of distributions of claims. The Canadian order, to which the U.S. order has now been conformed, provides that the $75 million payment will not occur until the CCRC ULC1 Notes are sold and a certificate is filed with both Courts advising that all conditions of the GSA have been waived or satisfied. While this does not satisfy the ULC2 Trustee's objection under this heading in full, I accept the submission of the CCAA Applicants that the GSA requires certain matters to take effect prior to others in order to allow the orderly flow of funds as set out in the GSA and that the arrangement relating to the escrow of funds protects the ULC2 noteholders in any event.

Analysis of Law re: Plan of Arrangement

[41] It is clear that, if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary. The Court has no discretion to sanction a plan of arrangement unless it has been approved by a vote conducted in accordance with s. 6 of the CCAA: *Royal Bank v. Fracmaster* (1999), 244 A.R. 93 (C.A.) at para. 13.

[42] The Ad Hoc Committee, the Fund and the ULC2 Trustee rely heavily on *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. S.C.J.) to support their submissions. As noted by Blair, J. in *Philip* at para. 42, in the context of reviewing a plan of arrangement filed in CCAA proceedings involving Philip Services and its Canadian subsidiaries in Canada where the primary debtor, Philip Services, and its United States subsidiaries had also filed for Chapter 11 protection under U.S. law and had filed a separate U.S. plan, the rights of creditors under a plan filed in CCAA proceedings in Canada cannot be compromised without a vote of creditors followed by Court sanction.

[43] The comments made by the Court in *Philip* must be viewed against the context of the specific facts of that case. Philip Services was heavily indebted and had raised equity through public offerings in Canada and the United States. These public offerings led to a series of class actions in both jurisdictions, which, together with Philip Services' debt load and the bad publicity caused by the class actions, led to the CCAA and Chapter 11 filings. At about the same time that plans of arrangement were filed in Canada and the U.S., Philip Services entered into a settlement agreement with the Canadian and U.S. class action plaintiffs that Philip Services sought to have approved by the Canadian Court. The auditors (who were co-defendants with Philip Services in the class action proceedings), former officers and directors of Philip Services who had not been released from liability in the class action proceedings and other interested parties brought motions for relief which included an attack on the Canadian plan of arrangement on the basis that it was not fair and reasonable as it did not allow them their right as creditors to vote on the Canadian plan.

[44] The effect of the plans filed in both jurisdictions was that the claims of Philip Services' creditors, whether Canadian or American, were to be dealt with under the U.S. plan, and only claims against Philip Services' Canadian subsidiaries were to be dealt with under the Canadian plan.

[45] The Court found that if the settlement and the Canadian and U.S. plans were approved, the auditors and the underwriters who were co-defendants in the class action proceedings would lose their rights to claim contribution and indemnity in the class action. The Court held at para. 35 that this was not a reason to impugn the fairness of the plans, since the ability to compromise claims under a plan of arrangement is essential to the ability of a debtor to restructure. The plans as structured deprived these creditors of the ability to pursue their contribution claims in the CCAA proceedings by carving out the claims from the Canadian proceedings and providing that they be dealt with under the U.S. plan in the U.S. Bankruptcy Court. The Court noted that this was so despite the fact that Philip Services had set in motion CCAA proceedings in Canada in

the first place and, by virtue of obtaining a stay, had prevented these creditors from pursuing their claims in Canada. The Canadian plan was stated to be binding upon all holders of claims against Philip Services, including Canadian claimants, without according those Canadian claimants a right to vote on the Canadian plan.

[46] In Blair J.'s opinion, it was this loss of the right of Philip Services' Canadian creditors to vote on the Canadian plan that caused the problem. He found at para. 38 that Philip Services, having initiated and taken the benefits of CCAA proceedings in Canada, could not carve out "certain pesky . . . contingent claimants, and... require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan...without the right to vote on the proposal.".

[47] The Court took into account that the auditors, underwriters and former directors and officers of Philip Services would be downgraded to the same status as equity holders under the U.S. plan, rather than having their claims considered as debt claims as they would be in Canada.

[48] These facts are not analogous to the facts of the Calpine restructuring. The CCAA Debtors and the U.S. Debtors are separate entities who have filed separate proceedings in Canada and the United States. No plan of arrangement has been filed or proposed in Canada and no attempt has been made to have a Canadian creditor's claims dealt with in another jurisdiction, except to the extent of continuing to require certain guarantee claims that the Fund has against CORPX dealt with as part of the U.S. proceeding, where the guarantee claims properly have been made and the reference of the ULC2 Trustee's issues to the U. S. Court, which I have found acceptable under s. 18.6 of the CCAA. No Canadian creditor has been denied a vote on a filed Canadian plan of arrangement. To the extent that *Philip* repeats the basic proposition that a plan of arrangement that compromises rights of creditors requires a vote by creditors before it is sanctioned by the Court, this principle has been applied to a situation where there were in existence clearly identified formal plans of arrangement.

[49] Blair J. had different comments to make about the settlement agreement in *Philip*. The settlement agreement was conditional not only upon court approval, but also the successful implementation of both the Canadian and U.S. plans. Philip Services linked the settlement and the plans together and the Court found that the settlement agreement could not be viewed in isolation. Blair J. found that it was premature to approve the settlement which he noted would immunize the class action plaintiffs and Philip Services from the need to have regard to the co-defendants in those actions. He was concerned, for example, that the settlement agreement would deprive the underwriters of certain of their rights under an underwriting agreement. It is interesting that Blair J. commented at para. 31 that what was significant to him in deciding that approval of the settlement was premature was "not the attempt to compromise the claims", but the underwriters' loss of a "bargaining chip" in the restructuring process if the settlement was approved at that point. He also noted at para. 33 that he was not suggesting that the proposed settlement ultimately would not be approved, but only that it was premature at that stage and should be considered at a time more contemporaneous with a sanctioning hearing.

[50] It is noteworthy that Blair J. did not characterize the settlement agreement as a plan of arrangement requiring a vote, even though it was clear that it deprived other creditors of rights, thus compromising those rights. Nor did he question the jurisdiction of the Court to approve such a settlement. He merely postponed approval in light of the inter-relationship of the settlement agreement and the plans.

[51] The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. The *Philip* case does not aid the creditors who are opposed to the GSA in any suggestion that a Court lacks jurisdiction under the CCAA to approve agreements that may involve resolution of the claims of some but not all of the creditors of a CCAA debtor prior to a vote on a plan of arrangement.

[52] The Opposing Creditors rely on *Cable Satisfaction International, Inc. v. Richter Associés Inc.* (2004), 48 C.B.R. (4th) 205 (Que. S.C.) at para. 46 for the proposition that a court cannot force on creditors a plan which they have not voted to accept. This comment was made by Chaput, J. in the context of a very different fact situation than the one involved in this application. In *Cable Satisfaction*, creditors voting on a plan of arrangement proposed by the CCAA debtor had rejected the plan and approved instead an amended plan proposed at the creditors' meeting by one of the creditors. The Court's comment was made in response to the CCAA debtor's suggestion that the plan it had tabled should be approved because a majority of proxies filed prior to the amendment of the plan approved the original plan.

[53] There is no definition of "arrangement" or "compromise" under the CCAA. In *Cable Satisfaction*, Chaput, J. suggested at para. 35 that, in the context of s. 4 of the CCAA, an arrangement or compromise is not a contract but a proposal, a plan of terms and conditions to be presented to creditors for their consideration. He comments at para. 36 that the binding force of an arrangement or compromise arises from Court sanction, and not from its status as a contract.

[54] It is surely not the case that an arrangement or compromise need be labeled as such or formally proposed as such to creditors in order to require a vote of creditors. The issue is whether the GSA is, by its terms and in its effect, such an arrangement or compromise.

[55] I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously. Those claims will be adjudicated either under the CCAA proceeding or in the U.S. Chapter 11 proceeding and, to the extent they are determined to be valid, the GSA provides a mechanism and a financial framework for their full payment or satisfaction, other than for the possibility of a relatively small deficiency for some creditors of CESCA whose claims are not guaranteed by the U.S. Debtors and an even smaller deficiency of

$25,000 in CCPL. The creditors of CESCA who are at real risk of suffering a deficiency have not objected to the approval of the GSA. In fact, counsel for TCPL and Alliance, two of the CESCA gas transportation claimants, and Westcoast, a major creditor of CCRC, appeared at the hearing to support approval of the GSA (or, at least in TCPL's case, not to object to it) on the basis that it improves their chances of recovery, resolving as it does all the major cross-border issues that have impeded the progress of this CCAA proceeding.

[56] The Calpine Applicants submit that the GSA can be reviewed and approved by the Court pursuant to its jurisdiction to approve transactions and settlement agreements during the CCAA stay period. They cite *Re Playdium Entertaiment Corp*. (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Comm. List]) at paras. 11 and 23 and *Re Air Canada* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Comm. List]) at para. 9 in support of their submission that the Court must consider whether such an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

[57] In *Playdium*, a CCAA restructuring in which no viable plan had been arrived at, Spence J. found that the Court could approve the transfer of substantially all of the assets of the CCAA debtor to a new corporation in satisfaction of the claims of the primary secured creditors. Against the objection of a party that had the right under certain critical contracts to withhold consent to such a transfer, the Court found that it had the jurisdiction to approve such a transfer of assets over the objection of creditors or other affected parties, citing *Re Lehendorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Comm. List]) and *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 289 (Ont. S.C.J. [Comm. List]). Spence J. found at para. 23 that for such an order to be appropriate, it must be in keeping with the purpose and spirit of the regime created by the CCAA. In determining whether to approve the transfer of assets, he considered the factors enumerated in *Red Cross*.

[58] Whether the transfer constituted a compromise of creditors' rights was not in issue in *Playdium* and the comment was made that the transferees were the only creditors with an economic interest in the CCAA debtor. The case, however, is authority for the proposition that the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.

[59] In *Air Canada*, Farley J., in the course of the restructuring, was asked to approve Global Restructuring Agreements ("GRAs"). He cited *Red Cross* as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring prior to a plan of arrangement. He commented at para. 9 that:

> ... I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd. . . .* In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171

> (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

[60] The GRA between Air Canada and a creditor, GECC, provided, among other things, for the restructuring of various leasing obligations and provided Air Canada with commitments for financing in return for interim payments on current aircraft rent and specific consideration in a restructured Air Canada. The Monitor noted that the financial benefits provided to Air Canada under the GRA outweighed the costs to Air Canada's estate arising from cross-collateralization benefits provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. The Monitor therefore recommended approval of the GRA.

[61] Another creditor complained at the approval hearing that other creditors were not being given treatment equal to that given to GECC. It appears that part of that unequal treatment was obtained by GECC as part of an earlier DIP financing that was not at issue before Farley J. at the time, but the Court engaged in an analysis of the benefits and costs to Air Canada of the GRA on the basis described above. It is noteworthy that Farley J. considered the suggestion of the objecting creditor that, if the GRA was not approved, GECC would not "abandon the field", but would negotiate terms with Air Canada that the objecting creditor felt would be more appropriate. The Court observed that the delay and uncertainty inherent in such an approach likely would be devastating to Air Canada.

[62] This decision illustrates, in addition to the appropriate test to be applied to a settlement agreement, that such agreements almost inevitably will have the effect of changing the financial landscape of the CCAA debtor to some extent. This is so whether the settlement involves the resolution of a simple claim by a single debtor or the kind of complicated claim illustrated in a complex restructuring such as Air Canada (or Calpine). Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

[63] I am satisfied that no rights are being confiscated under the GSA. Some claims are eliminated, but only with the full consent of the parties directly involved in those specific claims. The existing claims of the ULC2 Trustee are replaced with redesignated claims. However, the financial effect of the redesignated claims is the same, the ULC2 Trustee's right to assert the full amount of its claims remains and the CCAA Debtors and U.S. Debtors have agreed to hold funds in escrow sufficient to satisfy the entirety of those claims, once settled or judicially determined.

