Court File No. CV-21-00658423-00CL

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant",** and collectively, the "**Applicants")**

BRIEF OF AUTHORITIES OF U.S. CLASS COUNSEL

(MOTION RETURNABLE JUNE 7, 2022)

June 2, 2022

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Counsel to US counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*

Counsel to US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*

TO: **THE SERVICE LIST**

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant",** and collectively, the "**Applicants")**

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1. *Bell v. Gateway Energy Services Corp.*, Decision and Order of Eisenpress J. dated February 25, 2021

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2. *BLT Steak LLC v. Liberty Power Corp.*, Decision and Order of Hagler J.S.C. dated August 14, 2020
3. *Claridge v. North American Power & Gas LLC*, 2016 WL 7009062
4. *Roberts v. Verde Energy, USA, Inc.*, 2017 WL 6601993
5. *Roberts v. Verde Energy, USA, Inc.*, 2019 WL 1276501
6. *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70
7. *In re U.S. Foodservice Inc. Pricing Litig*., 729 F.3d at 127
8. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 2697
9. *Cline Mining Corporation (Re)*, 2014 ONSC 6998
10. *Cline Mining Corporation (Re)*, 2015 ONSC 622
11. *Arrangement relatif à Bloom Lake*, 2018 QCCS 1657
12. *New Home Warranty of British Columbia Inc., (Bankruptcy of)*, 1999 CanLII 6751 (BC SC)
13. *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.*, 2004 ABCA 386
14. *Woodward's Ltd., Re*, 1993 CanLII 870 (BC SC)
15. *Re: San Francisco Gifts Ltd. (Companies' Creditors Arrangement Act)*, 2004 ABQB 705
16. *Banro Corporation (Re)*, 2018 ONSC 2064
17. *SemCanada Crude Company (Re)*, 2009 ABQB 490
18. *Target Canada Co., Re*, 2016 ONSC 3651
19. *Re: Canwest Global Communications Corp.*, 2010 ONSC 4209
20. *Sino-Forest Corporation (Re)*, 2012 ONSC 7050
21. *Algoma Steel Corp. v. Royal Bank of Canada*, 1992 CanLII 7413 (ON CA)
22. *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587
23. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10
24. *In re Cheng & Company LLC*, 2015 WL 9283267
25. *In re Pacific Sunwear of California, Inc.*, 2016 WL 4250681
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28. *AbitibiBowater, Re*, 2010 QCCS 1261

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29. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

30. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6

31. *In re Adelphia Communications Corp.*, 359 B.R. 54

32. Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Section 23:12

Tab 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
----------X
DANIELLE BELL, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

GATEWAY ENERGY SERVICES CORP.,

Defendant.
----------X

DECISION & ORDER (Motion #12)

Index No.: 31168/2018

EISENPRESS, J.

The following papers numbered 1-7 were read on this motion by Plaintiff Danielle Bell, for an Order granting Class Certification and appointing Plaintiff and her counsel as Class Representative and Class Counsel:

PAPERS	**NUMBERED**
NOTICE OF MOTION/MEMORANDUM OF LAW IN SUPPORT/AFFIRMATION IN SUPPORT/EXHIBITS 1-19	1-3
MEMORANDUM OF LAW IN OPPOSITION/AFFIRMATION IN OPPOSITION/ EXHIBITS A-P	4-5
MEMORANDUM OF LAW IN REPLY/AFFIRMATION IN REPLY/EXHIBITS 1-6	6-7

Upon the foregoing papers, these motions are determined as follows:

Plaintiff Danielle Bell, a resident of New City, New York, commenced this putative class action by Summons and Verified Complaint dated March 1, 2018, alleging that defendant Gateway Energy Services Corporation ("Gateway"), of Montebello, New York, overcharged her and thousands of New York consumers for natural gas and/or electricity, in violation of General Business Law ("GBL") Section 349. Plaintiff seeks to certify the following class:

> All Gateway customers who were charged on a fixed rate plan at any time and were converted to a variable rate plan for natural gas and/or electricity services in New York from May of 2014 to

the present. [1]

Plaintiff's claims, and those of the proposed class, arise from an alleged unlawful and deceptive misrepresentation made by Gateway Energy Services Corporation ("Gateway") regarding the competitiveness of its variable rate energy pricing plans made in the "Welcome Letter" and/or "Renewal Letter" provided by Gateway to its customers before they entered into a contract with Gateway.

"CPLR article 9, which authorizes class action suits in New York, and sets forth the criteria to be considered in granting class action certification, is to be liberally construed. The determination to grant class action certification rests in the sound discretion of the Supreme Court, 'and any error should be resolved in favor of allowing the class action. [internal citations omitted]'" Kidd v Delta Funding Corp., 289 AD2d 203, 734 N.Y.S.2d 848 (2d Dept 2001) "The primary issue on a motion for class certification is whether the claims as set forth in the complaint can be efficiently and economically managed by the court on a classwide basis. The class representative has the burden of establishing the prerequisites of certification. [internal citations omitted]" Globe Surgical Supply v GEICO Ins. Co., 59 AD3d 129, 136-37, 871 N.Y.S.2d 263 (2d Dept 2008).

CPLR Section 901(a) states:

> "One or more members of a class may sue or be sued as representative parties on behalf of all if: (1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

---

[1]Excluded form the Class are Defendant; any parent, subsidiary, or affiliate of Defendant; any entity in which any Defendant has or had a controlling interest, or which Defendant otherwise controls or controlled; and any officer, director, legal representative, predecessor, successor, or assignee of a Defendant.

These CPLR Sec. 901(a) criteria, which are commonly referred to a numerosity, commonality, typicality, adequacy of representation, and superiority, are to be "liberally construed" by the reviewing Court. Wilder v. May Dept. Stores Co., 23 A.D.3d 646, 649, 804 N.Y.S.2d 423 (2d Dept. 2005).

Numerosity. Plaintiff contends that the class is so numerous that joinder of all members is impracticable. According to Plaintiff, Gateway's records indicate that the proposed Class encompasses more than 8,000 gas and electricity accounts with service addresses in New York. Defendant Gateway disputes numerosity and argues that Ms. Bell has produced no evidence that the same letters were sent to anyone else in the putative class. Gateway argues that even if on reply Plaintiff shows evidence that others received the letters, she cannot show that all persons who received the letter were influenced by it. Upon reply, Plaintiff points out that defense counsel on August 6, 2019, produced spreadsheets affixed with Bate stamps, which contained the entire charge history of all accounts meeting the putative class definition in the Verified Class Action Complaint dated March 1, 2018, and more specifically, those New York customers who enrolled with Gateway on a fixed rate and were later charged a variable rate because they failed to cancel or renew on or after May 23, 2014. Additionally, Defendant produced a multitude of documents which al contain the same "competitive" representation. In the instant case, the Court finds that the numerosity requirement has been met with some 8,223 proposed class members. See Pruitt v. Rockefeller Center Properties, Inc., 167 A.D.2d 14, 21, 574 N.Y.S.2d 672 (1st Dept. 1991)(action involving thousands of class members clearly meets the statute's numerosity requirement.)

Commonality. Plaintiff argues that the requirement of commonality is met here since there are at least two common questions that are determinative of every class member's claim. First, common to every class member's claim is whether Gateway represented that its variable rate would be competitive and second is a determination of the proper amount of damages, i.e. the difference between what Gateway charged or what customers would have

paid had they been utility customers. Plaintiff argues that the entire proposed class' claims can be adjudicated using a common set of proof, including the Welcome and Renewal Letters based upon the documents themselves. Damages can be adjudicated using common proof, to wit, Gateway's business records as compared to publicly available date regarding utility rates.

Defendant contends that there is no commonality because Ms. Bell offers no method of determining the "net impression" of Gateway's statements on a class-wide basis. Gateway contends that Plaintiff must prove that the challenged statements were made to all 8,000 plus putative class members and she fails to show there is some common thread running through the communications sent to all class members that would enable the jury to assess the "net effect" of the statements. Gateway further argues that there is no workable damages model, as comparison to utility rates is not proper.

To meet the standard of commonality, class members' claims need only be substantially similar, not identical in every aspect. Freeman v. Great Lakes Energy Partners, LLC, 12 A.D.3d 1170, 1171, 785 N.Y.S.2d 640 (4th Dept. 2004). "[I]ndeed, [the commonality] rule requires predominance, not identity or unanimity, among class members." Id. Moreover, the mere presence of a question of individual reliance does not preclude class action certification. Super Glue Corp v. Avis Rent A Car System, Inc., 132 A.D.2d 604, 607, 517 N.Y.S.2d 764 (2d Dept. 1987)

In the instant matter, the Court finds that Plaintiff has met the commonality standard. Although some of the letters and terms and conditions may vary somewhat, each contains the representation that Gateway's rates would be competitive, thus posing a common question. Additionally, the Court finds that comparison to the local utility rates is appropriate given the fact that Orange and Rockland had approximately 80% of the market and Defendant's own employee, Sam Gifford, compared Gateway's rates to the local utility, finding that Gateway's rates were 190% above the local utility.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER **PART** IAS MOTION 17EFM

Justice

----------X

BLT STEAK LLC,BLT FISH LLC

Plaintiff,

- v -

LIBERTY POWER CORP, L.L.C., LIBERTY POWER HOLDINGS LLC,

Defendant.

----------X

INDEX NO. 151293/2013

MOTION DATE N/A

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375

were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, it is

ORDERED, that the motion is granted to the extent stated on the record today. Submit Order.

8/12/2020
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			X	SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

Typicality.

Plaintiff argues that typicality is satisfied because all class members were victims of the same misconduct, i.e. Gateway's deceptive representations regarding its variable rate, and they suffered the same injury, i.e. paying a rate that was higher than they would have paid had Gateway not misrepresented that its variable rate would be competitive. Additionally, the Complaint contains allegations of plan-wide misrepresentations and non-disclosures, which she alleges, by definition, were not individualized.

In opposition, Defendant Gateway contends that typicality is not present because Ms. Bell was not influenced or injured by Gateway's statement that its variable rates would be competitive, since she never wanted variable rates. Defendant further argues that Ms. Bell is subject to unique rebuttals and defenses that preclude her from serving as a class representative, including that she had easily navigated the renewal process on three prior occasions; was aware variable rates could go up and down each month; and Gateway's action in sending a "no-strings attached" un-cased check and partially used gift card, means Ms. Bell has no standing.

To be typical, "it is not necessary that the claims of the named plaintiff be identical to those of the class." Super Glue Corp v. Avis Rent A Car System, Inc., 132 A.D.2d 604, 607, 517 N.Y.S.2d 764 (2d Dept. 1987). The requirement is satisfied even if the class representative cannot personally assert all the claims made on behalf of the class. Pruitt, 167 A.D.2d at 22. Typicality is satisfied by establishing that the claims representative parties arise "out of the same course of conduct and are based on the same theories as the other class members." Ackerman v. Price Waterhouse, 252 A.D.2d 179, 201, 683 N.Y.S.2d 179 (1st Dept. 1998). Moreover, the typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or measure of damages, and the claim that plaintiff's damages may differ from those of other members of the class is not a proper basis to deny class certification. Vickers v. Home Federal Sav. And Loan Ass'n of East Rochester, 56 A.D.2d

62, 65, 390 N.Y.S.2d 747 (4th Dept. 1977).

Here, whether or not Ms. Bell may have navigated the renewal process better than other proposed class members, or whether she did not intentionally seek to be placed on the variable rate, does not negate typicality where Ms. Bell's claims arise out of the same course of conduct- i.e. the representation that Gateway's energy rates would be competitive-as other class members. Moreover, contrary to Gateway's contentions, there are no unique defenses related to lack of standing. The Court made a finding with respect to the summary judgment motions that there exists a live controversy sufficient to confer standing. The Court noted that defendant' s reliance on a single 78 year old case, Tractor & Equipment Corp v. Chain Belt Co., 50 F. Supp. 1001, 1004 (S.D.N.Y. 1942), for the proposition that her retention of a check for an unreasonable period of time constitutes acceptance of an offer, is simply misplaced. In Tractor and Equipment Corp., the Court did not rule that plaintiff had accepted the offer based upon retention of the check, but rather, that this raised a triable issue of fact to be determined by the jury. In the instant matter, however, a plain reading of the letter accompanying the check and gift cards- which stated that there were "no-strings attached"- make clear that no settlement offer was being made. If there was no settlement offer being made, Plaintiff's failure to cash the check could not constitute an acceptance of an offer, rendering the Tractor and Equipment Corp. case inapplicable to the instant facts.