[64] The fact that this is a cross-border insolvency does not change the essential nature of the test which a settlement must meet, but consideration of the implications of the cross-border aspects of the situation is necessary and appropriate when weighing the benefits of the settlement for the debtors and their stakeholders generally. It cannot be ignored that the cross-border aspects of the insolvency of this inter-related corporate group have created daunting issues which have stymied progress on both sides of the border for many months. The GSA resolves most of those issues in a reasonably equitable and rational manner, provides a mechanism by which a number of the remaining issues may be resolved in the court of one jurisdiction or the other, and, by reason of the release for sale of the CCRC ULC1 Notes and the fortuity of the market, provides the likelihood of greatly enhanced recoveries and the expectation, supported by the Monitor's careful analysis, that an overwhelming majority of the Canadian stakeholders will be paid in full, either from the Canadian estate or through the U.S. Debtor guarantee process.

[65] In *Red Cross*, the Red Cross, under the Court's supervision in CCAA proceedings, applied to approve the sale of its blood supply assets and operations to two new agencies. One of the groups of blood transfusion claimants objected and called for a meeting of creditors to consider a counterproposal.

[66] Blair J. commented that the assets sought to be transferred were the source of the main value of the Red Cross's assets which might be available to satisfy the claims of creditors. He noted that the pool of funds resulting from the sale would not be sufficient to satisfy all claims, but that the Red Cross and the government were of the opinion that the transfer represented the best hope of maximizing distributions to the claimants. The Court characterized the central question on the motion as being whether the proposed purchase price for the assets was fair and reasonable in the circumstances and as close to maximum as reasonably likely, commenting at para. 16 that "(w)hat is important is that the value of that recovery pool is as high as possible."

[67] The objecting claimants in *Red Cross* asked the Court to order a vote on a proposed plan of arrangement rather than approving the sale. Those supporting the plan argued that approval of the sale transaction in advance of a creditors' vote on a plan of arrangement would deprive the creditors of their statutory right to put forward a plan and vote upon it.

[68] Blair J. declined to order a vote on the proposed plan, exercising his jurisdiction under ss. 4 and 5 of the CCAA to refuse to order a vote because of his finding that the proposed plan was unworkable and unrealistic in the circumstances.

[69] He then proceeded to consider whether the Court had jurisdiction to make an order approving the sale of substantial assets of a debtor company before a plan has been placed before the creditors for approval.

[70] Some of the objecting claimants submitted that the authority under s. 11 of the CCAA was narrow and would not permit such a sale. Others suggested that the sale should be permitted to proceed, but the transaction should be part of the plan of arrangement eventually put forth by

the Red Cross, with the question of whether it was appropriate and supportable determined in that context by way of vote. The latter argument is similar in effect to that made by the Opposing Creditors in this case.

[71] Blair J. rejected these submissions, finding that, realistically, the sale could not go forward on a conditional basis. He found that he had jurisdiction to make the order sought, noting at para. 43 that the source of his authority was found in the powers allocated to the Court to impose terms and conditions on the granting of a stay under s. 11 of the CCAA and may also be "grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in legislation so as to give effect to the objects of the CCAA'. "

[72] At para. 45, Blair J. made the following comments, which resonate in this application:

> It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:
>
> > 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 for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
> >
> > The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and

> it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted) [Emphasis in *Red Cross*.]

[73] Blair J. then stated that he was satisfied that the Court not only had jurisdiction to make the order sought, but should do so, noting the benefits of the sale and concluding at para. 46 that to forego the favourable purchase price "would in the circumstances be folly".

[74] While there are clear differences between the *Red Cross* sale transaction and the GSA in this case, what the *Red Cross* transaction did was quantify with finality the pool of funds available for distribution to creditors. The GSA does not go that far but, in its adjustments and allocations of inter-corporate debt and settlement of outstanding inter-corporate claims, it has implications for the value of the Canadian estate on an overall basis and implications for the funds available to creditors on an entity-by-entity basis. As recognized in *Red Cross*, *Air Canada* and *Playdium*, transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

[75] That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

[76] In this case, as in *Red Cross*, the Opposing Creditors have suggested that approval of the GSA sets a dangerous precedent. The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

[77] The issue of the jurisdiction of supervising judges in CCAA proceedings to make orders that do not merely preserve the *status quo* was considered by the Ontario Court of Appeal in *Re Stelco Inc.* (2005), 78 O.R. (3d) 254 at para. 18. This was an appeal of an order made by Farley J. approving agreements made by the debtor with two of its stakeholders and a finance provider. One of the agreements provided for a break fee if the plan of arrangement proposed by Stelco failed to be approved by the creditors. The Court noted at para. 20 that the break fee could deplete Stelco's assets. However, Rosenberg, J.A., for the Court, also noted at para. 3 that the Stelco CCAA process had been going on for 20 months, longer than anyone had expected, and that the supervising judge had been managing the process throughout. He then reviewed some of the many obstacles to a successful restructuring and found that the agreements resolved at least a few of the paramount problems.

[78] At para. 16, the Court stated that the objecting creditors argued, as they have in this case, that the orders sought would have the effect of substituting the Court's judgment for that of the creditors who have the right under s. 6 of the CCAA to approve a plan. Nevertheless, the Court of Appeal held that Farley J. had the jurisdiction to approve the agreements under s. 11 of the CCAA, which provides a broad jurisdiction to impose terms and conditions on the granting of a stay. The Court commented as follows at paras. 18-9:

> In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the CCAA process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. ...
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

[79] The CCAA Debtors in this case were faced with challenges similar to those faced by Stelco in its restructuring. This CCAA proceeding is in its nineteenth month. As set out earlier, the process had encountered considerable hurdles relating to the nature of the ULC1 noteholder claims, the inter-corporate debt claims and the BDCs. The same creditors who object to this application were, in previous applications, clamouring for the resolution of the ULC1 noteholder issue and for the sale of the CCRC ULC1 Notes. The GSA resolves these issues and allows the process to move forward with a view to dealing with the remainder of the issues in an orderly and efficient way and with the expectation that this insolvency can be concluded with the determination and payment of virtually all claims by year-end.

Conclusion

[80] Viewed against the test of whether the GSA is fair, reasonable and beneficial to creditors as a whole, the GSA is a remarkable step forward in resolving this CCAA filing. It eliminates approximately $7.5 billion in claims against the CCAA Debtors. It resolves the major issues between the CCAA Debtors and the U.S. Debtors that had stalled meaningful progress in asset realization and claims resolution. Most significantly, it unlocks the Canadian proceeding and provides the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities. The Monitor has concluded through careful and thorough analysis that the likely outcome of the implementation of the GSA is payment in full of all Canadian creditors. As the Ad Hoc Committee concedes, the GSA removes the issues that the members of the Committee have recognized for many months as the

major impediments to progress. The sale of the CCRC ULC1 Notes is a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale cannot occur otherwise than in the context of a settlement with those parties whose claims directly affect the Notes themselves. I am satisfied that the GSA is a reasonable, and indeed necessary, path out of the deadlock.

[81] I am also persuaded that the GSA provides clear benefits to the Canadian creditors of the CCAA Debtors and that, on an individual basis, no creditor is worse off as a result of the GSA considered as a whole. While it does not guarantee full payment of claims, the GSA substantially reduces the risk that this goal will not be achieved. Crucially, the GSA is supported and recommended unequivocally by the Monitor, who was involved in the negotiations and who has analysed its terms thoroughly. I am mindful that the GSA is not without risk to the Fund. However, that some risk falls upon the Fund does not make the GSA unfair. As the Calpine Applicants point out, particularly in the insolvency context, equity is not always equality. Given the Monitor's assessment that the risk of less than full payment to the CESCA creditors is relatively remote, I am satisfied that such risk does not obviate the fairness of the GSA.

[82] The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. The cross-border nature of many of the issues adds to the delicacy of the matter. Given that complexity, it behooves all parties and this Court to proceed cautiously and with careful consideration. Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.

Heard on the 24th day of July, 2007.
Dated at the City of Calgary, Alberta this 31st day of July, 2007.

B.E. Romaine
J.C.Q.B.A.

Major Canadian Appearances:

Larry B. Robinson, Q.C. and Sean F. Collins of McCarthy Tetrault LLP
Jay A. Carfagnini, Fred Myers, Brian Empey and Joseph Pasquariello of Goodmans LLP
for the CCAA Debtors

Patrick McCarthy, Q.C. and Josef A. Krueger of Borden Ladner Gervais LLP
for the Monitor

Robert I. Thornton, John L. Finnigan and Rachelle F. Moncur of ThorntonGroutFinnigan LLP
for the Ad Hoc Committee

Sean F. Dunphy and Elizabeth Pillon of Stikeman Elliott LLP
for the ULC2 Trustee

Howard A. Gorman of Macleod Dixon LLP
for the ULC1 Noteholders Committee

Peter H. Griffin and Peter J. Osborne of Lenczner Slaght Royce Smith Griffin LLP
for the U.S. Debtors

Peter T. Linder, Q.C. and Emi R. Bossio of Peacock Linder & Halt LLP
for the Fund

Ken Lenz of Bennett Jones LLP
for the HSBC Bank USA, N.A., as ULC1 Indenture Trustee

Jay A. Swartz of Davies Ward Phillips & Vineberg LLP
for Lehman Brothers

Rinus De Waal of Fasken Martineau DuMoulin LLP
for the Unsecured Creditors' Committee

Neil Rabinovitch of Fraser Milner Casgrain LLP
for the Unofficial Committee of 2nd Lien Debtholders

B. A. R. Smith, Q.C. of Fraser Milner Casgrain LLP
for Alliance Pipelines

Douglas I. McLean
for TransCanada Pipelines Limited

TAB 13

See para. 68

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does

not permit a release of claims against third parties and that 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.

Held, the appeal should be dismissed.

On a proper interpretation, 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. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; 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 CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to 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.

While the principle 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 is an important one, 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.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion 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 was reasonable.

Cases referred to

Steinberg Inc. c. Michaud, [1993] J.Q. no 1076, 42 C.B.R. (5th) 1, 1993 CarswellQue 229, 1993 CarswellQue 2055, [1993] R.J.Q. 1684, J.E. 93-1227, 55 Q.A.C. 297, 55 Q.A.C. 298, 41 A.C.W.S. (3d) 317 (C.A.), not folld

Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

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 [page517] 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 timetable -- 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 Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) 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. [page518]

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

[page519] 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 Montreal Protocol -- the parties committed [page520] 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 [page521] 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 art. 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 [page522] 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 co-operated 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 25. The vote was overwhelmingly in support of the Plan -- 96 per cent 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 per cent of those connected with the development of the Plan voted positively, as did 80 per cent 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 [page523] 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? [page524]

(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. [See Note 1 below] 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 [page525] 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 entre 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 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] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[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", [See Note 2 below] 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 [page526] -- 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": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[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 Qubec 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. [page527]

[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] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., 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 (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (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 O.R.:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] 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 [page528] 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 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 [page529] 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. [page530]
>
> . . . . .
>
> 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: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (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.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688,

[2000] O.J. No. 3993 (C.A.), at para. 11. 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 Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[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] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing 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. [See Note 4 below]

[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 [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[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. [See Note 5 below] 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 all ABCP Noteholders, stemming from the contributions the financial [page533] 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 [See Note 6 below] 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; [page534]
(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, 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:

> 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.
>
> 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 [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (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 Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- 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 Canadian Airlines (Re) 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 wellspring 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, [See Note 7 below] 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). [page536]

[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 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, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (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. [page537] 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:

> 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 p. 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.

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 [page538] 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--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)
See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (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 [page539] 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: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (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):

> 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.
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> . . . . .
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> 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.
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> . . . . . [page540]
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> 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 [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing 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. [page542]

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.

[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: [See Note 8 below]

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 and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] 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

[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; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: 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. [page544]

[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: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "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 [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (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: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. 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, [page546] 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, [page547] 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 per cent 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 [page548] 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.

Appeal dismissed.

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 dpt et placement du Qubec
Canaccord Capital Corporation [page549]
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 "C" -- 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 Dpt et Placement du Qubec

(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]

(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, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements 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.

Notes

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

Note 2: Georgina R. Jackson and 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, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

Note 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.

Note 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.

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

Note 7: Steinberg was originally reported in French: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [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.

Note 8: Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

TAB 14

See paras. 30-31

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-061483-224

DATE: December 19, 2023

BY THE HONOURABLE CHRISTIAN IMMER, J.S.C.

IN THE MATTER OF THE PLANS OF COMPROMISE OF:

FORMERXBC INC. (FORMERLY XEBEC ADSORPTION INC.)
11941666 CANADA INC. (FORMERLY XEBEC RNG HOLDINGS INC.)
APPLIED COMPRESSION SYSTEMS LTD.
1224933 ONTARIO INC. (FORMERLY COMPRESSED AIR INTERNATIONAL INC.)
FORMERXBC HOLDING USA INC. (FORMERLY XEBEC HOLDING USA INC.)
ENERPHASE INDUSTRIAL SOLUTIONS, INC.
CDA SYSTEMS, LLC
FORMERXBC ADSORPTION USA INC. (FORMERLY XEBEC ADSORPTION USA INC.)
FORMERXBC PENNSYLVANIA COMPANY (FORMERLY THE TITUS COMPANY)
FORMERXBC NOR CORPORATION (FORMERLY NORTEKBELAIR CORPORATION)
FORMERXBC FLOW SERVICES – WISCONSIN INC. (FORMERLY XBC FLOW SERVICES – WISCONSIN INC.)
CALIFORNIA COMPRESSION, LLC
FORMERXBC SYSTEMS USA, LLC (FORMERLY XEBEC SYSTEMS USA, LLC)
Debtors / Petitioners

And

DELOITTE RESTRUCTURING INC.
Monitor

REASONS FOR RENDERING THE SANCTION ORDER
(S. 6 And 11of the *Companies Creditors Arrangement Act*)

[1] Fifteen months have elapsed since the Court issued a First Initial Day Order ("IFDO") relying on the powers conferred to me by the *Companies Creditors Arrangement Act* ("CCAA").

[2] On that first day, hundreds of jobs were in jeopardy across Canada and the United States. Clients risked losing their critical supplier or service provider. Secured and unsecured creditors were owed very substantial sums.

[3] It was quickly obvious that this was fated to be a liquidating *CCAA*, and that a reorganization of the Debtors was not possible. To paraphrase the Supreme Court of Canada, the predominant remedial focus was then a liquidation that preserved going-concern value and the ongoing business operations of the Debtors.[1]

[4] A large group collaborated to achieve the best possible outcome for all concerned stakeholders, namely: The debtors and their Canadian and US legal counsel, the monitor and their Canadian and US legal counsel, the financial advisor, the directors and officers, the suppliers, the clients, the unsecured creditors, the secured creditors and their legal counsel.

[5] The following eight transaction were carried out in Canada of the United States, and the Court rendered 8 distinct vesting orders.

	DATE OF THE ORDERS	**SELLER(S)**	**PURCHASER(S)**
1	February 3, 2023[2]	Applied Compression Systems Ltd. **(ACS)**	1396905 B.C. Ltd.
2	February 13, 2023[3]	FormerXBC Inc. (formerly Xebec Adsorption Inc.) **(BLA)** and 11941666 Canada Inc. (formerly Xebec RNG Holdings Inc.) **(GNR)**	Fonds de solidarité des travailleurs du Québec (F.T.Q.) *-and-* GNR Québec Capital L.P.
3	February 13, 2023[4]	CDA Systems, LLC **(CDA)** *-and-* California Compression LLC **(CAL)**	Sullair, LLC

1 *9354-9186 Québec inc.* v. *Callidus Capital Corp*., 2020 SCC 10 (CanLII), [2020] 1 SCR 521, par. 46 « *Callidus* »].
2 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 268.
3 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 378.
4 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 380.

4	February 17, 2023[5]	FormerXBC Inc. (formerly Xebec Adsorption Inc.) **(BLA)** *-and-* 1224933 Ontario Inc. (formerly Compressed Air International Inc.) **(CAI)**	Ivys Adsorption Inc. (asset buyer) *-and-* Ivys, Inc. (equity buyer)
5	March 16, 2023[6]	FormerXBC Pennsylvania Company (formerly The Titus Company) **(TIT)**	FAD Pennsylvania Inc.
6	March 16, 2023[7]	FormerXBC Flow Services – Wisconsin Inc. (formerly XBC Flow Services – Wisconsin Inc.) **(XBC)**	Total Energy Systems, LLC
7	March 16, 2023[8]	FormerXBC Systems USA, LLC (formerly Xebec Systems USA, LLC) **(UEC)**	EnergyLink U.S. Inc.
8	May 24, 2023[9]	FormerXBC Systems USA, LLC (formerly Xebec Systems USA, LLC) **(UEC)**	Ivys Adsorption Inc.

[6] In addition, because of the terms of the ARIOs, the Court authorized the Monitor to carry out further transactions without seeking the Court's approval under certain conditions. Five further transactions were carried out namely:

- the sale of FormerXBC NOR Corporation to Next Air & Gas;
- the sale of certain assets of Enerphase Industrial Solutions, Inc. ("**AIR**") to Curtis Toledo in March 2023 and of other assets to Curtis Toledo;
- the sale of certain assets of FormerXBC Systems USA, LLC (formerly Xebec Systems USA, LLC) ("**UEC**") to Air Products and others to Western Midstream in July 2023.

[7] Finally, entities which were not petitioners as such were also sold, namely: Tiger Filtration Limited located in the U.K. and HyGear Technologies and Services B.V. located in the Netherlands.

[8] These transactions allowed operations to continue as seamlessly as possible. The vast majority of employees' positions were saved. Clients continued to be serviced. Supply chains were maintained. Complex transactions were structured to permit assets which were only partly built to be transferred.

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5 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 467; written reasons provided in *Arrangement relatif à Xebec Adsorption Inc*., 2023 QCCS 466.

6 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 837

7 *Arrangement relatif à Xebec Adsorption Inc*., 2023 QCCS 839

8 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 838.

9 *Arrangement relatif à FormerXBC inc. (Xebec Adsorption inc.),* 2023 QCCS 1780; written reasons provided in *Arrangement relatif à FormerXBC Inc. (Xebex Adsorption Inc.)*, 2023 QCCS 1818.

[9] This in of itself was a remarkable feat which met one of the objectives of the *CCAA*, namely: avoiding the social and economic losses resulting from liquidation of an insolvent company.[10]

[10] As a testament to the inherent fairness of the process and the collaborative effort led by the debtors and the monitor with all stakeholders, there was surprisingly little contestation.

[11] But there was some, and it attacked directly not only the debtors, but also the Monitor, the debtor's legal counsel and the directors and officers. More will be said at the end of these reasons.

[12] Progressively, greater visibility on the ultimate financial outcome was gained as the following milestones were passed:

- Closing of transactions and collection of proceeds;
- Payment of close to $8M to the secured creditor National Bank of Canada("NBC") as a result of the sale of Tiger Filtration Limited on which the NBC had a security;
- Actual drawings on the issued letters of credit;
- Understanding of the impacts of intercompany transactions;
- Determination by the Monitor of the limits of EDC's security on US assets, which in turn led to negotiations and the execution of a support agreement for which the authorization of the Court was obtained. [11]

[13] As all this came into focus, it became clear that distributions could be made to unsecured creditors.

[14] A claims process was presented and the Court found it to be fair, efficient and reasonable.[12] This process provided for the transmission of a Claims Package by the Monitor, the transmission of a claim by the creditor with a claims for claims against the Debtors and the D&Os with a Bar Date by July 24, 2023, the possible transmission of a Notice of Revision or Disallowance by Monitor and the possibility for the claimant to file an appeal application, which would then be submitted to this Court for adjudication.[13]

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10 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60 (CanLII), [2010] 3 SCR 379, par. 15.

11 *Arrangement relatif à Former XBC Inc. (Xebec Adsorption Inc.),* 2023 QCCS 4220, par. 18 to 20; reasons provided in *Arrangement relatif à FormerXBC Inc. (Xebex Adsorption Inc.)*, 2023 QCCS 4213, paragraphes 8 to 18.

12 *Arrangement relatif à FormerXBC Inc. (Xebex Adsorption Inc.)*, 2023 QCCS 1818, par. 27.

13 Id., par. 24.

[15] The Debtors and the Monitor then started working in earnest to determine the allocation of expenses and estimating the net proceeds available for distribution. On June 20, 2023, the Monitor presented the allocation method to the creditors. It then sought and obtained my authorization for its implementation. I indeed concluded that the Proposed Allocation Methodology was equitable and appropriate. Its principled approach, its adaptability to the ever-changing proceeds and costs, and its transparency advanced the policy and remedial objectives of the CCAA.[14]

[16] Plans or arrangement were then drawn up. Prior to this, the Court approved the Plan filing and meeting order.[15]

[17] The meeting was held. The vast majority of creditors of 11 Debtors voted and, save for one lonely vote against, approved the plans by the double majorities set out at par. 6(1) of the *CCAA*.

[18] Unfortunately, the formerly publicly traded parent, FormerXBC (formerly known as Xebec Adsorption Inc.) has no proceeds to distribute. It has presented no plan. Nevertheless, certain ancillary conclusions are sought, which mirror the releases for its directors, officers and slew of categories of professionals, which are granted in the plans.

[19] During the hearing, the Court asked that the language of the release regarding FormerXBC be tightened up and the Debtors and the Monitor provided a new version of par. 35 of the proposed order.

[20] Should the Court now sanction these compromises and order the ancillary relief sought? For the reasons set out below, it concludes that it must.

1. THE SANCTION OF THE 11 PLANS

[21] To explain its decision, the Court will first examine (1.1) 1.1 legal principles, focusing both on (1.1.1) the factors which must govern me generally when sanctioning, and (1.2.1) more focus specifically when examining releases. I will then (1.2) apply these principles to the facts at hand.

1.1 Legal principles

1.1.1 General factors when sanctioning

[22] Paragraph 6(1) CCAA prescribes that if a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be, present and

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[14] *Arrangement relatif à FormerXBC inc. (Xebec Adsorption inc.)*, 2023 QCCS 2417, par. 47.

[15] Arrangement relatif à Former XBC Inc. (Xebec Adsorption Inc.), 2023 QCCS 4220 and the reasons therefore at *Arrangement relatif à FormerXBC Inc. (Xebec Adsorption Inc.)*, 2023 QCCS 4213.

voting either in person or by proxy at the meeting or meetings of creditors agree to any compromise, the compromise may be sanctioned.

[23] Indeed, even if the affected creditors voted in favour of the Plan in the requisite double majorities, the sanctioning court must still examine (i) whether there has been strict compliance with all statutory requirements; (ii) whether all materials filed and procedures carried out were authorized by the CCAA; (iii) whether the Plan is fair and reasonable.[16]

[24] In particular, in determining what is fair and reasonable, courts have reviewed the plans using the following six factors [the "**Six Sanction Factors**"]: (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan; (b) what creditors would have received on bankruptcy or liquidation as compared to the plan; (c) alternatives available to the plan and bankruptcy; (d) oppression of the rights of creditors; (e) unfairness to shareholders; and (f) the public interest.[17]

1.1.2 Principles with regard to releases contained in plans

[25] When determining whether a plan is fair and reasonable, the sanctioning judge must pay particular attention to releases. Additional considerations come into play.

[26] Since 1997, section. 5.1 of the CCAA *explicitly* provides for potential releases of directors in plans:

> 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.
>
> (2) A provision for the compromise of claims against directors may not include claims that;
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> (…)

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16 *Arrangement relatif à Java-U Group inc*., 2018 QCCS 2617, par. 9 and the case law cited by Justice Gouin.

17 *Re: Canwest Global Communications Corp*., 2010 ONSC 4209, par. 15 [« *Canwest* »]

[27] Releases for directors are therefore possible, but strictly limited by the exception set out in para. 5.1(2) *CCAA*. The CCAA does not deal with other third party releasees.

[28] Can releases be extended to third parties and if yes, at what conditions?