Adequacy and Superiority. The Court finds that Plaintiff and her counsel will fairly and adequately protect the class, as there does not appear to be any conflicts which exists between class representatives and class members; the representative appears to have familiarity with the lawsuit and financial resources; and counsel has demonstrated both competence and experience as class counsel. Additionally, the Court finds that the class action is superior to other available methods for the fair and efficient adjudication of this controversy, particularly given the modest value of each individual claim and the cost of individual litigation. Additionally, Plaintiff represents that she is unaware of any other litigation concerning class

members' claims.

CPLR Sec. 902. Once the Court has determined the prerequisites set forth in CPLR Sec. 901 have been met, the Court must then consider the additional factors set forth in CPLR Sec. 902. Among the matters which the court shall consider in determining whether the action may proceed as a class action are (1)The interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) The impracticability or inefficiency of prosecuting or defending separate actions; (3) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) The desirability or undesirability of concentrating the litigation of the claim in the particular forum; (5) The difficulties likely to be encountered in the management of a class action." CPLR §902.

Here, the Court finds that these additional factors, called "feasibility considerations," favor certification in this case. There is no evidence that individual class members are seeking to control their own action, as it does not appear that there is other pending litigation which seeks to raise the same claims. Additionally, New York is the most desirable and suitable forum since the claims arise under New York law, the suit arises from Gateway's conduct in New York and all of the class members and accounts are, or were, maintained in New York. Additionally, the class action will conserve judicial resources and prevent inconsistent adjudications.

Accordingly, it is hereby

ORDERED that Plaintiff's Motion to Certify the Class is GRANTED in its entirety; and it is further

ORDERED that the certified class will consist of: "All Gateway customers who were charged on a fixed rate plan at any time and were converted to a variable rate plan for

natural gas and/or electricity services in New York from may of 2014 to the present. [2]"; and it is further

ORDERED that Danielle Bell is appointed as Class Representative and Kohn, Swift & Graf, P.C. and the Frederick Law Group, PLLC are appointed as Plaintiff's counsel; and it is further

ORDERED that the parties are directed to appear for a conference via Microsoft Teams on February 18, 2021 at 2 p.m. The Court shall provide the link for the conference the day prior.

The foregoing constitutes the Decision and Order of this Court on Motion #10.

Dated: New City, New York
January 8, 2021

HON. SHERRI L. EISENPRESS, A.J.S.C.

To: All Counsel via NYSCEF

[2]Excluded form the Class are Defendant; any parent, subsidiary, or affiliate of Defendant; any entity in which any Defendant has or had a controlling interest, or which Defendant otherwise controls or controlled; and any officer, director, legal representative, predecessor, successor, or assignee of a Defendant.

Tab 2

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER **PART** IAS MOTION 17EFM

Justice

----------X

BLT STEAK LLC,BLT FISH LLC

Plaintiff,

- v -

LIBERTY POWER CORP, L.L.C., LIBERTY POWER HOLDINGS LLC,

Defendant.

----------X

INDEX NO. 151293/2013

MOTION DATE N/A

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were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, it is

ORDERED, that the motion is granted to the extent stated on the record today. Submit Order.

8/12/2020
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			X	SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

Tab 3

2016 WL 7009062
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Julie CLARIDGE and Helen Marsh, Plaintiffs,

v.

NORTH AMERICAN POWER & GAS, LLC, Defendant.

15-cv-1261 (PKC)
|
Signed 11/30/2016

Attorneys and Law Firms

Douglas Gregory Blankinship, Shin Young Hahn, Todd Seth Garber, Finkelstein Blankinship, Frei-Pearson & Garber, LLP, White Plains, NY, Matthew R. Mendelsohn, Mazie Slater Katz & Freeman, LLC, Roseland, NJ, Matthew D. Schelkopf, McCuneWright, LLP, Berwyn, PA, for Plaintiffs.

Douglas Gregory Blankinship, Finkelstein Blankinship, Frei-Pearson & Garber, LLP, White Plains, NY, Joanna Marie Doherty, Chronakis Siachos & Kaplan, LLC, Hoboken, NJ, Peter George Siachos, Gordon & Rees, LLP, Morristown, NJ, for Defendant.

MEMORANDUM AND ORDER

CASTEL, U.S.D.J.

***1** Plaintiffs Julie Claridge and Helen Marsh move, pursuant to Rule 23, Fed. R. Civ. P., to certify a class of New York consumers who paid a variable monthly rate for electricity that they purchased from defendant North American Power & Gas, LLC ("North American"). (Docket # 50.) Plaintiffs assert that the proposed class was commonly bound by a sales agreement that North American distributed to all customers, and that this agreement misleadingly described the "variable market based rate" used to calculate monthly electricity bills. Plaintiffs bring claims for breach of contract, breach of the implied covenant of good faith and fair dealing and deceptive trade practices in violation of New York General Business Law sections 349 and 349-d.

For the reasons explained, the plaintiffs' motion for class certification is granted.

BACKGROUND.

North American is an energy services company ("ESCO") that supplies electricity to its customers, with the actual delivery of that electricity managed by local utilities. (Felder Report at 3.) North American first began selling electricity to New York consumers in or around June 2011. (Kinneary 4/7/16 Dep. at 19.)

When customers began their subscriptions to North American, they generally paid either a promotional rate for two months, or a fixed monthly rate for a set term. (Kinneary 4/7/16 Dep. at 23; Pl. Mem. at 4.) Once the promotional rate or fixed rate expired, customers paid North American for monthly electricity calculated under North American's "variable market based rate." (Id.)

All new customers received a "Welcome Packet" consisting of a "Welcome Letter" and "Sales Agreement," which included a "Customer Disclosure Statement and Terms and Conditions." (Blankenship Dec. Ex. 4.) The Disclosure Statement described North American's variable monthly rate. (Blankenship Dec. Ex. 4.) Under the heading "Open Price," it stated that customers would be charged a "variable market based rate" that "will be calculated on the method stated above to include any market prices for commodity, transportation, balancing fees, storage charges, NORTH AMERICAN POWER fees, profit, line losses plus applicable taxes, and any other charges or fees imposed by the utility or other entity having such authority to impose any such charges." (Blankenship Dec. Ex. 4.) There is no dispute that North American distributed a uniform version of the Sales Agreement to all new customers.

As this Court discussed in its decision denying North American's motion to dismiss, the Complaint plausibly alleged that the Sales Agreement's description of the "variable market based rate" was "incomplete and confusing," including a reference to a "method stated above" when no such method was described. See Claridge v. N. Am. Power & Gas, LLC, 2015 WL 5155934, at *4 (S.D.N.Y. Sept. 2, 2015). This Court concluded that, according to the Complaint's allegations, "[a] reasonable consumer acting reasonably would not know whether 'variable market based rates' refers to rates charged by competing ESCOs or the market prices that North American paid to others. A reasonable consumer acting reasonably could be deceived into believing that the rates he or she would be charged under the Agreement would approximate the market price, i.e., what

other ESCOs charged their customers." Id. at *5. Plaintiffs assert that North American's variable monthly rates charged them prices that were "substantially higher" than those of competing ESCOs and local utilities. Id. at *2.

***2** According to plaintiffs, during the time that North American has sold electricity in New York, it has determined its rates by forecasting customer demand for the coming month and then using a hedging strategy to purchase electricity in advance. (Kinneary Dep. at 67-68.) North American would then purchase additional electricity, as needed, on the short-term or "spot" market, to make up for any differences between its advance purchase and the actual demand of its New York customers. (See Pl. Mem. at 4.)

CLASS CERTIFICATION STANDARD.

Rule 23 governs the certification of a class action. The party seeking class certification must satisfy Rule 23(a) and "at least one of the three requirements listed in Rule 23(b)." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345 (2011). Rule 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

"The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." Dukes, 564 U.S. at 349 (quotation marks omitted). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Id. at 350 (emphasis in original).

Plaintiffs seek to certify a class under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." A court must "bear[ ] firmly in mind that the focus of Rule 23(b)(3) is on the predominance of common questions...." Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194 (2013). It "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof," but instead to prove that "common questions predominate over any questions affecting only individual class members." Id. at 1196 (emphasis in original; alterations and quotation marks omitted); accord Sykes v. Mel S. Harris & Associates LLC, 780 F.3d 70, 87 (2d Cir. 2015) ("The mere existence of individual issues will not be sufficient to defeat certification. Rather, the balance must tip such that these individual issues predominate.").

"[A] plaintiff must satisfy all of the requirements of Rule 23, by a preponderance of the evidence, to obtain class certification...." Novella v. Westchester Cnty., 661 F.3d 128, 148-49 (2d Cir. 2011). The "class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim' ...." Amgen, Inc., 133 S. Ct. at 1194. At the same time, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Id. at 1195. A claim's merits may be relevant if, for instance, the failure of proof as to one element would require individualized determinations for each class member, and would not affect all class members. See id. at 1195-96.

DISCUSSION.

A. Rule 23(a).

1. Numerosity.

***3** Rule 23(a)(1) requires plaintiffs to show that "the class is so numerous that joinder of all members is impracticable." Plaintiffs' expert, Frank Felder, Ph.D., estimates that there are more than 40,000 members of the proposed class. (Felder Report at 12.) In opposition, North American does not dispute that plaintiffs have shown numerosity.

The Court concludes that the plaintiffs have satisfied the numerosity requirement.

2. Commonality.

Rule 23(a)(2) requires plaintiffs to show that "there are questions of law or fact common to the class." It "requires the plaintiff to demonstrate that the class members have

suffered the same injury," which must turn "upon a common contention." Dukes, 564 U.S. at 350. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. "Consideration of this requirement obligates a district court to determine whether plaintiffs have 'suffered the same injury.' " Sykes, 780 F.3d at 84.

"[C]laims based on uniform misrepresentations to all members of a class are appropriate subjects for class certification" because "uniform misrepresentations" can be adjudicated with "no need for a series of mini-trials." In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 118 (2d Cir. 2013) (quotation marks omitted). In U.S. Foodservice, the Second Circuit affirmed certification of a RICO class whose members paid invoices containing allegedly unlawful markups. Id. It explained that "[w]hile each invoice obviously concerned different bills of goods with different mark-ups, the material misrepresentation—concealment of the fact of a mark-up inserted by the [billing entity]—was the same in each." Id.; see also Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 39 (1st Cir. 2003) ("The common factual basis is found in the terms of the contract, which are identical for all class members.").

Plaintiffs contend that North American misleadingly described to its New York customers the "variable market based rate" set forth in the Terms and Conditions portion of its Sales Agreement. The claims of the proposed class turn on common contentions of whether North American's description of its rate-setting practices was accurate and truthful, including whether North American misleadingly described its method for setting the variable market-based rate and whether its method was consistent with the factors specified in the Sales Agreement. Plaintiffs also point to common questions on damages, including whether damages should be calculated according to the difference between North American's rates and those of other market participants, or whether damages should instead reflect the difference between North American's actual charged rate and a hypothetical rate calculated pursuant to the factors described in the Sales Agreement. There is also the common question of whether, if the plaintiffs succeed on their claims, class members should be awarded $500 in statutory damages under New York General Business Law section 349-d.

North American argues that plaintiffs' claims require individualized adjudication because customers had different, subjective understandings of terms like "market rate," "daily market price" and "market value." (Opp. Mem. at 12.) It points out that Claridge testified in her deposition that she did not understand the distinction between the terms "market rate" and "wholesale rate," and that Marsh testified that variable prices should have been determined by "the commodity rate, the competitive rate of other electric energy sources ...." (Id., citing Claridge Dep. at 41, Marsh Dep. at 12.) But plaintiffs assert that North American's disclosures about the "variable market based rate" were themselves misleading and imprecise. Commonality is not defeated because consumers interpreted arguably vague and misleading language in different ways.