[29] In *Metcalfe*, the Ontario Court of Appeal concluded that the *CCAA* permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the CCAA Court where those releases are reasonably connected to the proposed restructuring. To arrive at this conclusion, it relied on the three following grounds: (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.[18]

[30] While reflecting on the second consideration – the meaning of a compromise or arrangement - the Ontario Court of Appeal found that generally, “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”. Hence, as an extension to this proposition, in *CCAA* plans of arrangement, debtors can agree with creditors to compromise claims against the debtor and to release third parties.[19]

[31] The Court of Appeal recognizes that the contractual reasoning has its limits since the plan is frequently imposed on an unwilling minority of creditors. It however concludes that the minority is protected to some extent by the double majority rule.[20]

[32] Third party releases have therefore been extended to officers, professionals or even lenders as a matter of course in plans of arrangement across Canada. [21]

[33] Nevertheless, Courts must still enquire whether such releases are fair and reasonable. As the Chief Justice of the Supreme Court of Canada Wagner explained while sitting in the Superior Court, “in applying and interpreting laws regarding bankruptcy and insolvency, winding-up or companies' creditors arrangements, the courts have consistently recognized that the fairness and reasonableness of the transactions under consideration must prevail”.[22]

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18 *Metcalfe & Mansfield Alternative Investments II Corp., (Re)* , 2008 ONCA 587; par. 43 leave to appeal to the Supreme Court denied: *Jean Coutu Group (PJC) Inc. et al*. v. *Metcalfe & Mansfield Alternative Investments II Corp. and Other Trustees of Asset Backed Commercial Paper Conduits Listed in Schedule “A” to this application et al.,* 2008 CanLII 46997 (SCC).

19 *Ibid.*, para. 63.

20 *Ibid.*, para. 68.

21 For a comprehensive review of the case law, see: Carole J Hunter and Vanessa A Allen, *Please Release Me: The Evolution of Releases in Restructuring Proceedings*, 2021 19th Annual Review of Insolvency Law, 2021 CanLIIDocs 13553.

22 *Hy Bloom inc*. v. *Banque Nationale du Canada*, 2010 QCCS 737, par. 74.

[34] To ensure the fairness and reasonableness of third party releases, Courts generally engage in a principled review of the following five factors [the "**Five Release Examination Factors**"]:[23]

> a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
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> b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
>
> c) Whether the plan could succeed without the releases;
>
> d) Whether the parties being released were contributing to the plan; and
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> e) Whether the release benefitted the debtors as well as the creditors generally.

1.2 Applying these principles to the facts at hand

1.2.1 The general principles

[35] There can be no dispute that all the statutory conditions are met. The conditions of s. 4 of the *CCAA* are met. All the conditions of the Meeting order were respected. The documents were transmitted and the Monitor's reports under subparagraph 23(1)d.1) *CCAA* were comprehensive. The statutory majorities of s. 6 *CCAA* were largely exceeded. The releases contain the limitations set out at para. 5.1(2) *CCAA*.

[36] Excluding for the moment the question of releases, are the plans fair and reasonable? To answer this question, the Six Sanction Factors must be examined.

[37] Were the claims properly classified and did the requisite majority of creditors approve the plan? . As the Court more fully explained in its reasons in support of the Plan filing and Credit meeting order, the affected creditors holding claims of $2,000 or less were presumed to have voted in favour. For purposes of convenience, and given the low value of these favourable votes, this was appropriate. Also, the Trustee voted the intercompany claims in favour of the plans. This is also fair and reasonable in the particular circumstances of this case, because, otherwise, these very significant values would not have been accounted for in the votes.

[38] The voting results show that even if one puts aside the deemed votes and intercompany votes, and only takes into consideration the votes of other creditors holding proven claims, *all creditors but one* voted in favour of the plans.

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[23] *Kitchener Frame Limited (Re)*, 2012 ONSC 234 and *Lydian International Limited (Re)*, 2020 ONSC 4006, par. 54.

[39] The following voting results on each of the Debtor Plans show not only strong creditor participation, but also quasi unanimity in favour of the plans:

- ACS: out of 27 proven claims, 6 were deemed to have voted in favour while 1 intercompany claim voted by EDC, one intercompany claim voted by the trustee and the claims of 13 other creditors were all voted in favour. Six creditors holding proven claims did not vote.

- AIR: out of 13 proven claims, 1 intercompany claim voted by EDC, 2 intercompany claim voted by the trustee and the claims held by 9 other creditors were all voted in favour. Only one creditor holding a proven claim did not vote.

- CAI: out of 18 proven claims, 1 intercompany claim was voted by EDC, 2 intercompany claim were voted by the trustee and 14 claims held by other creditors were all voted in favour. Only one creditor holding a proven claim did not vote.

- CAL: out of 26 proven claims, 4 were deemed to have voted in favour, 1 intercompany claim and one EDC claim voted by EDC, 3 intercompany claims voted by the trustee and the 14 claims held by other creditors were all voted in favour. One creditor voted against. Two creditors holding a proven claim did not vote.

- CDA: out of 11 proven claims, 2 were deemed to have voted in favour, 1 intercompany claim and one EDC claim voted by EDC , two intercompany claims voted by the trustee and the 4 claims held by other creditors were all voted in favour. One creditor holding a proven claim did not vote.

- TIT: out of 19 proven claims, 4 were deemed to have voted in favour, one intercompany claim voted by EDC, one intercompany claim voted by the trustee and the 13 claims held by other creditors were all voted in favour. All creditors therefore voted.

- NOR: out of 27 proven claims, 2 were deemed to have voted in favour, 1 intercompany claim and one EDC claim were voted by EDC, 5 intercompany claims voted by the trustee and the claims of 13 other creditors were all voted in favour. 4 creditors holding proven claims did not vote.

- UEC: out of 109 proven claims, 18 were deemed to have voted in favour, one claim voted by EDC , two intercompany claims voted by the trustee and the claims of 72 other creditors were all voted in favour. 16 creditors holding proven claims did not vote.

- XBC: out of 17 proven claims, 5 were deemed to have voted in favour, one intercompany claim and one EDC claim voted by EDC , three intercompany claims voted by the trustee and the claims of 6 other creditors were all voted in favour. One creditor holding a proven claim did not vote.

- XHU: out of 5 proven claims, one intercompany claim and one EDC claim voted by EDC and the claims of 3 other creditors were all voted in favour. One creditor holding a proven claim did not vote. All claims were voted or deemed to have been voted.

- XSU: out of 6 proven claims, one intercompany claim voted by EDC, one intercompany claim voted by the trustee and the claims of 4 other creditors were all voted in favour. All claims were voted or deemed to have been voted.

[40] What creditors would have received on bankruptcy or liquidation as compared to the plan? More than 7 days before the meeting, in accordance with sub para. 23(1)(d.1) *CCAA*, the Monitor provided to the creditors, for each Debtor, a detailed report on the state of the company's business and financial affairs. [24]

[41] The report set out in exhaustive detail (i) the funds available for distribution, (ii) the estimated distribution to affected creditors holding a proven claim and (iii) a comparison of the estimated distribution with the distribution that could be hoped for in a liquidation.

[42] Given that all assets have been sold, the only difference between the plan and a liquidation is that no support agreement would have been entered into with EDC and this would have triggered significant legal costs, uncertainty and long delays for the US affiliates. All Debtors would have incurred costs related to the liquidation, but the costs of the US affiliates would have been greater due to the particularities of US bankruptcy legislation.

[43] A summary table was filed at the hearing extracting the comparison tables of each of the eleven reports.[25] It evidences that distributions in all the liquidation scenarios are lower than under the plans.

[44] Were alternatives available to the plan and bankruptcy? Given that all assets were sold, there was no alternative.

[45] Was there oppression of the rights of creditors? All creditors are treated equally. There can be no oppression.

[46] Was there unfairness to shareholders? There is no money left for the shareholders and therefore any compromise or arrangement which provides for the payment of equity claims could not be sanctioned per par. 6(8) *CCAA*.

[47] Are the plans in the public interest? Clearly, all transactions which were carried out upstream were in the interest of all stakeholders. Plans which ensure distributions and which do not run counter to the other Sanction Factors are necessarily in the public interest, subject to releases being fair and reasonable.

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[24] Exhibit P-4.
[25] Exhibit P-6.

1.2.2 Are the releases fair and reasonable

[48] The reasoning set out in *Metcalfe* is applicable to the facts of this case.

[49] No one is contesting the plans or the releases. Indeed, the lone creditor who voted against a plan made no representations to the Court.

[50] Extensive information was provided to the creditors, including, specifically, on the issue of the releases, before they were called to vote:

- Over the course of the course of the CCAA proceedings, the Monitor filed 13 reports.
- The Monitor provided a detailed allocation report. He held an information meeting on June 14, 2023 to explain it.
- The Monitor held numerous meetings with creditors and ensured that there would be a high level of voter participation.
- At the creditors' meeting, the Monitor reviewed in detail the plans, including the releases it contained.

[51] Therefore, the creditors were well informed of the issues at stake before they voted. Clearly, this is a scenario where the creditors voted in favour of plans which contained, without any ambiguity, the releases. Given the extensive level of information they received on this topic, and given that all but one voted in favour, the Court does not see why it should not give effect to their expressed intention.

[52] In any event, it is difficult in this file to see who could be harmed because of the D&O claims process and the settlement of the class action.

[53] Creditor D& O claims: given the terms of the Claims Procedure Order, no creditor any longer holds a valid claim against directors and officers.[26]

[54] Indeed, all unsecured creditors were given the opportunity to file a claim not only against Xebec, but also against the directors and officers by July 24 2023 - the Claims Bar Date. If they did not, the would be forever barred from advancing a Claim against the directors and officers.

[55] The Monitor's 13th report[27] lists the 36 creditors that did file D&O claims. The Monitor to these D&O claims sent out notices rejecting these claims. Mr. Nadon in his testimony surmises that most of these creditors were in fact confused as to their eventual

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[26] *Arrangement relatif à FormerXBC inc. (Xebec Adsorption inc.)*, 2023 QCCS 1773, par. 18 to 20. See reasons at *Arrangement relatif à FormerXBC Inc. (Xebex Adsorption Inc.)*, 2023 QCCS 1818.

[27] Exhibit P-5.

rights and unwittingly checked the D&O Claim box. Indeed, two creditors eventually withdrew their claim, while the rest did not appeal. These claims are now forever barred.

[56] One claim was maintained despite the Monitor's notice. Haffner Energy SA claimed approximately $2,7 M € from the D&Os. This claim was settled subsequently and paid for entirely from insurance proceeds.

[57] Hence, as a result of the claims process, no creditor today has a claim against the D&Os.

[58] The shareholders: prescription and the settlement of the class action on behalf of a large class of shareholders make it highly unlikely that any shareholder could still exercise a claim.

[59] Indeed, in a settlement that the undersigned approved, Releasors forever and absolutely released, relinquished and discharged the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had", in consideration of which the class received payment of $5M financed by Xebec's insurer. The following definitions help to understand the release's scope:[28]

- Released Claims are any and all manner of claims, demands, actions, suits, causes of action, whether class, individual, representative or otherwise in nature, whether personal or subrogated, damages whenever incurred, damages of any kind including compensatory, punitive or other damages, liabilities of any nature whatsoever, including interest, costs, expenses, class administration expenses, penalties, and lawyers' fees, known or unknown, suspected or unsuspected, foreseen or unforeseen, actual or contingent, and liquidated or unliquidated, in law, under statute or in equity that Releasors, or any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have, relating in any way to any conduct occurring anywhere, from the beginning of time to the date hereof relating to any conduct alleged (or which could have been alleged) in the Action including, without limitation, any such claims which have been asserted, would have been asserted, or could have been asserted, directly or indirectly, whether in Canada or elsewhere, concerning, based on, arising out of, or in connection with both: (i) the purchase or other acquisition, holding, sale, disposition or other transactions in relation to Securities by Plaintiffs or any other Settlement Class Member during the Class Period; and (ii) the allegations, transactions, acts, facts, matters, occurrences, disclosures, statements, filings, representations, omissions, or events that were or could have been alleged or asserted in the Action

[28] See the settlement agreement filed as a schedule to the class action authorization judgment for purposes of settlement, *Leclair* c. *FormerXBC inc. (Xebec Adsorption inc.)*, 2023 QCCS 2416.

- Releasors are, amongst other, the Plaintiffs and Settlement Class Members, who in turn is a person who purchased or otherwise acquired securities of Xebec by any means (whether pursuant to a primary market offering, in the secondary market or otherwise) from November 10, 2019, to March 24, 2021, and held some or all of such securities as of the close of trading on the TSX on March 11, 2021 or March 24, 2021.

- Releasees are amongst others, FormerXBC, the directors Guy Saint-Jacques, William Beckett, Louis Dufour, Stéphane Archambault and Kurt Sorschak, the underwriters, and all of their respective present and former, direct and indirect, parents, subsidiaries, divisions, affiliates, partners, principals, insurers, and all other persons, partnerships or corporations with whom any of the former have been, or are now, affiliated, and all of their respective past, present and future officers, directors, employees, agents, shareholders, attorneys, trustees, servants and representatives; and the predecessors, successors, purchasers, heirs, executors, administrators and assigns of each of the foregoing.

[60] A person who wished to opt-out from the class action and the Settlement Agreement could do so by delivering a notice before August 31, 2023. Only one member, who holds 330 shares properly did so.

[61] The Court found this settlement to be fair, reasonable and equitable for all the Class members and approved it.[29] In its conclusions, the Court ordered and declared that the Releasors forever and absolutely release, relinquish and discharge the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any capacity, ever had, now have, or hereafter can, shall or may now have or hereafter can, shall or may have.

[62] Hence, creditors and most likely shareholders do not have any recourse against the D&Os. By adding all professionals, the releases provide final and definitive closure to which all creditors agreed to in the plans.

[63] Given all of the above, the Court finds the releases in the plans to be fair and reasonable.

2. THIRD PARTY RELEASES FOR FORMERXBC

2.1 Legal principles

[64] If no plan is presented, can a *CCAA* court still provide releases?

[65] Relying on s. 11 of the *CCAA*, the *CCAA* supervising judge, may make any "order that it considers appropriate" and which responds "to the circumstances of each case and

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[29] *Leclerc* c. *FormerXBC Inc. (Xebec Adsorption Inc.)*, 2023 QCCS 3952.

[meets] contemporary business and social needs".[30] This authority is "not boundless". The Court must keep in mind "three "baseline considerations" which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence".[31] Whether the order sought is appropriate must be assessed "by considering whether the order would advance the policy and remedial objectives of the CCAA".

[66] Courts have relied on their discretionary powers under s. 11 to grant releases. They are commonly granted in vesting orders or reverse vesting orders.[32]

[67] In exercising discretion under s. 11 CCAA, it is not sufficient to simply acknowledge that it is common practice in *CCAA* proceedings to grant releases. A more principled approach is required.

[68] As a first step, it must first be determined whether the releasees are clearly set out. Simply listing releasees generically is inappropriate and will in any event most likely not be executory. Clearly identifying the intended releasees will ensure the ability to make a proper assessment of the contributions the directors, officers, the professionals or other releasees.

[69] What considerations should be applied when examining releases benefiting directors, officers, and professionals, including the monitor and legal counsel?

[70] Obviously, directors and officers need to be incentivized to support the *CCAA* process. For officers, this can partly be ensured by key employment retention programs (KERPs) secured by KERP charges for officers and by trailer liability insurance. The prospect of a release is an additional strong - if not essential - incentive for D&Os not to leave the ship and be fully invested in their work. Otherwise, they could simply resign.

[71] These considerations are not perfectly transferable to professionals.

[72] Legal counsel and the monitor are undoubtedly essential to the proper running of a *CCAA.* This is why their remuneration will generally be guaranteed by superpriority administrative charges. The Supreme Court of Canada deems that this is required "to derive the most value for the stakeholders". The financiers and the professionals will not act if there was a "high level of risk involved". In the particular context of determining whether the deemed trusts under the *Income Tax Act* could trump any superpriority, the Supreme Court stated that "for a monitor and financiers to put themselves at risk to

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30 *Callidus*, par. 48.

31 *Id*., par. 49.

32 The Québec Superior Court Chief Justice Paquette states that "it is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction"*Arrangement relatif à Blackrock Metals Inc.,* 2022 QCCS 2828, par. 128. Leave to appeal refused by the Court of Appeal of *Quebec Arrangement relatif à Blackrock Metals Inc.,* 2022 QCCA 1073 and by the Supreme Court of Canada, *Winner World Holdings Limited, et al.* v. *Blackrock Metals Inc., et al*., 2023 CanLII 36969.

restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness".[33]

[73] Superpriority charges coupled with interim financing will generally ensure that the monitor and its and the debtors' legal counsel are paid. They are, at that point, arguably, in a better position than most Canadian professionals, and in particular lawyers who carry out transactional work.

[74] No doubt, obtaining releases will enhance their interest to render services.

[75] When examining the Five Release Factors, professionals are essential to the plan. Providing them a release will therefore necessarily be rationally connected to the plan, which could not succeed without their contribution. This will benefit the debtors. This reasoning will hold true in any *CCAA* file. If this is enough, the review of the Five Release Factors will be a mere formality.

[76] The monitor and the debtor have argued forcefully that, by extension of *Canada North*'s reasons, it would be just as unfair for potential claimants to hide in the weeds during the restructuring and then attack the professionals once the plans are approved or the CCAA stay ended. Releases are essential to protect professionals against such tactics.

[77] For better or for worse, the fear of being sued after completion of a mandate is the lot of any lawyer or professional. They do not obtain releases at the end of their mandate unless this is explicitly included in a release. Protection is assured through liability insurance. In Québec, the professional who has liability insurance, and is sued for contractual or extracontractual liability, benefits from the measure set out at art. 2503 C.C.Q.: "legal costs and expenses resulting from actions against the insured, including those of the defence, and interest on the proceeds of the insurance are borne by the insurer over and above the proceeds of the insurance".

[78] A contribution, as brilliant as it may be, does not entitle the professionals, in of itself, to releases.

[79] The fairness and reasonableness of releases must be justified on the facts of each case, in a context where the creditors do not vote and do not agree to these releases. Most likely, this will occur in a liquidating *CCAA* scenario.

[80] A Court should therefore examine, at a minimum, who benefits from the release and who is negatively impacted by the release.

- Does a large group of stakeholders namely employees, clients and participants in the supply chain stand to benefit from the *CCAA* proceedings as the operations of the Debtors will be continued in a new entity? In such a scenario, for the sake

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[33] *Canada* v. *Canada North Group Inc.*, 2021 SCC 30, par. 30.

closure and preventing unwanted disruptions and costs flowing from ongoing litigation, releases may be fair and reasonable.

- If the proceedings have maximized payout solely for the secured creditor, should the professionals not rather seek indemnities from them?

[81] A Court could also consider whether there already have been manifestations of potential recourses, most likely unfounded, which may be directed against the professionals. This may also speak in favour of the releases.

[82] In the particular context of this case, the examination of such considerations leads to the conclusion that the clearly delineated releases are fair and reasonable.

2.2 Should the Court exercise its discretion in favour of the releasees?

[83] FormerXBC could not file a plan, having no funds to distribute.

[84] This gives rise to the following curious situation: in the eleven Debtor plans sanctioned by me, all for FormerXBC's affiliates, third party releases are provided while for the parent, FormerXBC, none are provided.

[85] A release was asked for by the Debtors in the February 8, 2023 application for the 3rd ARIO and AVOs for the sale of substantially all or all the assets of GNR LP, CDA, CAL and CAI and FormerXBC.

[86] At that date, CDA, CAL and CAI still alleged that it was not envisaged that there would be sufficient funds to finance a plan of arrangement or compromise, including one that would provide for what they alleged were "customary releases in favour of the D&Os". For CDA, CAL and CAI, that turned out to be wrong as plans were presented and voted on. But not for FormerXBC.

[87] The Sellers argued that it was appropriate and fair in the circumstances that the D&Os benefit from a release "so as to enable them to turn the page once these CCAA Proceedings will have been completed". They stressed that the board of directors composed of independent directors (with the exception of the CEO), were meeting on a no-less-than-weekly basis throughout these CCAA Proceedings and were fully engaged with management and providing continuous support in connection with the ongoing operations and the SISP and were instrumental in maximizing the value of the assets of the Xebec Group. The officers were also working "tirelessly" throughout these CCAA Proceedings, the whole for the benefit of all stakeholders, including notably the employees. They claimed that the D&O Releases were "in line with releases granted by Courts across Canada in similar CCAA proceedings". [34]

[34] See the Application for the Issuance of a Third Amended And Restated Initial Order and Approval and Vesting Orders dated February 8, 2023, par. 76 to 83.

[88] At the time, the Court believed that given all the work that was still to be carried out, that it was premature to consider granting releases to the D&Os. To consider eventual releases, the D&O's feet needed to be held close to the fire. Hence, it deferred the examination of the request to a later date. This decision has now been sufficiently deferred and it is now the appropriate time to consider this request.

[89] The Debtors and the Monitor ask for the following order:

> [35] **ORDERS** that effective as of the date of the issuance of the Certificate of Implementation in respect of each Plan Debtor (in such capacities, collectively, the "FormerXBC Released Parties"):
>
> (a) current Directors of FormerXBC;
>
> (b) Jim Vounassis, Mike Munro, Russel Warner, Nathalie Théberge, Stéphane Archambault, in their capacity as Officers and/or consultants of FormerXBC;
>
> (c) FormerXBC's legal counsel (Osler, Hoskin & Harcourt LLP, McDonald Hopkins, Bielli & Klauder LLC, Clifford Chance LLP, Stevens & Bolton LLP) in relation to these CCAA Proceedings and the U.S. Case;
>
> (d) financial advisors (National Bank Financial) in relation to these CCAA Proceedings and the U.S. Case; and
>
> (e) the Monitor (Deloitte Restructuring LLP) and its legal counsel (McCarthy Tétrault LLP, Holland & Knight LLP) in relation to these CCAA Proceedings and the U.S. Case;
>
> shall all be deemed to be forever irrevocably released and discharged from any demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, Taxes, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence based in whole or in part on any act or omission, transaction, that constitute or are in any way relating to, arising out of, or in connection with any Claims (including any and all D&O Claims as well as any Claims in respect of statutory liabilities of all Directors, Officers and Employees of Former XBC and any alleged fiduciary or other duty), the business and affairs of FormerXBC, the administration and/or management of FormerXBC, the CCAA Proceedings or the U.S. Case as they relate to FormerXBC, or any Claim that has been barred or extinguished by the Claims Procedure Order (collectively, the "FormerXBC Released Claims"), which FormerXBC Released Claims shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the FormerXBC Released Parties, all to the fullest extent permitted by Applicable Law, provided that nothing herein shall release or

> discharge (i) the Directors with respect to matters set out in Section 5.1(2) of the CCAA; and (ii) the FormerXBC Released Parties with respect to intentional or gross fault, a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.

[90] The capitalized terms refer to those used in the plans which I have sanctioned.

[91] For the reasons set out above, it is appropriate that the current directors be released. The testimony of Mr. Vounassis and the Monitor convince the Court that their solid and unwavering commitment ensured that all the work was carried out. The last lines of the release contain the required limitations set out in par. 5.1(2) *CCAA*.

[92] The same level of commitment has been evidenced by the officers listed above. There is no doubt in the Court's mind that it is appropriate that they be granted releases. The restrictions of par. 5.1(2) of the *CCAA* do not apply to officers. The release is extended to the "fullest extent permitted by Applicable Law". Applicable Law is defined in the plans as ""any law (including any principle of civil law, common law or equity)". To ensure greater certainty, the Debtors proposed in response to my request, that it be explicitly specified that nothing in the release shall release or discharge "the FormerXBC Released Parties with respect to intentional or gross fault, a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence". This is a reflection of the public order principle set out at art. 1474 CCQ and properly addresses my concerns regarding over-extending the scope of the release.