***4** The claims of the proposed class turn on the "common contention" that North American misleadingly described its method for calculating variable monthly rates, a claim that "is capable of classwide resolution ...." Dukes, 564 U.S. at 350. Plaintiffs have therefore shown common questions of law and fact under Rule 23(a)(2).

3. Typicality.

Rule 23(a)(3) requires plaintiffs to show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "To establish typicality under Rule 23(a)(3), the party seeking certification must show that 'each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.' " In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009) (quoting Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993)). "Typicality requires that 'the disputed issue[s] of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class.' " Mazzei v. Money Store, 829 F.3d 260, 272 (2d Cir. 2016) (quoting Caridad v. Metro-N. Commuter R.R., 191 F.3d 283, 293 (2d Cir. 1999)). "One purpose of the typicality requirement is 'to ensure that ... the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.' " Id. at 272 (quoting Marisol A. ex rel. Forbes v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997)).

Plaintiffs assert that their claims are typical because, like all proposed class members, they assert that North American

misrepresented the "variable market based rates" used to calculate monthly electricity bills. North American contends that Marsh and Claridge cannot show typicality because, prior to paying the monthly variable rate, they were offered introductory fixed rates for different periods of time, and that the initial fixed rates varied widely. (Opp. Mem. at 15.) It also asserts that customers received differing sales pitches from North American, which informed their decisions to become North American customers. (Id. at 16-17.) But the plaintiffs' proposed class consists of "customers who paid [North American's] variable rate," (Docket # 50) and not its fixed rate. Further, their claims are directed toward North American's statements made in a widely dispersed document and a uniform contract; oral representations by North American to solicit new customers do not lie at the heart of their claims. Because plaintiffs' claims turn on North American's written disclosure concerning the "variable market based rates," its arguments concerning other marketing practices do not defeat typicality. See, e.g., In re Polaroid ERISA Litig., 240 F.R.D. 65, 76 (S.D.N.Y. 2006) ("Defendants' argument that Plaintiffs' claims for misrepresentation and nondisclosure inherently require an individualized analysis is also insufficient to defeat typicality. The Complaint contains allegations of plan-wide misrepresentations and nondisclosures which, by definition, were not individualized.").

North American also argues that plaintiffs cannot show typicality because its "fixed and variable rates are calculated based upon a complex algorithm of variables unique to each customer," including a customer's "zone and/or subzone," weather, renewable energy credits, customer complaints and "[l]ocal, national and global news." (Opp. Mem. at 15-16.) As support, North American cites different fixed rates (as opposed to variable rates) that it charged to Marsh and Claridge. (Id. at 16.) Assuming that these assorted factors informed North American's calculation of variable market based rates, they do not defeat typicality, but instead reflect that Marsh and Claridge, like other customers, were charged at rates based on numerous factors, including some that seemingly were not disclosed in the Sales Agreement.

***5** Because Marsh and Claridge have made a showing that their claims are typical of the proposed class members, the Court concludes that they satisfy the typicality requirement of Rule 23(a)(3).

4. Adequacy.

Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." "[A]dequacy is satisfied unless 'plaintiff's interests are antagonistic to the interest of other members of the class.' " Sykes, 780 F.3d at 90 (quoting Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000)); see also In re Flag Telecom, 574 F.3d at 35 (determining adequacy "entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.") (quotation marks omitted).[1]

North American does not assert that Marsh or Claridge have interests antagonistic to the class. It again points to the named plaintiffs' failure in their depositions to provide a consistent definition of the phrase "wholesale market prices," and argues that "a plaintiff who does not understand the definition or scope of a term that is at the heart of a litigation cannot adequately represent the interests of a class the plaintiff seeks to certify." (Opp. Mem. at 18.) But again, the failure of the two named plaintiffs to articulate in their depositions a consistent interpretation of allegedly misleading terms does not render plaintiffs inadequate class representatives.

The Court concludes that plaintiffs satisfy the adequacy requirement of Rule 23(a)(4).

B. Rule 23(b)(3).

Rule 23(b)(3) requires plaintiffs to show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." It requires "a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." Amgen Inc., 133 S. Ct. at 1191 (emphasis in original). "Predominance is satisfied 'if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.' " 7Roach v. T.L. Cannon Corp., 778 F.3d 401, 405 (2d Cir. 2015) (quoting In re U.S. Foodservice Inc., 729 F.3d at 118).

1. Plaintiffs' Claims under the New York General Business Law.

Plaintiffs' claims under the New York General Business Law can be adjudicated through common proof, and the use of generalized proof is more substantial than the issues potentially subject to individual proof. New York General Business Law section 349(a) makes it unlawful to use "[d]eceptive acts or practices in the conduct of any business, trade or commerce ...." New York General Business Law section 349-d(3) specifically governs the deceptive practices of ESCOs, and states that "[n]o person who sells or offers for sale any energy services for, or on behalf of, an ESCO shall engage in any deceptive acts or practices in the marketing of energy services." The parties agree that sections 349(a) and -d(3) have identical elements. See Claridge, 2015 WL 5155934, at *4. The scope of section 349 is "intentionally broad" and requires a plaintiff to prove "a deceptive act or practice directed toward consumers and that such act or practice resulted in actual injury to a plaintiff." Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 3 N.Y.3d 200, 205-06 (2004). "Justifiable reliance by the plaintiff is not an element of the statutory claim." Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 941 (2012).

***6** Here, liability can be determined on a class-wide basis because the plaintiffs' claims are directed toward uniform terms that were contained in a common Sales Agreement distributed to all new customers. Individualized evidence is not required. Rather, plaintiffs must prove whether North American employed "a deceptive act or practice" by misleading consumers about its method for calculating a "variable market based rate." In large measure, plaintiffs' claims will succeed or fail based on a determination of whether the Sales Agreement was deceptive in its description of the "variable market based rate"—an issue that can be adjudicated through the use of common proof, and not individualized proof. A class-wide determination is superior to an individualized determination because the latter would simply entail repeated adjudications of identical provisions of the Sales Agreement. Cf. In re U.S. Foodservice, 729 F.3d at 118 ("[F]raud claims based on uniform misrepresentations to all members of a class 'are appropriate subjects for class certification' because, unlike fraud claims in which there are material variations in the misrepresentations made to each class member, uniform misrepresentations create 'no need for a series of mini-trials.' ") (quoting Moore v. PaineWebber, Inc., 306 F.3d 1247, 1253 (2d Cir. 2002)).

The Court therefore concludes that, under Rule 23(b)(3), common questions of law and fact predominate over plaintiffs' General Business Law claims, and that a classwide resolution is superior to individual actions to adjudicate the merits.

2. Plaintiffs' Contract Claims.

Plaintiffs also seek certification for their claims asserting breach of contract and breach of the covenant of good faith and fair dealing. "[T]he essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." U.S. Bank Nat'l Ass'n v. Lieberman, 98 A.D.3d 422, 423 (1st Dep't 2012). In New York, all contracts contain an implied covenant of good faith and fair dealing, under which "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995).

Contract claims satisfy Rule 23(b)(3) when the claims of the proposed class "focus predominantly on common evidence ...." In re U.S. Foodservice Inc., 729 F.3d at 125. The Second Circuit has affirmed certification of a contract claim when minor variations existed in the language of the disputed contracts because the underlying claim was directed to a "substantially similar" terms. Id. at 124. Plaintiffs claimed that defendants were in breach because they concealed the true nature of their fuel-pricing practices, and that they therefore did not know and understand the defendants' true course of performance. Id. at 125. Questions of whether a defendant acted in good faith under the contract also were deemed "common to all class members." Id. at 125. "To be clear, courts properly refuse to certify breach of contract class actions where the claims require examination of individual contract language." Id. at 124. Individual issues may predominate when, for instance, contract claims turn on material differences in state law. See Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 147-48 (2d Cir. 2015) (because contract claims were intertwined with different state-law malpractice standards, common questions did not predominate).

Plaintiffs' claims for breach of contract and breach of the covenant of good faith and fair dealing are largely directed to language in the Sales Agreement that was distributed to all members of the proposed class. The claims predominantly focus on common evidence. In opposition to plaintiffs' motion, North American again cites to subjective interpretations of the phrase "wholesale market rate," and argues that each customer may have had a unique and individual interpretation of the underlying billing practices. However, there is no dispute that North American distributed a uniform Sales Agreement that governed customers' subscriptions and described the calculation of variable market based rates. To the extent that North American argues that customers' subjective understanding may have been informed by loosely scripted conversations with telemarketers or by other marketing materials (Opp. Mem. at 20), the Sales Agreement contains an integration clause that states, "This agreement and the Enrollment Form or Welcome Letter reflect Customer's entire agreement with [North American] and supersede any oral or written statements made in connection with this agreement or Customer electricity supply." (Blankinship Dec. Ex. 4 at 7.) External marketing about North American's billing rates would not go toward plaintiffs' breach claim, and North American has not pointed to any ambiguity that would make parol evidence relevant to resolving plaintiffs' claims.

***7** Plaintiffs' claims for breach of contract and breach of the covenant of good faith and fair dealing are directed to the text of a uniform Sales Agreement that was distributed to all members of the proposed class. Common issues susceptible to generalized proof substantially predominate over individualized issues, if any. The Court therefore concludes that plaintiffs have satisfied Rule 23(b)(3) as to these claims.

C. Rule 23(g).

Rule 23(g)(1) states that "[u]nless a statute provides otherwise, a court that certifies a class must appoint class counsel." The Court must consider the work of counsel in identifying or investigating potential claims; counsel's experience in litigating class actions; counsel's knowledge of applicable law; and the resources available to counsel. Rule 23(g)(1)(A). Class counsel "must fairly and adequately represent the interests of the class." Rule 23(g)(4). "The purpose of this requirement is to protect the interests of absent class members, who will be bound by the results of the action under res judicata." Kulig v. Midland Funding, LLC, 2014 WL 5017817, at *2 (S.D.N.Y. Sept. 26, 2014). " '[I]n determining the adequacy of counsel, the court looks beyond reputation built upon past practice and examines counsel's competence displayed by present performance.' " Id. (quoting Bolanos v. Norwegian Cruise Lines Ltd., 212 F.R.D. 144, 156 (S.D.N.Y. 2002)). Although North American opposes the motion for class certification, it "does not dispute the competence of class counsel ...." (Opp. Mem. at 17.)

Plaintiffs are represented by three law firms: Finkelstein, Blankinship, Frei-Pearson & Garber, LLP ("Finkelstein"); Mazie Slater Katz & Freeman, LLC ("Mazie"); and McCuneWright LLP ("McCune"). Attorneys from Finkelstein and Mazie have been counsel of record to plaintiffs since the commencement of this action. Matthew D. Schelkopf, an attorney at McCune, also has been counsel of record to plaintiffs since the action was commenced, but was employed by different law firm at commencement. The three firms jointly move to be appointed co-class counsel.

Based on their performance in this action, the Court concludes that the plaintiffs' attorneys have fairly and adequately represented the interests of the class, and there is no indication that they will not continue to do so. Counsel successfully opposed the defendant's motion to dismiss the Complaint pursuant to Rule 12(b)(6), and have advocated for plaintiffs' interests throughout a discovery process that has been contentious at times. Their submissions to the Court have reflected knowledge of the law governing plaintiffs' claims and familiarity with class action procedures. Their present performance has demonstrated competence to protect the interests of the class and to pursue the class's claims. See generally Kulig, 2014 WL 5017817, at *2.

Based on the declarations submitted by counsel and their supporting exhibits, the Court also concludes that plaintiffs' counsel have adequate resources to litigate this action and are experienced in litigating class actions. Finkelstein has been appointed class counsel in several consumer class actions, including cases in this District that were brought against electricity providers and other utilities. (Blankinship Dec. Ex. 7.) Greg Blankinship, a partner at Finkelstein, has practiced law since 2003 and has been appointed class counsel in at least five class actions, including actions against utilities that asserted deceptive pricing practices. (Blankinship Dec. Ex. 7.) Mazie has been appointed class counsel in at least eight class actions, principally in cases that involve products liability. (Mendelsohn Dec. ¶ 5) Matthew R. Mendelsohn, a partner at Mazie, has practiced law since 2005, and has been

class counsel in consumer class actions, primarily involving products-liability claims. (Mendelsohn Dec. Ex. A.) In 2013, he was appointed class counsel in a products-liability action brought in this District. (Mendelsohn Dec. ¶ 6.) McCune has been appointed class counsel in class actions involving products liability and consumer fraud claims. (Schlkopf Dec. ¶¶ 8-14 & Ex. A.) Matthew D. Schelkopf, a partner at McCune, has practiced law since 2002, and has been class counsel in at least seven class actions, all of them involving products-liability claims. (Schelkopf Dec. ¶¶ 8-14.)