[93] Is it appropriate that the professionals listed in subparagraphs 35 (c), (d) and (e) of the proposed order cited above be released? The Court believes that in the specific circumstances of this file, it is indeed appropriate that all professionals be released:

- It is known since February 2023 that releases would be sought.
- Although FormerXBC is a liquidating CCAA without any distribution for creditors, ongoing operations ensure future business for suppliers, preservation of numerous employee positions and servicing of clients. Ensure closure regarding any potential future litigation is an important consideration.
- The professionals are clearly identified in the release and the Court can assess what contributions they have made.
- The creditors of all the affiliates have voted in favour of broad releases.
- All claims against FormerXBC directors and officers are barred and the class settlement shareholders have provided broad releases.
- Early on, a shareholder, Simon Arnsby, who claimed to hold millions of shares wrote a letter alleging that XBC's legal counsel, Osler, Hoskin & Harcourt LLP was in a conflict of interest, because Me Brian Levitt, co-chair and co-president

of Osler is or was a XBC board member.[35] I invited him to file a formal motion with precise information, supported by an affidavit. None was filed but he has never formally withdrawn these allegations.

- Mr. Simon Arnsby also wrote that the Monitor was in a conflict of interest given that Peter Bowie, "Chief Executive of Deloitte China and Chairman of Deloitte Canada", was a XBC board member. I also invited him to present a motion, but none came.[36] He complained of insufficient dissemination of information. Once again, he did not file any motion, but he has not formally withdrawn these accusations.

- Mr. Arnsby made allegations that the financial advisor, National Bank Financial, was in a conflict of interest given that National Bank of Canada was one of the two secured lenders.[37] No motion was presented, but he has not formally withdrawn his accusations.

- He then presented an *Urgent ex parte application for investigation*. He asked that there be an investigation as to why the members of Xebec's Board of directors, who collectively own less than 0,5% of Xebec shares, were unable to ensure financing, then filed for CCAA relief and are not now calling on former officers Sorschak and van Driel to drive the quest for financing, restructuring or divesting solutions. The Court heard and dismissed this application.[38]

- Mr. Arnsby was obviously still dissatisfied since he filed a complaint against the Monitor with the Superintendent of Bankruptcy. It was investigated but not accepted.

- An arbitration was instituted in the People's Republic of China where Chinese based joint venturers are seeking to enforce rights of first refusal, which the Court after a contested hearing specifically suspended. Mr. Archambault remains a director and the Chinese joint venture partners are refusing to replace him.

[94] All these facts show that formal closure is called for and appropriate.

[95] The Court will therefore exercise my discretion in favour of the releasees and will order the releases sought in favour of the FormerXBC releasees.

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35 *Arrangement relatif à Xebec Adsorption Inc.*, 2022 QCCS 3888, par. 53 to 63.
36 *Id.*
37 *Id.*
38 *Arrangement relatif à Xebec Adsorption Inc*., 2022 QCCS 4440, par. 12 to 28.

[96] It is for all these reasons that I have today signed the Sanction Order.

_____
CHRISTIAN IMMER, J.S.C.

MTRE SANDRA ABITAN
MTRE JULIEN MORISSETTE
MTRE ILIA KRAVTSOV
MTRE SOPHIE COURVILLE-LE BOUYONNEC
(OSLER HOSKIN & HARCOURT LLP)
ATTORNEYS OF PETITIONERS

MTRE JOCELYN PERREAULT
MTRE MARC-ETIENNE BOUCHER
MCCARTHY TÉTRAULT S.E.N.C.R.L., S.R.L.
ATTORNEYS OF MONITOR

MTRE SAMUEL PERRON
NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L., S.R.L.
ATTORNEY OF EXPORT DEVELOPMENT CANADA

MTRE SE-LINE DUONG
MILLER THOMSON SENCRL / LLP
ATTORNEY OF LNRG

MTRE ARIANNE GAUTHIER
MINISTÈRE DE LA JUSTICE DU CANADA
ATTORNEY OF PROCUREUR GENERAL DU CANADA

Hearing date: December 15, 2023

TAB 15

See paras. 1-2, 5, 44, 57-58

SUPERIOR COURT
(COMMERCIAL DIVISION)

Canada
Province of Québec
District of Montréal
No: 500-11-055122-184
Date: August 24, 2018

Presiding: The Honourable Chantal Corriveau, S.C.J.

In the matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended:

LE GROUPE SMI INC./THE SMI GROUP INC.

LE GROUPE S.M. INC./THE S.M. GROUP INC.

CLAULAC INC.

SMi CONSTRUCTION INC.

ÉNERPRO INC.

LE GROUPE S.M. INTERNATIONAL (CONSTRUCTION) INC./S.M. INTERNATIONAL GROUP (CONSTRUCTION) INC.

Debtors

and

LE GROUPE S.M. INTERNATIONAL S.E.C./THE S.M. GROUP INTERNATIONAL LP

ÉNERPRO S.E.C./ENERPRO LP

LES SERVICES DE PERSONNEL S.M. INC.

LE GROUPE S.M. (ONTARIO) INC./THE S.M. GROUP (ONTARIO) INC.

AMÉNATECH INC.

LABO S.M. INC.

LES CONSULTANTS INDUSTRIELS S.M. INC./S.M. INDUSTRIAL CONSULTANTS INC.

LES CONSULTANTS S.M. INC./S.M. CONSULTANTS INC.

FACILIOP EXPERTS CORP.

LE GROUPE S.M. INTERNATIONAL INC./THE S.M. GROUP INTERNATIONAL INC.

CSP CONSULTANTS EN SÉCURITÉ INC./CSP SECURITY CONSULTING INC.

LE GROUPE S.M. INTERNATIONAL (S.A.) INC./THE S.M. GROUP INTERNATIONAL (S.A.) INC.

LE GROUPE S.M. INTERNATIONAL (CONSTRUCTION) EURL

SM SAUDI ARABIA CO LTD.

THE S.M. GROUP INTERNATIONAL SARL

THE S.M. GROUP INTERNATIONAL ALGÉRIE EURL

C 2308

J.N.S.C.

S.M. UNITED EMIRATES GENERAL CONTRACTING LLC

COMMANDITÉ SMi-ÉNERPRO FONDS VERT INC./SMi-ENERPRO GREEN FUND GP INC.

SMi-ÉNERPRO FONDS VERT S.E.C./SMi-ENERPRO GREEN FUND LP

Mises-en-cause

and

ALARIS ROYALTY CORP.

INTEGRATED PRIVATE DEBT FUND V LP

Applicants

and

DELOITTE RESTRUCTURING INC.

Monitor

and

LGBM INC.

Chief Restructuring Officer

INITIAL ORDER

---

[1] CONSIDERING the Motion for the Issuance of an Initial Order dated August 22, 2018 (the "**Petition**") of the Petitioners;

[2] CONSIDERING the Application for an Initial Order dated August 23, 2018 (the "**Application**") of Alaris Royalty Corp. and Integrated Private Debt Fund V LP (the "**Applicants**") pursuant to the Companies' Creditors Arrangement Act, RSC 1985, c C-36 (the "**CCAA**"), the affidavit and the exhibits;

[3] CONSIDERING the notification of the Application;

[4] CONSIDERING the representations of the lawyers present;

THE COURT:

[5] GRANTS the Application.

[6] ISSUES an order pursuant to the CCAA (the "**Order**"), divided under the following headings:

- Service
- Application of the CCAA
- Effective Time
- Plan of Arrangement
- Administrative Consolidation
- Stay of Proceedings against the Debtors and the Property

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- Stay of Proceedings against the Directors and Officers
- Possession of Property and Operations
- No Exercise of Rights or Remedies
- No Interference with Rights
- Continuation of Services
- Non-Derogation of Rights
- Key Employee Retention Plan
- Interim Financing
- Directors' and Officers' Indemnification
- Restructuring
- Powers of the Monitor
- Appointment of the Chief Restructuring Officer
- Priorities and General Provisions Relating to CCAA Charges
- General

Service

[7] ORDERS that any prior delay for the presentation of the Application is hereby abridged and validated so that the Application is properly returnable today and hereby dispenses with further service thereof.

[8] DECLARES that sufficient prior notice of the presentation of this Application has been given by the Applicants to interested parties, including the secured creditors who are likely to be affected by the charges created herein.

Application of the CCAA

[9] DECLARES that the Petitioners are debtor companies to which the CCAA applies.

[10] DECLARES that the Mises-en-cause shall benefit from the stay of proceedings and other relief granted herein.

Effective Time

[11] DECLARES that this Order and all of its provisions are effective as of 12:01 a.m. Montreal time, province of Quebec, on August 22, 2018 (the "**Effective Time**").

Plan of Arrangement

[12] DECLARES that the Applicants shall have the authority to file with this Court and to submit to the Debtors' creditors one or more plans of compromise or arrangement (collectively, the "**Plan**") in accordance with the CCAA.

Administrative Consolidation

[13] ORDERS the consolidation of the CCAA proceedings of the Petitioners and the Mises-en-cause (collectively, the "**Debtors**") under one single Court file, in file number 500-11-•.

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[14] ORDERS that all existing and future proceedings, filings, and other matters (including, without limitation, all applications, applications and cash flows) in the CCAA Proceedings henceforth be filed jointly and together by the Debtors under file number 500-11-●.

[15] DECLARES that the consolidation of these CCAA proceedings in respect of the Debtors shall be for administrative purposes only and shall not effect a consolidation of the assets and property or of the debts and obligations of each of the Debtors including, without limitation, for the purposes of any Plan or Plans that may be hereafter proposed.

Stay of Proceedings against the Debtors and the Property

[16] ORDERS that, until and including September 21, 2018, or such later date as the Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Debtors, or affecting the Debtors' business operations and activities (the "**Business**") or the Property (as defined herein below), including as provided in paragraph [25] herein except with leave of this Court. Any and all Proceedings currently under way against or in respect of the Debtors or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, the whole subject to subsection 11.1 CCAA.

[17] ORDERS that the rights of Her Majesty in right of Canada and Her Majesty in right of a Province are suspended in accordance with the terms and conditions of subsection 11.09 CCAA.

Stay of Proceedings against Directors and Officers

[18] ORDERS that during the Stay Period and except as permitted under subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director or officer of the Debtors nor against any person deemed to be a director or an officer of any of the Debtors under subsection 11.03(3) CCAA (each, a "**Director**", and collectively the "**Directors**") in respect of any claim against such Director which arose prior to the Effective Time and which relates to any obligation of the Debtors where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation.

Possession of Property and Operations

[19] ORDERS that the Debtors shall remain in possession and control of their present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof (collectively the "**Property**"), the whole in accordance with the terms and conditions of this order including, but not limited, to paragraphs [44] and [57] hereof.

[20] ORDERS that the Debtors shall be entitled to continue to utilize the central cash management system currently in place as described in the Petition or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System

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shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Debtors of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as defined herein below) other than the Debtors, pursuant to the terms of the documentation applicable to the Cash Management System.

[21] ORDERS that each of the Debtors are authorized to complete outstanding transactions and engage in new transactions with other Debtors, and to continue, on and after the date of this Order, to buy and sell goods and services, and allocate, collect and pay costs, expenses and other amounts from and to the other Debtors, or any of them (collectively, the "**Intercompany Transactions**") in the ordinary course of business. All ordinary course Intercompany Transactions among the Debtors shall continue on terms consistent with existing arrangements or past practice, subject to such changes thereto, or to such governing principles, policies or procedures as the Monitor may require, or subject to further Order of this Court.

[22] ORDERS that the Debtors shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, bonuses, expenses, benefits and vacation pay payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any agents retained or employed by the Debtors in respect of these proceedings, at their standard rates and charges; and

(c) with the consent of the Monitor, amounts owing for goods or services actually supplied to the Debtors prior to the date of this Order by third party suppliers up to a maximum aggregate amount of $1,000,000, if, in the opinion of the Debtors, the supplier is critical to the business and ongoing operations of the Debtors.

[23] ORDERS that, except as otherwise provided to the contrary herein, the Debtors shall be entitled but not required to pay all reasonable expenses incurred by the Debtors in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business; and

(b) payment for goods or services actually supplied to the Debtors following the date of this Order.