***8** Based on their performance in this case, the experience of the law firms and of the attorneys of record, and of the resources available to those attorneys, the Court appoints the Finkelstein, Mazie and McCune firms as co-class counsel in this case.

D. Class Period.

Plaintiffs' notice of motion seeks to certify a class "of all New York North American Power & Gas, LLC customers who paid North American Power & Gas, LLC's variable rate ...." (Docket # 50.) This proposed class is overbroad and does not account for the relevant limitations periods.

This action was filed on February 20, 2015. New York General Business Law sections 349(a) and 349-d(3) has a three-year limitations period. CPLR 214(2); Gaidon v. Guardian Life Ins. Co. of Am., 96 N.Y.2d 201, 209-10 (2001). For claims under the General Business Law, the plaintiff class is limited to consumers who paid North American's variable rate on or after February 20, 2012.

Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing are governed by the six-year limitations period of CPLR 213(2). North American first began selling electricity to New York consumers in or around June 2011. (See Kinneary 4/7/16 Dep. at 19.) For the claims alleging breach of contract and breach of the covenant of good faith and fair dealing, the class includes consumers who paid North American's variable market based rates in or after June 2011.

CONCLUSION.

Plaintiffs' motion for class certification is GRANTED. (Docket # 50.) The Clerk is directed to terminate the motion.

The law firms of Finkelstein, Blankinship, Frei-Pearson & Garber, LLP, Mazie Slater Katz & Freeman, LLC and McCuneWright LLP are jointly appointed to act as class counsel.

Within 21 days, class counsel shall submit a proposed form of notice to class members and a proposed plan for distributing notice.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 7009062

Footnotes

1 The Court addresses the qualification of plaintiffs' counsel under Rule 23(g) below.

End of Document

Tab 4

2017 WL 6601993

Superior Court of Connecticut,
Judicial District of Hartford, Complex Litigation Docket at Hartford.

Shane C. ROBERTS

v.

VERDE ENERGY, USA, INC.

X07HHDCV156060160S
|
File Date: December 6, 2017

Moukawsher, J.

1. *Summary: Common violations may be dealt with in common*.

***1** Substitute plaintiff Constance Jurich and her husband sue Verde Energy. They claim Verde overcharged them for electricity in violation of their contract and state statutes. They claim Verde was required to charge rates linked to wholesale market electric rates but didn't. They want the court to certify a class of all the consumers who had these kinds of contracts with Verde. Verde opposes class certification focusing on its view that the issues are too individualized to be addressed in a class action. The court grants class certification because liability focuses on common questions of standard contract language and its conformity with the law. Conceivable individual issues are not an obstacle to class certification because they may not arise, may not overwhelm the litigation if they do arise, and if they overwhelm the litigation the court can modify or decertify the class.

2. *The potential class is numerous, shares common questions, and is represented by a typical class member who will adequately represent the class*.

Class certification is multi-layered. Practice Book § 9–7 permits representatives to bring suits on behalf of a class where:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Verde doesn't dispute that there are thousands of members of a potential class, so the court concludes it is impractical to join them all. There are common questions of law or fact to the class and they clearly predominate over any individual issues. A common contract is at issue. The parties hotly dispute what the contract means, the significance for its approval for use by the state, the significance of the statute mandating its content and the manner in which Verde sets rates for electricity. The resolution of all of these common issues would answer the common question of whether Verde violated its contract and any statutes.

Verde focuses on the complexity of its rate setting, including the fact that those rates reflect some individual determinations related to peak use and the inevitability that every customer has a different bill each month. Verde suggests that reconstructing any rate besides the one it charged would be impossible because of how it buys power, including its reliance on futures contracts, bulk rates, and incorporated peak use charges attributable to individual customers.

But Verde's concerns are at best premature. The class would have to prove liability first and then victory for the class would not necessarily require a reconstruction of the rates and Verde admits that while peak use charges are attributable to individuals they aren't billed to individuals but are extra charges that are spread over and paid by the entire class. Victory might consist solely of injunctive relief to abate any violations. It also might not involve any reconstruction of Verde's rates at all, but rely on setting an “appropriate” rate and comparing it to Verde's actual rates without reference to what batch of electricity was bought from whom and when. And if the only way to assess any form of relief after a decision on liability is either impossible or entirely individual, Practice Book § 9–9(b)(5) says the court's class certification orders “may be altered or amended as may be desirable from time to time.” This means that if any of Verde's currently theoretical fears are realized the court can modify the class or even decertify it. Likewise, if it prevails on its claims that each class member would have to prove they read the contract and it caused them to do or refrain from doing something, this would call for a reordering of the class action management too. But there are certainly strong common issues and they predominate over individual issues that *might* affect some of the claims but in no case all of them.

***2** Constance Jurich is typical enough to be a class representative. Verde points out that she paid some of her bills late and got an undeserved credit and therefore Verde claims she sometimes had an atypical balance. But this doesn't matter on the question whether she was overcharged. She purchased electricity under the contract challenged. Verde also says she is atypical because the complaint is aimed at those with an alleged "teaser" rate that was artificially low and Jurich didn't have one. But the complaint claims Verde breached its promise to use market rates and violated state statutes in ways dependent on the departure from "appropriate" market rates. The complaint's reference to teaser rates doesn't make it dependent on teaser rates nor does its absence from Jurich's case make her atypical in terms of pressing the main claim about Verde's alleged abuse of the term "market rates."

Constance Jurich will fairly and adequately protect the interest of the class. There is no evidence she has any interest adverse to other class members. The evidence shows further that she is represented by counsel experienced and competent in both class action claims and claims of this specific type.

Niko Jurich, on the hand, has no basis to be a class representative. He was never a party to the contract at issue. He is merely Constance Jurich's husband. He would hardly be typical of parties contracting with Verde for this type of variable electric service when he never contracted with Verde at all. He is disapproved as a class representative.

3. *Common questions predominate and class action treatment is superior to other approaches*.

Constance Jurich seeks certification under Practice Book § 9–8(3). To win it, she must prove common questions of law or fact predominate over any purported individual questions. She must also prove a class action is superior to other available methods for the fair and efficient adjudication of the controversy. There is no point in repeating the analysis already performed on the commonality question. The common questions are real and numerous. The individual questions are contingent in character. They don't affect all claims for relief. And their impact may be judged and adjusted for as their character becomes clear.

A class action is superior to individual litigation. Consumer contracts affecting thousands of people but not necessarily yielding thousands of dollars to each class member are well suited for class certification. Without the class action method most claims like this wouldn't be brought, including claims with great social utility. Piecemeal litigation would be less workable. Given that much of the case depends on the central common legal issues surrounding the contract class members would have little interest in separately controlling the litigation and, as noted, if individual remedies appear to overwhelm the rest of the case, certification can be modified or withdrawn as may be justified. There is no other litigation the court knows that would compete with this litigation, so no disadvantage appears from that direction. This is a case about rates in Connecticut, so no other forum appears to have any advantages and barring the remedies possibilities alluded to, the central legal issues of this case are easily managed on a class basis. Therefore, the court finds the class method the superior method for the claims at issue.

4. *An opt-out class is certified, questions and the class are defined and notice is postponed*.

The court certifies a class defined as Jurich requests:

> All individual residential and small business consumers enrolled (either initially or through "rolling over" from a fixed rate plan) in a Verde Energy USA, Inc. variable rate electricity plan in connection with a property located within Connecticut at any time within the applicable statute of limitations preceding the filing of this action through and including the date of class certification, excluding persons whose *only* contract with Verde contained a "Governing Law and Arbitration" clause (as first introduced in or about October 2015).
>
> ***3** Specifically excluded from this Class are: the Defendant, the officers, directors and employees of Defendant; any entity in which Defendant has a controlling interest; any affiliate, legal representative of Defendant; the judge to whom this case is assigned and any member of the judge's immediate family; and any heirs, assigns and successors of any of the above persons or organizations in their capacity as such.

The court certifies as the class claims all claims set forth in the current version of the complaint. The court appoints as class representative Constance Jurich. The court appoints as class counsel the law firm of Izard Kindall & Raabe, LLP. As discussed on the record, the court will postpone any order of notice until the completion of legal challenges that may affect the class or eliminate this action. When the notice is given, Practice Book § 9–9(a)(2)(B)(v) provides that it must establish a way to "exclude from the class any member who requests exclusion ..." While the rule doesn't expressly state that this "opt-out" approach is exclusive, the court finds in

any event that it is the best method in a case such as this where the complexity of the claims and the size of the individual amounts at stake may artificially depress participation and the significance of any remedy, thereby irrationally diluting the public benefit that might be gained from deterring any trade practice or other violations that might be found. Therefore, this class action will be an "opt-out" class action.

All Citations

Not Reported in Atl. Rptr., 2017 WL 6601993, 65 Conn. L. Rptr. 563

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Tab 5

2019 WL 1276501

Superior Court of Connecticut,
Judicial District of Hartford, Complex Litigation Docket at Hartford.

Shane C. ROBERTS

v.

VERDE ENERGY, USA, INC.

X07HHDCV156060160S

|

February 1, 2019

Opinion

Moukawsher, J.

***1** This court decided the consumer contract at issue in this case was illegally unclear about the rates consumers would be charged for electric power. It held that a statute specifically made this violation an automatic unfair or deceptive trade practice under CUTPA.

Verde now wants the court to decide summarily that the class certified in the case must fail or at least be ineligible for any kind of money award. Stripped of legalistic ornament, Verde protests paying money to people who haven't proved they were harmed by an inadequate rate disclosure. In its view, each class member should have to prove they relied on the disclosure at issue and were damaged by that reliance. Without monetary damage, Verde posits class members have no "ascertainable loss" of money or property as required by General Statutes § 42-110g(a) and therefore no cause of action. Verde further claims that even if the plaintiffs do prove monetary damages, the class cannot recover without proof of individual monetary losses. Verde also uses its claims about the individual character of the issue to undercut the continued treatment of this case as a class action.

But no dollar amount of ascertainable loss has to be alleged to bring a lawsuit. As the Connecticut Supreme Court held in 1981 in *Hinchliffe v. American Motors Corp.,* ascertainable loss may be shown merely by proving a purchase that is in part the product of an unfair or deceptive practice that results in a thing different from what was expected from the bargain. It also specifically held that consumers don't have to rely on misleading information to have a CUTPA claim.[1]

But Verde says that to prove the "ascertainable loss" prerequisite to prevailing under CUTPA—to get any equitable relief or money damages—requires proof that any claimed loss was legally caused by the wrongful act.

Indeed, there is some tension between the holding in *Hinchliffe* and a later 1994 holding in *Haesche v. Kissner* that says the deceptive practice must have caused harm.[2] The only way to reconcile them is to say that a plaintiff suffering no harm from a practice can receive no recovery, but qualifying harms need not be limited solely to harm caused by reliance on a misrepresentation.

After all, *Hinchliffe* said the loss doesn't have to be precise to be ascertainable. Here, it may be the value of the opportunity the class lost to benefit from better bargains that could have been chosen following adequate disclosure. This is, of course, a harder financial harm to qualify than individual harm, but it may prove a significant financial harm nonetheless.

There is a good reason courts don't require more precise and more individual determinations of detrimental reliance to meet the ascertainable loss threshold. It's Verde that deprived the class of its chance to make these determinations. Therefore, it's Verde not the class that for ascertainable loss purposes must bear the burden of not knowing who would have made what choice and what savings would have resulted. Nonetheless, if it turns out there weren't any financially better opportunities class members might have been chosen, the lost opportunity would not only be imprecise, it would be worthless, and thus it would mean that the class has suffered no ascertainable loss.

***2** The court cannot ignore the ascertainable loss requirement. But it must also avoid weakening the statute that makes unclear rate disclosures unfair trade practices. The purpose of that statute is to help ratepayers do something about unclear rate disclosures. It would defeat that purpose if our inability to say precisely how people would respond to a clear notice would stop people from complaining about an unclear notice. That would allow the party issuing the unclear notice to profit from its own wrong.

To the extent that ascertainable loss doesn't require individual reliance and individual calculations, this settles the summary

judgment and class legal issues raised. The rest will depend upon the facts.

The class says it did suffer money damages, but it complains that the court has stayed discovery, tying its hands in its quest to quantify these losses. Following discovery, it may appear that there is no way adequately to prove damages the court can award. This may mean the court could find the class made it over the ascertainable loss threshold but was tripped up by its failure to prove a specific credible damage amount. The result could be a judgment for the defendant or some other form of relief such as equitable relief.

But all that will have to wait for another day. In the meantime, the motions for summary judgment and to alter class certification are denied. The discovery stay is lifted.

All Citations

Not Reported in Atl. Rptr., 2019 WL 1276501, 67 Conn. L. Rptr. 761

Footnotes

1 184 Conn. 607, 614-17.

2 229 Conn. 213, 222-23.

Tab 6

See pp. 9-10

780 F.3d 70
United States Court of Appeals, Second Circuit.

Monique SYKES, Rea Veerabadren, Kelvin Perez, Clifton Armoogam, Individually and on behalf of all others similarly situated, Plaintiffs–Appellees,

v.

MEL S. HARRIS AND ASSOCIATES LLC, Mel S. Harris, Todd Fabacher, Michael Young, Kerry Lutz, Esq., LR Credit 18, LLC, L–Credit, LLC, Leucadia National Corporation, LR Credit, LLC, LR Credit 10, LLC, Samserv, Inc., William Mlotok, Benjamin Lamb, David Waldman, Joseph A. Orlando, Michael Mosquera, John Andino, LR Credit 14, LLC, LR Credit 21, LLC, Philip M. Cannella, Defendants–Appellants.[1]

Docket Nos. 13–2742–cv, 13–2747–cv, 13–2748–cv
|
Argued: Feb. 7, 2014.
|
Decided: Feb. 10, 2015.

Synopsis

Background: Debtors filed putative class action against debt-buying company, law firm, and process server alleging they had engaged in fraudulent scheme to obtain default judgments against debtors in civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law. Plaintiffs moved for class certification, and the United States District Court for the Southern District of New York, Denny Chin, Circuit Judge, 285 F.R.D. 279, certified two classes. Defendants appealed.

Holdings: The Court of Appeals, Pooler, Circuit Judge, held that:

[1] district court did not abuse its discretion in determining that proposed class of debtors met commonality requirement for class certification;

[2] district court did not abuse its discretion in determining that common issues of law and fact predominated over any individual ones, as required for class certification;

[3] district court did not abuse its discretion in determining that class action was superior method for resolving debtors' claims;

[4] *Rooker-Feldman* doctrine did not bar debtors' action;

[5] Full Faith and Credit Act did not bar debtors' action; and

[6] district court did not abuse its discretion in certifying debtors' claims under provision of federal class action rule providing for injunctive relief if defendant acted or refused to act on grounds that apply generally to the class.

Affirmed.

Jacobs, J., filed separate dissenting opinion.

West Headnotes (22)

[1] Federal Courts Class actions

Court of Appeals reviews district court's decision to certify a class for abuse of discretion, the legal conclusions that informed its decision de novo, and any findings of fact for clear error. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

3 Cases that cite this headnote

[2] Federal Civil Procedure Class Actions

Class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

4 Cases that cite this headnote

[3] **Federal Civil Procedure** Evidence; pleadings and supplementary material

Party seeking class certification must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, and that other requirements of rule governing class actions are met. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

7 Cases that cite this headnote

[4] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Commonality requirement for class certification obligates plaintiff to demonstrate that the class members have suffered the same injury; this does not mean merely that they have all suffered a violation of the same provision of law. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

29 Cases that cite this headnote

[5] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

To satisfy the predominance criterion for class certification, individual questions need not be absent; the predominance rule requires only that those questions not predominate over the common questions affecting the class as a whole. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

45 Cases that cite this headnote

[6] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Common issues may predominate, as required for class certification, when liability can be determined on a class-wide basis, even when there are some individualized damage issues. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

42 Cases that cite this headnote

[7] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Meeting the class action predominance requirement requires plaintiffs to show that they can prove, through common evidence, that all class members were injured by the alleged conspiracy; that is not to say the plaintiffs must be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member, but court expects the common evidence to show all class members suffered some injury. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

47 Cases that cite this headnote

[8] **Racketeer Influenced and Corrupt Organizations** Elements of violation in general

Racketeer Influenced and Corrupt Organizations Business, property, or proprietary injury; personal injuries

Racketeer Influenced and Corrupt Organizations Causal relationship; direct or indirect injury

To prevail on a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, plaintiffs must show (1) a substantive RICO violation; (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation. 18 U.S.C.A. § 1962.

9 Cases that cite this headnote

[9] **Antitrust and Trade Regulation** Nature and Elements

Antitrust and Trade Regulation Public impact or interest; private or internal transactions

To maintain a cause of action for deceptive practices under New York law, a plaintiff must show: (1) defendant's conduct is consumer oriented, (2) defendants is engaged in a deceptive act or practice, and (3) plaintiff was

injured by this practice; first element may be satisfied by showing that the conduct at issue potentially affects similarly situated consumers. N.Y.McKinney's General Business Law § 349.

12 Cases that cite this headnote

[10] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

District court did not abuse its discretion in determining that proposed class of debtors met commonality requirement for class certification in action against debt-buying company, law firm, and process server, based on defendants' alleged conduct of systematically filing false affidavits of merit and, in many instances, false affidavits of service, in order to fraudulently procure default judgments against the debtors in civil court. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

2 Cases that cite this headnote

[11] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Commonality prerequisite for class certification is satisfied if there is a common issue that drives the resolution of the litigation such that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

27 Cases that cite this headnote

[12] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Determination as to whether class may be certified, on theory that questions common to class members predominate, may require a court to consider how a trial on the merits would be conducted if a class were certified. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

38 Cases that cite this headnote

[13] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

District court did not abuse its discretion in determining that common issues of law and fact predominated over any individual ones, as required for certification of debtors' putative class action against debt-buying company, law firm, and process server, since all claims were based on defendants' alleged uniform, widespread practice of filing automatically-generated, form affidavits of merit not based on personal knowledge and, in many instances false affidavits of service, to obtain default judgments against debtors in civil court. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[14] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

In determining whether class may be certified, fact that damages may have to be ascertained on an individual basis is a factor that the court must consider in deciding whether issues susceptible to generalized proof outweigh individual issues. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

9 Cases that cite this headnote

[15] **Federal Civil Procedure** Representation of class; typicality; standing in general

Class certification requirement that plaintiff be adequate representative of class is satisfied unless plaintiff's interests are antagonistic to the interest of other members of the class. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

37 Cases that cite this headnote

[16] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

District court did not abuse its discretion in determining that class action was superior method for resolving debtors' claims against debt-buying company, law firm, and process server for violations of Racketeer Influenced and Corrupt Organizations Act (RICO), Fair Debt Collection Practices Act (FDCPA), and New York state law, even though defendants asserted that New York state court was superior forum; there was no basis to conclude that plaintiffs could proceed as a class in the state court, as that court had jurisdiction only over actions in which the value of the controversy was $25,000 or less, and New York law would provide plaintiffs no right of action, could not address the gravamen of the plaintiffs' allegations as it could only vacate the default judgments against them, and denied plaintiffs any control over the course of the litigation. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.; McKinney's N.Y.City Civ.Ct.Act § 202; N.Y.McKinney's CPLR Rule 5015.

6 Cases that cite this headnote

[17] **Courts** Federal-Court Review of State-Court Decisions; Rooker-Feldman Doctrine

Rooker-Feldman doctrine bars the federal courts from exercising jurisdiction over claims brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

56 Cases that cite this headnote

[18] **Courts** Debtor and creditor; bankruptcy; mortgages, liens, and security interests

Rooker-Feldman doctrine did not bar debtors' putative class action alleging debt-buying company, law firm, and process server engaged in fraudulent scheme to obtain default judgments against debtors in civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law, where consumers did not seek to overturn state court judgments, and claims sounding under FDCPA, RICO, and state law spoke not to the propriety of the state court judgments, but to the fraudulent course of conduct that defendants pursued in obtaining such judgments. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487.

72 Cases that cite this headnote

[19] **Judgment** Full Faith and Credit

Full Faith and Credit Act did not bar debtors' putative class action alleging debt-buying company, law firm, and process server engaged in fraudulent scheme to obtain default judgments against debtors in city civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law, even though defendants asserted that the state courts treated judgments entitling them to recovery as valid; whatever was required in civil court would not decide the issue of liability for defendants, rather, the conduct of defendants, and the question of whether that conduct was ultimately fraudulent, would decide their liability. 28 U.S.C.A. § 1738; Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487.

9 Cases that cite this headnote

[20] **Federal Courts** Matters of Substance

Court of Appeals declined to decide, in the first instance, issue of whether Fair Debt Collection Practices Act (FDCPA) permitted plaintiff to assert claims for a false statement that was made to a party other than the debtor. Fair Debt Collection Practices Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq.

17 Cases that cite this headnote

[21] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

District court did not abuse its discretion in certifying debtors' claims alleging debt-buying company, law firm, and process server engaged in fraudulent scheme to obtain default judgments against debtors in civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law, under provision of federal class action rule providing for injunctive relief if defendant acted or refused to act on grounds that apply generally to the class; although defendants asserted that individualized issues of service differentiated class members from one another and named plaintiffs would not benefit because they already had their default judgments vacated, relief to each member of the class did not require that the relief to each member of the class be identical, only that it be beneficial, and named plaintiffs might each still be subject to a further action by defendants. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

28 Cases that cite this headnote

[22] Federal Courts Judgment and Relief

Court of Appeals declined to decide, in the first instance, issue whether Racketeer Influenced and Corrupt Organizations Act (RICO) permitted private injunctive relief. 18 U.S.C.A. § 1961 et seq.

1 Cases that cite this headnote

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Before: JACOBS, CALABRESI, and POOLER, Circuit Judges.

Judge JACOBS dissents in a separate opinion.

Opinion

POOLER, Circuit Judge:

These consolidated appeals are taken from the September 4, 2012 class certification opinion, *Sykes v. Mel Harris & Assocs., LLC,* 285 F.R.D. 279 (S.D.N.Y.2012) ("*Sykes II*"), and March 28, 2013 class certification order of the United States District Court for the Southern District of New York (Denny Chin, *Circuit Judge*). Defendants in this case comprise three entities: "(1) various subsidiaries of Leucadia National Corporation ("Leucadia") that purchase and collect consumer debt; (2) Mel S. Harris and Associates LLC ("Mel Harris"), a law firm specializing in debt collection litigation; [and] (3) Samserv, Inc. ("Samserv"), a process service company." ***75** *Sykes II,* 285 F.R.D. at 283. Defendants also include "associates of each of the foregoing entities," *id.,* and we respectively refer to them as the Leucadia defendants, Mel Harris defendants, and Samserv defendants (as did the district court).

The district court's March 28, 2013 order certified two classes. The first class, certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, comprises "all persons who have been or will be sued by the Mel Harris defendants as counsel for the Leucadia defendants ... assert[ing] claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961; New York General Business Law (GBL) § 349; and New York Judiciary Law § 487." Special App'x at 46.

The second class, certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, comprised "all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants in ... New York City Civil Court and where a default judgment has been obtained. Plaintiffs in the Rule 23(b)(3) class assert claims under RICO; the Fair Debt Collection Practices Act [(FDCPA)], 15 U.S.C. § 1692; GBL § 349; and New York Judiciary Law § 487." Special App'x at 47.

We conclude that the district court did not abuse its discretion in certifying either class.

Affirmed.