[24] ORDERS that the Debtors shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be

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deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes, or, in the case of foreign Debtors any similar amounts payable pursuant to applicable local law; and

(b) all goods and services, harmonized sales or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Debtors and in connection with the sale of goods and services by the Debtors, or, in the case of foreign Debtors, any similar amounts payable pursuant to applicable local law, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order.

No Exercise of Rights or Remedies

[25] ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Debtors is a party as a result of the insolvency of the foreign Debtors and/or these CCAA proceedings, any events of default or non-performance by the Debtors or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Debtors, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court.

[26] DECLARES that, to the extent any rights, obligations, or prescription, time or limitation periods, including, without limitation, to file grievances, relating to the Debtors or any of the Property or the Business may expire (other than pursuant to the terms of any contracts, agreements or arrangements of any nature whatsoever), the term of such rights, obligations, or prescription, time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the Debtors, or any of them, become(s) bankrupt or a receiver as defined in subsection 243(2) of the Bankruptcy and Insolvency Act (Canada) (the "**BIA**") is appointed in respect of any of the Debtors, the period between the date of this Order and the day on which the Stay Period ends shall not be calculated in respect of the Debtors in determining the 30 day periods referred to in Sections 81.1 and 81.2 of the BIA.

No Interference with Rights

[27] ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, except with the written consent of the Debtors, as applicable, and the Monitor, or with leave of this Court.

Continuation of Services

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[28] ORDERS that during the Stay Period and subject to paragraph [30] hereof and subsection 11.01 CCAA, all Persons having verbal or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, utility or other goods or services made available to the Debtors, are hereby restrained until further order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Debtors, and that the Debtors shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses, domain names or other services, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtors, without having to provide any security deposit or any other security, in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Debtors, as applicable, with the consent of the Monitor, or as may be ordered by this Court.

[29] ORDERS that, notwithstanding anything else contained herein and subject to subsection 11.01 CCAA, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided to the Debtors on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to make further advance of money or otherwise extend any credit to the Debtors.

[30] ORDERS that, without limiting the generality of the foregoing and subject to Section 21 of the CCAA, if applicable, cash or cash equivalents placed on deposit by any Debtor with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by a Debtor and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into a Debtor's account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

Non-Derogation of Rights

[31] ORDERS that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, guarantee or bond (the "**Issuing Party**") at the request of any of the Debtors shall be required to continue honouring any and all such letters, guarantees and bonds, issued on or before the date of this Order, provided that all conditions under such letters, guarantees and bonds are met save and except for defaults resulting from this Order; however, the Issuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid.

Key Employee Retention Plan

[32] ORDERS that the Draft Key Employee Retention Plan (the "**KERP**"), Exhibit A-10 to the

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Application, is hereby approved.

[33] ORDERS the CRO to finalize the KERP before September 21, 2018.

[34] ORDERS the Debtors to pay to the Monitor, within five days of the date of this Order, an amount of $500,000 to be held in trust by the Monitor to make the payments contemplated by the KERP.

Interim Financing

[35] ORDERS that Debtors be and is hereby authorized to borrow, repay and reborrow from Integrated Asset Management Corp. (the "**Interim Lender**") such amounts from time to time as Debtors may consider necessary or desirable, up to a maximum principal amount of $2,000,000 outstanding at any time, on the terms and conditions as set forth in the Interim Financing Term Sheet, Exhibit A-9 to the Application, and in the Interim Financing Documents (as defined hereinafter), to fund the ongoing expenditures of Debtors and to pay such other amounts as are permitted by the terms of this Order and the Interim Financing Documents (as defined hereinafter) (the "**Interim Facility**").

[36] ORDERS that the CRO, for and on behalf of the Debtors, is hereby authorized to execute and deliver such credit agreements, security documents and other definitive documents (collectively the "**Interim Financing Documents**") as may be required by the Interim Lender in connection with the Interim Facility and the Interim Financing Term Sheet, and Debtors are hereby authorized to perform all of their obligations under the Interim Financing Documents.

[37] ORDERS that Debtors shall pay to the Interim Lender, when due, all amounts owing (including principal, interest, fees and expenses, including without limitation, all reasonable fees and disbursements of counsel and all other reasonably required advisers to or agents of the Interim Lender on a full indemnity basis (the "**Interim Lender Expenses**")) under the Interim Financing Documents and shall perform all of their other obligations to the Interim Lender pursuant to the Interim Financing Term Sheet, the Interim Financing Documents and this Order.

[38] DECLARES that all of the Property of the Debtors is hereby subject to a charge, hypothec and security for an aggregate amount of $2,400,000 (such charge, hypothec and security is referred to herein as the "**Interim Lender Charge**") in favour of the Interim Lender as security for all obligations of Debtors to the Interim Lender with respect to all amounts owing (including principal, interest and the Interim Lender Expenses) under or in connection with the Interim Financing Term Sheet and the Interim Financing Documents. The Interim Lender Charge shall have the priority established by paragraphs [65] and [66] of this Order.

[39] ORDERS that the claims of the Interim Lender pursuant to the Interim Financing Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the Interim Lender, in that capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan.

[40] ORDERS that the Interim Lender may:

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(a) notwithstanding any other provision of this Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the Interim Lender Charge and the Interim Financing Documents in all jurisdictions where it deems it is appropriate; and

(b) notwithstanding the terms of the paragraph to follow, refuse to make any advance to Debtors if the Debtors fails to meet the provisions of the Interim Financing Term Sheet and the Interim Financing Documents.

[41] ORDERS that the Interim Lender shall not take any enforcement steps under the Interim Financing Documents or the Interim Lender Charge without providing at least 5 business days written notice (the "**Notice Period**") of a default thereunder to the Debtors, the CRO, the Applicants, the Monitor and to creditors whose rights are registered or published at the appropriate registers or requesting a copy of such notice. Upon expiry of such Notice Period, the Interim Lender shall be entitled to take any and all steps under the Interim Financing Documents and the Interim Lender Charge and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA.

[42] ORDERS that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs [35] to [41] hereof unless either (a) notice of an application for such order is served on the Interim Lender by the moving party within seven (7) days after that party was served with this Order or (b) the Interim Lender applies for or consents to such order.

Directors' and Officers' Indemnification

[43] ORDERS that the Debtors shall indemnify their Directors from all claims relating to any obligations or liabilities they may incur and which have accrued by reason of or in relation to their respective capacities as directors or officers of the Debtors after the Effective Time, except where such obligations or liabilities were incurred as a result of such Director's gross negligence, wilful misconduct or gross or intentional fault as further detailed in Section 11.51 CCAA.

Restructuring

[44] DECLARES that, to facilitate the orderly restructuring of their business and financial affairs (the "**Restructuring**") but subject to such requirements as are imposed by the CCAA, the Debtors shall have the right, subject to approval of the Monitor or further order of the Court, to:

(a) permanently or temporarily cease, downsize or shut down any of their operations or locations as they deem appropriate and make provision for the consequences thereof in the Plan;

(b) pursue all avenues to finance or refinance, market, convey, transfer, assign or in any other manner dispose of the Business or Property, in whole or part, subject to further order of the Court and sections 11.3 and 36 CCAA, and under reserve of subparagraph (c);

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(c) convey, transfer, assign, lease, or in any other manner dispose of the Property, outside of the ordinary course of business, in whole or in part, and that the price and value in each case does not exceed $200,000 or $2,000,000 in the aggregate;

(d) terminate the employment of such of their employees or temporarily or permanently lay off such of their employees as they deem appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision, on such terms as may be agreed upon between the Debtors, as applicable, and such employee, or failing such agreement, make provision to deal with, any consequences thereof in the Plan, as the Debtors may determine;

(e) subject to the provisions of section 32 CCAA, disclaim or resiliate, any of their agreements, contracts or arrangements of any nature whatsoever, with such disclaimers or resiliation to be on such terms as may be agreed between the Debtors, as applicable, and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan; and

(f) subject to section 11.3 CCAA, assign any rights and obligations of Debtors.

[45] DECLARES that, if a notice of disclaimer or resiliation is given to a landlord of any of the Debtors pursuant to section 32 of the CCAA and subsection [44](e) of this Order, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours by giving such Debtor and the Monitor 24 hours' prior written notice and (b) at the effective time of the disclaimer or resiliation, the landlord shall be entitled to take possession of any such leased premises and re-lease any such leased premises to third parties on such terms as any such landlord may determine without waiver of, or prejudice to, any claims or rights of the landlord against the Debtors, provided nothing herein shall relieve such landlord of their obligation to mitigate any damages claimed in connection therewith.

[46] ORDERS that the Debtors, as applicable, shall provide to any relevant landlord notice of the intention of any of the Debtors to remove any fittings, fixtures, installations or leasehold improvements at least seven (7) days in advance. If a Debtor has already vacated the leased premises, it shall not be considered to be in occupation of such location pending the resolution of any dispute between such Debtor and the landlord.

[47] DECLARES that, in order to facilitate the Restructuring, the Debtors may, subject to the approval of the Monitor, or further order of the Court, settle claims of customers and suppliers that are in dispute.

[48] DECLARES that, pursuant to sub-paragraph 7(3)(c) of the Personal Information Protection and Electronic Documents Act, SC 2000, c 5, the Debtors are permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to their advisers (individually, a "**Third Party**"), but only to the extent desirable or required to negotiate and complete the

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Restructuring or the preparation and implementation of the Plan or a transaction for that purpose, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Debtors binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Debtors or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation or implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Debtors.

[49] ORDERS that pursuant to clause 3(c)(i) of the Electronic Commerce Protection Regulations, made under An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities, and to Amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, SC 2010, c 23, the Debtors, the CRO and the Monitor are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective purchasers or bidders and to their advisors but only to the extent desirable or required to provide information with respect to any sales process in these CCAA proceedings.

Powers of the Monitor

[50] ORDERS that Deloitte Restructuring Inc. is hereby appointed to monitor the business and financial affairs of the Debtors as an officer of this Court (the "**Monitor**") and that the Monitor, in addition to the prescribed powers and obligations, referred to in Section 23 of the CCAA:

(a) shall, as soon as practicable, (i) publish once a week for two (2) consecutive weeks or as otherwise directed by the Court, in La Presse+ and the Globe & Mail National Edition and (ii) within five (5) business days after the date of this Order (A) post on the Monitor's website (the "**Website**") a notice containing the information prescribed under the CCAA, (B) make this Order publicly available in the manner prescribed under the CCAA, (C) send, in the prescribed manner, a notice to all known creditors having a claim against the Debtors of more than $1,000, advising them that this Order is publicly available, and (D) prepare a list showing the names and addresses of such creditors and the estimated amounts of their respective claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder;

(b) shall monitor the Debtors' receipts and disbursements;

(c) shall assist the Debtors, to the extent required by the Debtors, in dealing with their creditors and other interested Persons during the Stay Period;

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(d) shall assist the Debtors, to the extent required by the Debtors, with the preparation of their cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

(e) shall advise and assist the Debtors, to the extent required by the Debtors, to review the Debtors' business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

(f) shall assist the Debtors, to the extent required by the Debtors, with the Restructuring and in their negotiations with their creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

(g) shall report to the Court on the state of the business and financial affairs of the Debtors or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order and may file consolidated Reports for the Debtors;

(h) shall report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

(i) may retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

(j) may engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceeding, under this Order or under the CCAA;

(k) may act as a "foreign representative" of any of the Debtors or in any other similar capacity in any insolvency, bankruptcy or reorganisation proceedings outside of Canada;

(l) may give any consent or approval as may be contemplated by this Order or the CCAA;

(m) may hold and administer funds in connection with arrangements made among the Debtors, any counter-parties and the Monitor, or by Order of this Court; and

(n) may perform such other duties as are required by this Order or the CCAA or by this Court from time to time.

Unless expressly authorized to do so by this Court, the Monitor shall not otherwise interfere with the business and financial affairs carried on by the Debtors, and the Monitor is not empowered to take possession of the Property nor to manage any of the

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business and financial affairs of the Debtors nor shall the Monitor be deemed to have done so.

[51] ORDERS that the Debtors and their Directors, officers, employees and agents, accountants, auditors and all other Persons having notice of this Order shall forthwith provide the Monitor with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Debtors in connection with the Monitor's duties and responsibilities hereunder.

[52] DECLARES that the Monitor may provide creditors and other relevant stakeholders of the Debtors with information in response to requests made by them in writing addressed to the Monitor and copied to the counsel for the Debtors'. In the case of information that the Monitor has been advised by the Debtors is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of the Debtors or the CRO unless otherwise directed by this Court.

[53] DECLARES that if the Monitor, in its capacity as Monitor, carries on the business of the Debtors or continues the employment of the Debtors' employees, the Monitor shall benefit from the provisions of section 11.8 of the CCAA.

[54] DECLARES that no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out of the provisions of any order of this Court, except with prior leave of this Court, on at least seven days' notice to the Monitor and its counsel. The entities related to or affiliated with the Monitor referred to in subparagraph [50](i) hereof shall also be entitled to the protection, benefits and privileges afforded to the Monitor pursuant to this paragraph.

[55] ORDERS that the Debtors shall pay the reasonable fees and disbursements of the Monitor, the CRO, the Monitor's legal counsel, the legal counsel for the Applicants and other advisers, directly related to these proceedings, the Plan and the Restructuring, whether incurred before or after this Order, and shall be authorized to provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

[56] DECLARES that the Monitor, the Monitor's legal counsel (Stikeman Elliott LLP), the legal counsel for the Applicants (McCarthy Tétrault LLP and Miller Thomson LLP), the CRO, as security for the professional fees and disbursements incurred both before and after the making of this Order and directly related to these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a charge, hypothec and security in the Property to the extent of the aggregate amount of $250,000 (the "**Administration Charge**"), having the priority established by paragraphs [65] and [66] of this Order.

Appointment of the Chief Restructuring Officer

[57] ORDERS that LGBM Inc. is hereby appointed Chief Restructuring Officer ("**CRO**") over the Debtors and, subject to the Orders of the Court that may be granted from time to time in these proceedings and in consultation with the Monitor and the Applicants, shall

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be authorized but not required, for and on behalf of the Debtors to:

(a) conduct and control the financial affairs and operations of the Debtors and carry on the business of the Debtors;

(b) execute and deliver the Interim Financing Documents, as provided for by paragraph [36] of this Order;

(c) finalize the KERP, as provided for by paragraph [33] of this Order;

(d) exercise the rights provided for by [44] of this Order;

(e) execute such documents as may be necessary in connection with any proceedings before or order of the Court;

(f) take steps for the preservation and protection of the Property;

(g) negotiate and enter into agreements with respect to the Property;

(h) engage and give instructions to legal counsel;

(i) apply to the Court for any vesting order or orders which may be necessary or appropriate in order to convey the Property to a purchaser or purchasers thereof with the prior consent of the Monitor;

(j) take any steps required to be taken by the Debtors under any Order of the Court;

(k) provide information to the Monitor and the Applicants regarding the business and affairs of the Debtors;

(l) exercise such shareholder or member or rights, as may be available to the Debtors; and

(m) take any steps, enter into any agreements or incur any obligations necessary or incidental to the exercise of the aforesaid powers.

[58] ORDERS that the Debtors and their Directors, officers, employees and agents, accountants, auditors and all other Persons having notice of this Order shall forthwith provide the CRO with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Debtors.

[59] ORDERS that the Letter of Engagement of the CRO dated July 3, 2018, Exhibit A-6 to the Application (the "**CRO Agreement**"), is approved and the Debtors are authorized to perform all of their obligations pursuant to the CRO Agreement.

[60] ORDERS that neither the CRO nor any employee or agent of the CRO shall be deemed to be a director or trustee of the Debtors.

[61] ORDERS that neither the CRO, nor any officer, director, employee, or agent of the

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CRO, including, without limitation, Paul Lafrenière, shall incur any liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any liability or obligation incurred as a result of gross negligence or wilful misconduct on its or their part.

[62] ORDERS that, as provided for by paragraph [56] of this Order, the professional fees and disbursements payable to the CRO pursuant to the CRO Agreement are entitled to the benefit of the Administration Charge.

[63] ORDERS that during the Stay Period no action or other proceeding shall be commenced directly, or by way of counterclaim, third party claim or otherwise, against or in respect of the CRO and any officers, directors, employees or agents of the CRO who may assist the CRO with the exercise of its powers and obligations under this Order or the CRO Agreement (the "**CRO Indemnified Parties**") that in any way relates to the Debtors, and all rights and remedies of any Person against or in respect of the CRO Indemnified Parties that in any way relate to the Debtors are hereby stayed and suspended, except with the written consent of the CRO or with leave of this Court on notice to the CRO and the Monitor. Notice of any such application seeking leave of this Court shall be served upon the CRO and the Monitor at least seven (7) days prior to the return date of any such application for leave.

[64] ORDERS that the Debtors' indemnity in favour of the CRO Indemnified Parties, as set out in the CRO Agreement, shall survive any termination, replacement or discharge of the CRO.

Priorities and General Provisions Relating to CCAA Charges

[65] DECLARES that the priorities of the Administration Charge and the Interim Lender Charge (collectively, the "**CCAA Charges**"), as between them with respect to any Property to which they apply, shall be as follows:

(a) first, the Administration Charge; and

(b) second, the Interim Lender Charge.

[66] DECLARES that each of the CCAA Charges shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") affecting the Property whether or not charged by such Encumbrances.

[67] ORDERS that, except as otherwise expressly provided for herein, the Debtors shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Debtors, as applicable, obtain the prior written consent of the Monitor and the Applicants, and the prior approval of the Court.

[68] DECLARES that each of the CCAA Charges shall attach, as of the Effective Time, to all present and future Property of the Debtors, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

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[69] DECLARES that the CCAA Charges and the rights and remedies of the beneficiaries of the CCAA Charges, as applicable, shall be valid and enforceable and not otherwise be limited or impaired in any way by: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such application(s) or any assignment(s) in bankruptcy made or deemed to be made in respect of any of the Debtor; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement, lease, sub-lease, offer to lease or other arrangement which binds the Debtors (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement:

(a) the creation of any of the CCAA Charges shall not create nor be deemed to constitute a breach by the Debtors of any Third Party Agreement to which any of the Debtor is a party; and

(b) the beneficiaries of the CCAA Charges shall not have any liability to any Debtors whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

[70] DECLARES that notwithstanding: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such application(s) or any assignment(s) in bankruptcy made or deemed to be made in respect of any of the Debtor; and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by any of the Debtor pursuant to this Order and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

[71] DECLARES that the CCAA Charges shall be valid and enforceable as against all Property of the Debtors and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Debtors.

General

[72] ORDERS that no Person shall commence, proceed with or enforce any Proceedings against any of the Directors, employees, legal counsel or financial advisors of the Debtors or of the Monitor in relation to the Business or Property of the Debtors, without first obtaining leave of this Court, upon ten (10) days' written notice to the Debtors counsel, the Monitor's counsel, and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

[73] ORDERS that, subject to further Order of this Court, all applications in these CCAA proceedings are to be brought on not less than five (5) days' notice to all Persons on the service list. Each application shall specify a date (the "**Initial Return Date**") and time (the "**Initial Return Time**") for the hearing.

[74] ORDERS that any Person wishing to object to the relief sought on an application in

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these CCAA proceedings must serve responding application materials or a notice stating the objection to the application and the grounds for such objection (a "**Notice of Objection**") in writing to the moving party, the Debtors and the Monitor, with a copy to all Persons on the service list, no later than 5 p.m. Montreal Time on the date that is three (3) days prior to the Initial Return Date (the "**Objection Deadline**").

[75] ORDERS that, if no Notice of Objection is served by the Objection Deadline, the Judge having carriage of the application (the "**Presiding Judge**") may determine: (a) whether a hearing is necessary; (b) whether such hearing will be in person, by telephone or by written submissions only; and (c) the parties from whom submissions are required (collectively, the "**Hearing Details**"). In the absence of any such determination, a hearing will be held in the ordinary course.

[76] ORDERS that, if no Notice of Objection is served by the Objection Deadline, the Monitor shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Monitor shall thereafter advise the service list of the Hearing Details and the Monitor shall report upon its dissemination of the Hearing Details to the Court in a timely manner, which may be contained in the Monitor's next report in these proceedings.

[77] ORDERS that, if a Notice of Objection is served by the Objection Deadline, the interested parties shall appear before the Presiding Judge on the Initial Return Date at the Initial Return Time, or such earlier or later time as may be directed by the Court, to, as the Court may direct: (a) proceed with the hearing on the Initial Return Date and at the Initial Return Time; or (b) establish a schedule for the delivery of materials and the hearing of the contested application and such other matters, including interim relief, as the Court may direct.

[78] DECLARES that this Order and any proceeding or affidavit leading to this Order, shall not, in and of themselves, constitute a default or failure to comply by the Debtors under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

[79] DECLARES that, except as otherwise specified herein, the Debtors and the Monitor are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of the Debtors and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

[80] DECLARES that the Debtors and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Debtors shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

[81] DECLARES that, unless otherwise provided herein, under the CCAA, or ordered by this

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Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on counsel for the Applicants and counsel for the Monitor and has filed such notice with this Court, or appears on the service list prepared by counsel for the Monitor, save and except when an order is sought against a Person not previously involved in these proceedings.

[82] DECLARES that the Debtors, the Applicants or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of this Order on notice only to each other.

[83] DECLARES that any interested Person may apply to this Court to vary or rescind this Order or seek other relief at the comeback hearing scheduled for •, 2018 (the "**Comeback Hearing**") upon five (5) days' notice to the Debtors, the Applicants and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

[84] DECLARES that this Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

[85] AUTHORIZES the Monitor or any of the Debtors, and in the case of the Monitor, with the prior consent of the Debtors, to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and any subsequent orders of this Court and, without limitation to the foregoing, any orders under Chapter 15 of the U.S. Bankruptcy Code, including an order for recognition of these CCAA proceedings as "**Foreign Main Proceedings**" in the United States of America pursuant to Chapter 15 of the U.S. Bankruptcy Code, and for which the Monitor, or the authorized representative of the Debtors, shall be the foreign representative of the Debtors. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Debtors and the Monitor as may be deemed necessary or appropriate for that purpose.

[86] REQUESTS the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order and to assist the Debtors, the CRO, the Monitor and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, the CRO and the Monitor as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor or the authorized representative of the Debtors in any foreign proceeding, to assist the Debtors, the CRO and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

[87] DECLARES that, for the purposes of any applications authorized by paragraphs [85] and [86], Debtors' centre of main interest is located in the province of Québec, Canada.

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[88] ORDERS the provisional execution of this Order notwithstanding any appeal.

[89] DECLARES that the mandate letters of Deloitte dated July 27, 2017, January 12, 2018 and June 19, 2018, Exhibit A-4 En Liasse, the Mandate letter of Alternative Capital Group Inc. dated April 30, 2018, Exhibit A-5, the Letter of Intent of Thornhill Investments Inc. dated July 18, 2018, Exhibit A-8, the Interim Financing Term Sheet, Exhibit A-9, and the Draft Key Employee Retention Plan, Exhibit, Exhibit A-10, are confidential and are filed under seal.

Chantal Corriveau jcs

The Honorable Justice Chantal Corriveau
Superior Court of the Province of Québec, Canada

COPIE CERTIFIÉE CONFORME
AU DOCUMENT DÉTENU PAR LA COUR

Personne désignée par le greffier

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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF:

JTI-MACDONALD CORP. — **Court File No. CV-19-615862-00CL**
IMPERIAL TOBACCO CANADA LIMITED AND **IMPERIAL TOBACCO COMPANY LIMITED** — **Court File No. CV-19-616077-00CL**
ROTHMANS, BENSON & HEDGES INC. — **Court File No. CV-19-616779-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE QUEBEC CLASS ACTION PLAINTIFFS (Re: JTIM, JTI-TM and RBH Objections to the Sanction Orders Returnable commencing January 29-31, 2025)

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