BACKGROUND

We draw our facts from the district court's class certification opinion, which depended on "the depositions, declarations, and exhibits submitted ... in connection with" the motion for class certification. *Sykes II,* 285 F.R.D. at 283. The district court, as was proper, only resolved "factual disputes to the extent necessary to decide the class certification issue." *Id.* citing *In re Initial Public Offerings Sec. Litig.,* 471 F.3d 24, 27, 41–42 (2d Cir.2006). It did not resolve "factual assertions relate[d] to the merits ... but state[d] them as the parties' assertions," and we will follow that practice. *Id.* Where we are required to supplement the background as laid out by the district court by virtue of the arguments of the parties on appeal, we will also refer to the depositions, declarations, and exhibits which formed the record before the district court at class certification.

I. Plaintiffs

"Monique Sykes, Rea Veerabadren, Kelvin Perez, and Clifton Armoogam are New York City residents who were each sued by various defendants in debt collection actions commenced in New York City Civil Court between 2006 and 2010." *Sykes II,* 285 F.R.D. at 283. Each plaintiff "denies being served with a summons and complaint in their respective action.... Defendants, nevertheless, were able to obtain default judgments against them." *Id.*

II. Defendants' Alleged Default Judgment Scheme

A. Default Judgments

These default judgments, in the words of plaintiffs, are the result of defendants' construction of a "default judgment mill." The "mill" operates in this fashion: first, by obtaining charged-off consumer debt; second, by initiating a debt-collection action by serving a summons and complaint on the purported debtor; and third, by submitting fraudulent documents to the New York City Civil Court in order to obtain a default judgment.

At the first step, "[p]laintiffs allege that the Leucadia and Mel Harris defendants entered into joint ventures to purchase ***76** debt portfolios, and then filed debt collection actions against the alleged debtors with the intent to collect millions of dollars through fraudulently-obtained default judgments." *Id.*

At the second step, Mel Harris would employ "a software program ... designed by [Mel Harris employee] Mr. [Todd] Fabacher." Appellees' App'x at 157. Fabacher is employed as a "director of information technology for Mel Harris." *Sykes II,* 285 F.R.D. at 284. His program "selects and organizes debts for the generation of a summons and complaint for each debt. These documents are signed by an attorney, and bundled together in batches of 50. Each batch is sent to a single process serving company." Appellees' App'x at 157. Further, the process serving company associated with each debt is saved by this computer program, so "the process serving company associated with any particular debt can be readily ascertained." Appellees' App'x at 157.

To effectuate this second step, Leucadia and Mel Harris defendants would hire a process server, often Samserv. *Sykes II,* 285 F.R.D. at 283. Plaintiffs allege that "Samserv routinely engaged in 'sewer service' whereby it would fail to serve the summons and complaint but still submit proof of service to the court." *Id.* This proof of service was first delivered to Mel Harris, which, "[a]fter process [wa]s allegedly served, ... receive[d] from the process serving company an electronic affidavit of service." Appellees' App'x at 157. After receiving this affidavit of service, the system designed by Fabacher "automatically organize[d] and print[ed] a motion for a default judgment [and] an affidavit of merit ... within approximately 35 days after the date of service of process." Appellees' App'x at 157–58.

Having generated these documents, at the third step, "[a]fter a debtor failed to appear in court for lack of notice of the action, the Leucadia and Mel Harris defendants would then apply for a default judgment by providing the court with ... an 'affidavit of merit' attesting to their *personal knowledge* regarding the defendant's debt and an affidavit of service as proof of service." *Sykes II,* 285 F.R.D. at 283 (emphasis added).

Before the district court at the class certification stage, there was substantial evidence of the scope and impacts of this alleged scheme. "Between 2006 and 2009, various Leucadia entities filed 124,838 cases," and Mel Harris represented Leucadia in 99.63 percent of those cases. *Id.* at 284. "The 'vast majority' of such cases were adjudicated without appearance by the defendant debtors, indicating the likelihood that a default judgment was entered." *Id.* Further, "[b]etween 2007 and 2010 various Leucadia entities obtained default judgments in 49,114 cases in New York City Civil Court." *Id.*

B. Affidavits of Service

The district court concluded that "[b]etween January 2007 and January 2011, Samserv defendants performed service of process in 94,123 cases filed by Mel Harris in New York City Civil Court, 59,959 of which were filed on behalf of Leucadia defendants." *Id.* In evaluating the evidence submitted by plaintiffs with respect to Samserv's practice of engaging in sewer service, the district court concluded that there was "substantial support for plaintiffs' assertion that defendants regularly engaged in sewer service." *Id.* This conclusion was based on the fact that "[r]ecords maintained by defendants reveal hundreds of instances of the same process server executing service at two or more locations at the same time," *id.,* as well as the fact that "[t]here were ... many other occasions where multiple services were ***77** purportedly made so close in time that it would have been impossible for the process server to travel from one location to the other as claimed." *Id.*

Plaintiffs point out that the record before the district court also included a number of other irregularities. For example, "in 2,915 instances, a process server claimed to have attempted or completed service *before* the date that the service was assigned to that process server—[a] physical impossibility." Appellees' App'x at 163. Additionally, process servers often reported 60 service attempts in a single day, Appellees' App'x at 183, and the six particular process servers who accounted for a majority of service performed by Samserv for Mel Harris "reported high volumes of service, including hundreds of days on which they claimed to have made more than 40 visits in a single day," Appellees' App'x at 165. However, an experienced process server attested to the fact that "based on [his] experience, ... it is unlikely that a process server could regularly make more than 25 service attempts at personal residences in one day." Appellees' App'x at 153. Finally, "[t]he six process servers also reported widely divergent rates of personal, substitute, and nail and mail service." Appellees' App'x at 165. There was no evidence in the record at class certification that would explain the divergent rates for the means of service. Plaintiffs finally point out that, despite the district court's order that Samserv defendants produce logbooks recording their service attempts by October 6, 2009, which could ostensibly confirm service, none have been turned over.

C. Affidavits of Merit

The district court provided a complete overview of the process for generating affidavits of merit, the facts of which

are not challenged on appeal. "The affidavits of merit submitted by the Mel Harris and Leucadia defendants ... follow a uniform format." *Sykes II,* 285 F.R.D. at 284. Fabacher "attests that he is 'an authorized and designated custodian of records' for" one of the Leucadia entities that owns the charged-off debt, in New York City Civil Court. *Id.* He affirms that because he " 'maintain[s] the ... records and accounts ... including records maintained by and obtained from [the collection entity's] assignor' ... he is 'thereby fully and personally familiar with, and [has] *personal knowledge* of, the facts and proceedings relating to the [debt collection action].' " *Id.* (first, second, fourth, and fifth alterations in original) (emphasis added).

The district court explained the crux of the issue as follows:

> Typically, Fabacher does not receive the original credit agreements between the account holders and the creditors. Instead, he receives a bill of sale for the portfolio of debts purchased that includes 'sample' credit agreements and 'warranties' made by the seller regarding the debts in the portfolio. In many instances, such agreements do not exist. If they do exist, Fabacher's 'standard practice' does not entail reviewing them before endorsing an affidavit of merit. He instead relies on the warranties made by the original creditor....
>
> Fabacher produces the affidavits of merit for signature in batches of up to 50 at a time. He 'quality check[s]' one affidavit in each batch and if it is accurate, he signs the remaining affidavits in the batch without reviewing them. The quality check consists of ensuring that information printed on the affidavit matches the information stored in the Debt Master database.

Id. at 285 (alteration in original). Reviewing these allegations at an earlier stage in the proceedings, the district court concluded ***78** that "[a]ssuming 260 business days a year, Fabacher had to have personally (and purportedly knowledgeably) issued an average of twenty affidavits of merit per hour, i.e., one every three minutes, over a continuous eight-hour day." *Sykes v. Mel Harris & Assocs., LLC,* 757 F.Supp.2d 413, 420 (S.D.N.Y.2010) ("*Sykes I* ").

Plaintiffs point out that the practice of Leucadia defendants in purchasing these charged-off debts, which involves acquiring only limited information with respect to the character of this debt, is not uncommon in the secondary consumer debt market. Typical information transmitted in the purchase of a consumer debt will include the consumer's name, address, and the amount owed. *See* Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry,* 34–35 (Jan.2013), *available at* http://www.ftc. gov/sites/default/files/documents/reports/structure-andpractices-debt-buying-industry/debtbuyingreport.pdf (last visited Feb. 6, 2015). It is extremely rare, however, that the purchaser of the debt will receive any underlying documentation on the debt. *Id.*

III. Proceedings Below

Monique Sykes commenced this action against "some of the Leucadia, Mel Harris, and Samserv defendants" on October 6, 2009, alleging FDCPA and GBL claims. *Sykes II,* 285 F.R.D. at 285. Rea Veerabadren joined the action on December 28, 2009, and "class allegations and RICO claims were added." *Id.* Kelvin Perez joined the suit on March 31, 2010, at the filing of a second amended complaint, which added the New York Judiciary Law claim against Mel Harris. *Id.*

Defendants moved to dismiss, and the district court denied the motion. In adjudicating the motion to dismiss, the district court reasoned, inter alia, that the FDCPA claims were not time-barred under the relevant one-year statute of limitations for Sykes and Perez on the grounds that those claims had been equitably tolled. *Sykes I,* 757 F.Supp.2d at 421–22. This was because, the district court found, "sewer service purposefully ensures that a party is never served, [therefore] it is plausible that defendants' acts were 'of such character as to conceal [themselves]' to warrant equitable tolling." *Id.* at 422 (second alteration in original) (quoting *Bailey v. Glover,* 88 U.S. (21 Wall.) 342, 349–50, 22 L.Ed. 636 (1874)).

For their part, Samserv defendants moved to dismiss the FDCPA claims on the grounds that they were not "debt collectors" for the purposes of the FDCPA. *Id.* at 423 (citing exemptions for process servers under 15 U.S.C. § 1692a(6)(D)). The district court disagreed, reasoning that the FDCPA "protects process servers only 'while' they serve process," and therefore "Samserv defendants' alleged failure to serve plaintiffs process and provision of perjured affidavits of service remove them from the exemption." *Id.*

Leucadia and Samserv defendants further argued that plaintiffs lacked standing to bring their claims under RICO. *Id.* at 427. This was because, according to defendants, plaintiffs could neither establish an injury to their property interest nor that "the RICO violations were [ ] the proximate cause of their injuries" *Id.* The district court disagreed, reasoning that "defendants' pursuit of default judgments and attempts to enforce them against plaintiffs proximately caused

their injuries, *see Baisch v. Gallina,* 346 F.3d at 366, 373–74 (2d Cir.2003), which include the freezing of personal bank accounts and incurring of legal costs to challenge those default judgments." *Id.* at 427–28.

Finally, Leucadia and Mel Harris defendants challenged the district court's subject ***79** matter jurisdiction under the *Rooker–Feldman* doctrine, "because plaintiffs are effectively appealing from a state-court judgment." *Id.* at 429. The district court rejected this argument as well. First, the district correctly noted that the doctrine would only apply if "a plaintiff invites a district court to review and reject an adverse state-court judgment." *Id.* (citing *Hoblock v. Albany Cnty. Bd. of Elections,* 422 F.3d 77, 85 (2d Cir.2005)). The district court then concluded that "plaintiffs assert claims independent of the state-court judgments and do not seek to overturn them." *Id.*

Following the district court's decision, plaintiffs moved for class certification, as well as for another opportunity to amend their complaint. *Sykes II,* 285 F.R.D. at 285. The third amended complaint (the operative complaint on appeal) added Clifton Armoogam as plaintiff and an additional Leucadia entity as defendant. *Id.* The district court granted the motion for class certification on September 4, 2012. *Id.* at 294. Leucadia and Mel Harris defendants obtained new counsel after this decision.

On March 28, 2013, the district court adopted plaintiffs' proposed class certification order. The two classes certified are as follows.

> Pursuant to Federal Rule of Civil Procedure 23(b)(2), a class is certified of all persons who have been or will be sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has been or will be sought. Plaintiffs in the Rule 23(b)(2) class assert claims under [RICO], [GBL] § 349, and New York Judiciary Law § 487.
>
> Pursuant to Rule 23(b)(3), a class is certified of all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has been obtained. Plaintiffs in the Rule 23(b)(3) class assert claims under RICO; the [FDCPA]; GBL § 349, and New York Judiciary Law § 487.

Special App'x at 46–47.

JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1367, and 15 U.S.C. § 1692k(d). After certification, each defendant timely petitioned for leave to appeal the grant of certification pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. Our court granted these petitions July 19, 2013. We have jurisdiction pursuant to 28 U.S.C. § 1292(e).

STANDARD OF REVIEW

[1] "We review a district court's decision to certify a class under Rule 23 for abuse of discretion, the legal conclusions that informed its decision *de novo,* and any findings of fact for clear error." *In re U.S. Foodservice Inc. Pricing Litig.,* 729 F.3d 108, 116 (2d Cir.2013) ("*In re U.S. Foodservice* ").

DISCUSSION

I. Legal Standards

A. Class Certification

[2] "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " *Wal–Mart Stores, Inc. v. Dukes,* ––– U.S. ––––, 131 S.Ct. 2541, 2550, 180 L.Ed.2d 374 (2011) (quoting *Califano v. Yamasaki,* 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). Two classes of plaintiffs were certified in this case, under both Rule 23(b)(2) and ***80** Rule 23(b)(3) of the Federal Rules of Civil Procedure. As such, plaintiffs must meet both the requirements for the particular relief, injunctive or monetary, sought under those two rules, as well as the threshold requirements for class certification under Rule 23(a).

1. Rule 23(a) Prerequisites

[3] Rule 23(a) of the Federal Rules of Civil Procedure provides that a class may be certified only if four prerequisites have been met: numerosity, commonality, typicality, and adequacy of representation. *See Dukes,* 131 S.Ct. at 2550; *accord In re Nassau Cnty. Strip Search Cases,* 461 F.3d 219, 225 (2d Cir.2006). Specifically, the Rule provides as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). These remaining requirements "do[ ] not set forth a mere pleading standard. A party seeking class certification must ... be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes,* 131 S.Ct. at 2551.

[4] The Supreme Court has recently clarified the commonality requirement under Rule 23(a). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law." *Id.* (internal quotation marks and citation omitted). Interpreting this requirement in the context of sexual discrimination claims in violation of Title VII of the Civil Rights Act, the Court instructed that such claims "must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve *an issue* that is central to the validity of each one of the claims in one stroke." *Id.* at 2551 (emphasis added). Furthermore, the Court noted that in certain "context [s] ... '[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.' " *Id.* at 2551 n. 5 (alteration in original) (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157–58, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

2. Rule 23(b)(2) Requirements for Injunctive Relief

Beyond these prerequisites, Rule 23(b) provides additional considerations for a district court to consider prior to the certification of a class. Under Rule 23(b)(2), a class action may only be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief ... is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). The Supreme Court has clarified that certification of a class for injunctive relief is only appropriate where "a single injunction ... would provide relief to each member of the class." *Dukes,* 131 S.Ct. at 2557.

***81 3. 23(b)(3) Requirements**

Rule 23(b)(3) imposes two additional burdens on plaintiffs attempting to proceed by class action, namely, predominance and superiority. Specifically, a class may be certified only if the district court determines as follows:

> [T]he questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3).

In assessing the justifications for the creation of Rule 23(b)(3) classes the Supreme Court has observed as follows:

> While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.... "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive

> for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir.1997).

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (some internal quotation marks and citations omitted).

[5] With respect to common issues, Rule 23(b)(3), by its plain terms, imposes a "far more demanding" inquiry into the common issues which serve as the basis for class certification. *Id.* at 623–24, 117 S.Ct. 2231. While the inquiry may be more demanding, the Supreme Court has also instructed that Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans and Trust Funds,* —— U.S. ——, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013) (internal quotation marks omitted) (alterations in original). Rather, all that is required is that a class plaintiff show that "common questions 'predominate.' " *Id.* (quoting Fed.R.Civ.P. 23(b)(3)). That is, "[i]ndividual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole." *Messner v. Northshore Uni. HealthSystem,* 669 F.3d 802, 815 (7th Cir.2012).

[6] **[7]** Furthermore, "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 139 (2d Cir.2001); *see also Leyva v. Medline Indus. Inc.,* 716 F.3d 510, 514 (9th Cir.2013) ("[T]he presence of individualized damages cannot, by itself, defeat class certification ***82** under Rule 23(b)(3)."). The Supreme Court has explicitly determined that it is "clear that individualized monetary claims belong in Rule 23(b)(3)." *Dukes,* 131 S.Ct. at 2558. For the purposes of class certification, however, plaintiffs cannot "identif[y] damages that are not the result of the wrong." *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 1434, 185 L.Ed.2d 515 (2013). That is, "the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva,* 716 F.3d at 514. Put another way,

> [t]he plaintiffs must ... show that they can prove, through common evidence, that all class members were ... injured by the alleged conspiracy.... That is not to say the plaintiffs must be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member. But we do expect the common evidence to show all class members suffered *some* injury.

In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C.Cir.2013) (internal citations omitted).

Finally, the disjunctive inquiry that district courts must engage in prior to class certification requires analysis of the predominance of common issues, as well as a determination that class certification is the superior method for adjudicating these claims. Fed.R.Civ.P. 23(b)(3). Rule 23(b)(3) also lists four factors—individual control of litigation, prior actions involving the parties, the desirability of the forum, and manageability—which courts should consider in making these determinations. Fed.R.Civ.P. 23(b)(3)(A)-(D). By the structure of the rule, these factors seem to apply both to the predominance and superiority inquiry. However, while these factors, structurally, apply to both predominance and superiority, they more clearly implicate the superiority inquiry. *See, e.g., Vega v. T–Mobile USA Inc.,* 564 F.3d 1256, 1278 (11th Cir.2009) ("In determining superiority, courts must consider the four factors of Rule 23(b)(3).").

While Rule 23(b)(3) sets out four individual factors for courts to consider, manageability "is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication." 2 William B. Rubenstein, Newberg on Class Actions § 4.72 (5th ed. West 2014). As a component of manageability, in determining whether a class action in a particular forum is a superior method of adjudication, courts have considered "when a particular forum is more geographically convenient for the parties ... or, for example, when the defendant is located in the forum state." *Id.* § 4.71.

B. Claims for Relief

1. FDCPA

Plaintiffs allege that Leucadia, Mel Harris, and Samserv defendants acted in violation of various provisions of the FDCPA. The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). The statute provides for civil liability for a wide range of

abusive actions, and plaintiffs focus their claims on violations of Section 1692e and Section 1692f of the statute.

Section 1692e prohibits "false or misleading representations," and provides as follows:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: ... (2) The false representation of —(A) the character, amount, or legal status of any debt ... (8) Communicating or threatening to communicate to ***83** any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.... (10) The use of any false representation or deceptive means to collect or attempt to collect any debt....

15 U.S.C. § 1692e(2), (8), (10). Section 1692f, for its part, prohibits a debt collector from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt." *Id.* § 1692f. The FDCPA limits actions to those brought "within one year from the date on which the violation occurs." *Id.* § 1692k(d).

Violations of these provisions expose a debt collector to civil liability. 15 U.S.C. § 1692k. The district court concluded, and defendants do not meaningfully challenge, that "[l]iability under the FDCPA can be established irrespective of whether the presumed debtor owes the debt in question." *Sykes II,* 285 F.R.D. at 292; *see also Baker v. G.C. Svcs. Corp.,* 677 F.2d 775, 777 (9th Cir.1982) ("The Act is designed to protect consumers who have been victimized by unscrupulous debt collectors, regardless of whether a valid debt actually exists."). In the case of a class action, named plaintiffs' damages are capped at $1,000. 15 U.S.C. § 1692k(a)(2)(A)-(B). Class damages are capped at $500,000 or 1 per centum of the net worth of the debt collector. *Id.* § 1692k(a)(2)(B). Prevailing plaintiffs are also entitled to costs and attorney's fees. *Id.* § 1692k(a)(3). The FDCPA instructs that, in the case of a class action, that damages should be assessed, inter alia, on the basis of "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional." *Id.* § 1692k(b)(2).

2. RICO

[8] To prevail on their civil RICO claims in this case, "plaintiffs must show (1) a substantive RICO violation under [18 U.S.C.] § 1962, (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation." *In re U.S. Foodservice,* 729 F.3d at 117. Plaintiffs allege Leucadia, Mel Harris, and Samserv defendants together formed a RICO enterprise for the purposes of 18 U.S.C. § 1961(4), which the district court found plausible at the motion to dismiss stage. *Sykes I,* 757 F.Supp.2d at 426. Plaintiffs further allege here that defendants, as part of this enterprise, engaged in acts of wire and mail fraud in violation of 18 U.S.C. §§ 1341, 1344, which can serve as predicate acts for a violation of 18 U.S.C. § 1962(c). The district court concluded that plaintiffs had plausibly alleged that "defendants' pursuit of default judgments and attempts to enforce them against plaintiffs proximately caused their injuries, which include the freezing of personal bank accounts and incurring of legal costs to challenge those default judgments." *Sykes I,* 757 F.Supp.2d at 427–28.

3. State Law Claims

[9] Plaintiffs finally bring two claims under state law. First, plaintiffs bring claims pursuant to New York's General Business Law, which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. L. § 349(a). "To maintain a cause of action under § 349, a plaintiff must show: (1) that the defendant's conduct is 'consumer oriented'; (2) that the defendants is engaged in a 'deceptive act or practice'; and (3) that the plaintiff was injured by this practice." *Wilson v. Nw. Mut. Ins. Co.,* 625 F.3d 54, 64 (2d Cir.2010) ***84** (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y.2d 20, 623 N.Y.S.2d 529, 532–33, 647 N.E.2d 741 (1995)). With respect to the first element, it "may be satisfied by showing that the conduct at issue 'potentially affect[s] similarly situated consumers.' " *Id.* (alteration in original) (quoting *Oswego Laborers' Local 214 Pension Fund,* 623 N.Y.S.2d at 533, 647 N.E.2d 741). The statute provides that an individual "may bring an action ... to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions." N.Y. Gen. Bus. L. § 349(h). The law also provides that a court may award

attorney's fees and also treble damages "up to one thousand dollars, if the court finds the defendant wilfully or knowingly violated this section." *Id.*

Second, plaintiffs bring a claim pursuant to the New York Judiciary Law against the Mel Harris defendants. New York law provides that "[a]n attorney ... who ... [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party ... [i]s guilty of a misdemeanor, and ... he forfeits to the party injured treble damages, to be recovered in a civil action." N.Y. Jud. L. § 487.

II. Application

A. The Proposed Classes Satisfy the Requirements of Commonality & Typicality Under 23(a)[2]

[10] **[11]** Rule 23(a)'s commonality prerequisite is satisfied if there is a common issue that "drive[s] the resolution of the litigation" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. Consideration of this requirement obligates a district court to determine whether plaintiffs have "suffered the same injury." *Id.* (internal quotation marks omitted). The district court concluded that plaintiffs had satisfied the commonality requirement of Rule 23(a). Specifically, the district court reasoned as follows:

> [Plaintiffs'] overarching claim is that defendants systematically filed false affidavits of merit and, in many instances, false affidavits of service to fraudulently procure default judgments in New York City Civil Court. Whether a false affidavit of merit or a false affidavit of service or both were employed in a particular instance, the fact remains that plaintiffs' injuries derive from defendants' alleged unitary course of conduct, that is, fraudulently procuring default judgments.

Sykes II, 285 F.R.D. at 290 (internal quotation marks and citation omitted). The district court thus determined that the common injury in this case, which was the same for all plaintiffs, is a fraudulently procured default judgment. We conclude that this commonality determination was not an abuse of discretion.

1. Affidavits of Merit

At the outset, Leucadia and Mel Harris defendants principally argue that, by characterizing ***85** the common issue in this litigation as one involving the false and fraudulent affidavits of merit, the district court impermissibly discounted the importance of the affidavits of service. Thus, Leucadia defendants suggest that "the district court, by elevating the importance of the affidavits of merit and minimizing the importance of the affidavits of service, impermissibly rewrote Plaintiffs' substantive claims." Mel Harris, likewise, suggest that "the District Court elevated the importance of the affidavits of merit only by impermissibly rewriting plaintiffs' substantive claims to fit the class-action procedure." We disagree. The operative complaint in this case makes clear that both sewer service and false affidavits of merit are necessary to effectuating defendants' alleged scheme. Thus, while the operative complaint alleges that sewer service is "the primary reason" few defendants appear in New York City Civil Court to defend against debt collection actions, plaintiffs have made clear that this is but one component of the overarching debt collection plan effectuated by defendants. Thus, plaintiffs allege that "in order to secure an otherwise legally unobtainable judgment on default, Defendants fraudulently swear to the courts that they have actually served their victims, when they have not, and that they have admissible proof that a debt is owed, when they do not." Joint App'x at 54. We see nothing impermissible in the district court determining that defendants' scheme, which had multiple components, was a "unitary course of conduct" that depended on false affidavits of merit for its success. *Marisol A. v. Giuliani,* 126 F.3d 372, 377 (2d Cir.1997).

Second, such a framework makes sense, as it is not disputed that these false affidavits of merit are necessary to the scheme to procure fraudulently obtained default judgments based on what is required in state court. The New York City Civil Court has jurisdiction over debt collection actions that seek to recover damages of $25,000 or less. N.Y.C. Civ.Ct. Act § 202. Section 3215 of the New York Civil Practice Law and Rules governs the procedures for obtaining a default judgment in these courts. Section 3215(a) permits plaintiffs seeking "a sum certain" to make an application "to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint...." N.Y. C.P.L.R. § 3215(a). Requisite proof, in turn, is defined in Section 3215(f) as "proof of service of the summons and the complaint ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." *Id.* § 3215(f). Thus, both affidavits of service, as well as affidavits of merit, are necessary to obtain default judgments, though neither, independently, is sufficient.

Plaintiffs' contention is that Fabacher's statement in each one of the affidavits of merit, that he is "personally familiar with, and [has] personal knowledge of, the facts and proceedings relating to" the default judgment action, *see, e.g.,* Appellees' App'x at 10, is false. The reason such statements are false is that Fabacher has not reviewed, nor do defendants actually possess, documents relevant to the underlying debt.

Resolving the question of whether this contention is false "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. With respect to the FDCPA, determining whether Fabacher's statement is indeed false resolves the central basis for FDCPA liability in this case, namely, the prohibition on making "any false, deceptive, or misleading representation ... in connection with the collection of any debt." 15 U.S.C. § 1692e. Similarly, ***86** the prohibition on "deceptive acts or practices," N.Y. Gen. Bus. L. § 349(a), and the prohibition on attorney's engaging in "deceit," N.Y. Jud. L. § 487, can fairly be said to turn on the falsity of Fabacher's representation of personal knowledge. Both wire and mail fraud, the predicate acts underlying plaintiffs' theory of RICO liability, may be established "by means of false or fraudulent ... representations." 18 U.S.C. § 1341 (mail fraud); *id.* § 1343 (wire fraud). False affidavits of merit thus provide independent bases for liability for each of the claims advanced by plaintiffs. While the resolution of this question will not address each element of each of these claims, that is not required for there to be a common question under Rule 23. *See Amgen,* 133 S.Ct. at 1196. The district court did not abuse its discretion by finding that a fraudulently obtained state court judgment that depended on the filing of a false affidavit of merit could serve as a common issue satisfying Rule 23(a).

2. Affidavits of Service

[12] Moreover, even assuming that the district court was required to determine that the false affidavits of service were susceptible to class-wide proof, we would still conclude that the district court did not abuse its discretion in finding that the requirements of Rule 23(a) were satisfied. The district court found, on the basis of the evidence before it, that there was "substantial support for plaintiffs' assertion that defendants regularly engaged in sewer service." *Sykes II,* 285 F.R.D. at 284. Further, determining whether to certify a class may require a court "to consider how a trial on the merits would be conducted if a class were certified." *Bell Atl. Corp. v. AT & T Corp.,* 339 F.3d 294, 302 (5th Cir.2003) (internal quotation marks omitted) (discussing predominance requirement under Rule 23(b)(3)).

Plaintiffs articulate two distinct reasons why they will be able to bring forward at trial competent evidence which will prove the fraudulent nature of the affidavits of service. First, they suggest that the affidavits of service will not be entitled to credibility, given the district court's finding that "defendants regularly engaged in sewer service." *Sykes II,* 285 F.R.D. at 284. Absent the affidavits of service, the only other means that Samserv defendants would have at their disposal to prove service would be contemporaneous logbooks, which process servers are required to keep by law. N.Y. Gen. Bus. L. § 89cc. Absent these logbooks, the testimony of process servers cannot be credited. *First Commercial Bank of Memphis v. Ndiaye,* 189 Misc.2d 523, 733 N.Y.S.2d 562, 565 (N.Y.Sup.Ct.2001) ("Testimony of a process server who fails to keep records in accordance with statutory requirements cannot be credited.").

Second, plaintiffs aver that, because Samserv defendants have been ordered to turn over their logbooks to plaintiffs, but have not, they will be able to prove fraud by spoliation. Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure permits, in the case of a failure to comply with a discovery order, the district court to, inter alia, "direct[ ] that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims." Fed.R.Civ.P. 37(b)(2)(A)(i). Proof of fraudulent service might thus be achieved on a class-wide level. Defendants misread the requirements of Rule 23(a) when they suggest that these theories of class-wide proof fail to "affirmatively demonstrate [plaintiffs'] compliance with" Rule 23(a). *Dukes,* 131 S.Ct. at 2551. All that must be proven, at this stage, is that "there are *in fact* sufficiently ... common questions of law or fact." *Id.* Anticipating proof of failures of service in the manner suggested ***87** by plaintiffs is in keeping with demonstrating a common question of fact based on the district court's obligation to anticipate "how a trial on the merits would be conducted if a class were certified." *Bell Atl. Corp.,* 339 F.3d at 302 (internal quotation marks omitted).

In sum, the district court did not abuse its discretion in determining that plaintiffs had demonstrated sufficiently common questions of law or fact to satisfy the prerequisites of Rule 23(a).

B. The District Court did Not Abuse its Discretion in Certifying the 23(b)(3) Class

[13] While Rule 23(b)(3) also speaks in terms of commonality, it imposes a "far more demanding" inquiry. *Amchem,* 521 U.S. at 623–24, 117 S.Ct. 2231. By its terms, it anticipates the existence of individual issues: the class may only be certified if "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). The mere existence of individual issues will not be sufficient to defeat certification. Rather, the balance must tip such that these individual issues predominate. But the district court must establish that a class action is superior to "other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). We conclude that the district court did not abuse its discretion in finding these requirements met, and thus certifying this class under Rule 23(b)(3).

1. Common Questions of Law and Fact Predominate

Defendants submit that individual issues will predominate over common issues in this case because the district court will be forced to confront individual issues with respect to damages, timeliness, and service. We conclude that the district court did not abuse its discretion in finding that these issues, even if they are individualized in certain respects, do not predominate over class issues.

a. Damages

In making its decision on the propriety of class certification, the district court reasoned as follows:

> Every potential class member's claim arises out of defendants' uniform, widespread practice of filing automatically-generated, form affidavits of merit based on 'personal knowledge' and, in many instances, affidavits of service, to obtain default judgments against debtors in state court. Whether this practice violates the FDCPA, New York GBL § 349, New York Judiciary Law § 487, and/or constitutes a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) and (d) does not depend on individualized considerations.... The Court recognizes that should defendants be found liable on some or all of these claims, individual issues may exist as to causation and damages as well as to whether a class member's claim accrued within the applicable statute of limitations. This, however, does not preclude a finding of predominance under Rule 23(b)(3).

Sykes II, 285 F.R.D. at 293.

Plaintiffs' operative complaint seeks three kinds of damages: statutory damages; "actual and/or compensatory damages ... in an amount to be proven at trial"; and what plaintiffs refer to as "incidental damages." Joint App'x at 219–20. It is not disputed that statutory damages under GBL § 349 can be assessed on the basis of common proof, as they are capped at $50. N.Y. Gen. Bus. L. § 349(h). Furthermore, Congress has devised a generally applicable formula for class action damages ***88** under the FDCPA, one which caps damages at $500,000 and provides that district courts consider, among other factors, the scope of the violations of the FDCPA as well as the number of individuals implicated by fraudulent debt collection practices. 15 U.S.C. § 1692k(b)(2).

The only individualized damages inquiries that "may exist," *Sykes II,* 285 F.R.D. at 293, are those that turn, in plaintiffs' words, on "the return of the money extracted from them as a result of ... fraudulent judgments," as well as incidental damages. We conclude that inquiries into these damages are not sufficient grounds on which to conclude that the district court's determination that individualized damages issues will not predominate in this case was an abuse of discretion. In the first place, plaintiffs point out that the amount of any money extracted from plaintiffs is stored by defendants themselves. Because the evidence necessary to make out such damages claims, while individual, is easily accessible, such individual damage considerations do not threaten to overwhelm the litigation. *See Leyva,* 716 F.3d at 514.

Second, defendants misstate the central holding of *Comcast* in an attempt to advance the argument that individual damages issues predominate in this case. It is true that the Court, in *Comcast,* reversed a grant of class certification on the grounds that individual damages issues precluded certification. But these damages claims were individual because, based on undisputed evidence, the plaintiffs' "model f[e]ll[ ] ... short of establishing that damages [were] capable of measurement on a classwide basis." 133 S.Ct. at 1433. This was only so, however, because the sole theory of liability that the district court determined was common in that antitrust action, overbuilder competition, was a theory of liability that the plaintiffs' model indisputably "failed to measure" when determining the damages for that injury. *Id.* This

is not the case here. The common theory of liability that plaintiffs advance is dependent on a fraudulent course of conduct that was allegedly engaged in by defendants, in violation of multiple federal and state statutes. That liability model is uniquely tied to the damages, which plaintiffs claim they are entitled to with respect to each claim that they advance, whether under the FDCPA, RICO, or state statutes. *Comcast* did not rewrite the standards governing individualized damage considerations: it is still "clear that individualized monetary claims belong in Rule 23(b)(3)." *Dukes,* 131 S.Ct. at 2558. All that is required at class certification is that "the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva,* 716 F.3d at 514. Plaintiffs in *Comcast,* admittedly, could not do so. Plaintiffs here have satisfied that standard.

[14] Third, defendants suggest that the district court did not engage in the "rigorous analysis" required at the class certification stage. In doing so, they emphasize that the district court's statement that individualized questions "do[ ] not preclude a finding of predominance under Rule 23(b)(3)" was not sufficient to make out the opposite conclusion, namely, that common questions did predominate. *Sykes II,* 285 F.R.D. at 293. Defendants' quest for magic words overlooks the vast number of common issues that the district court identified as necessary to resolve this litigation. It is true that the law of this Circuit is that the fact that "damages may have to be ascertained on an individual basis ... is ... a factor that we must consider in deciding whether issues susceptible to generalized proof 'outweigh' individual issues." *McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 231 (2d Cir.2008), *abrogated on other* ***89** *grounds by Bridge v. Phx. Bond & Indem. Co.,* 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008), *as recognized by In re U.S. Foodservice,* 729 F.3d at 119. However, from the above it is clear that individual damages did factor into the district court's analysis. The district court simply found that these individual considerations did not outweigh other issues which were common, such as the following:

> (1) whether defendants' practice of filing affidavits of merit and/or affidavits of service with respect to the plaintiff class members violates the FDCPA; (2) whether defendants collectively constitute a RICO enterprise within the meaning of 18 U.S.C. § 1961(4); (3) whether defendants have engaged in a pattern of racketeering activity in connection with the collection of debt in violation of 18 U.S.C. § 1962(c) and (d); (4) whether defendants have used deceptive acts and practices in the conduct of their businesses in violation of New York GBL § 349; and (5) whether the Mel Harris defendants have engaged in deceit and collusion with intent to deceive the courts and any party therein in violation of New York Judiciary Law § 487.

Sykes II, 285 F.R.D. at 293. Defendants concede that each of these questions is one that is common to the members of the class certified under Rule 23(b)(3). They merely quibble with the district court's assessment that, on balance, these ultimate issues of liability outweigh the individualized concerns that they raise. On reviewing the district court's certification order, this is not a sufficient contention on which we may rely to conclude that the district court abused its discretion in certifying this class.

b. Timeliness

The district court acknowledged, as well, that individualized issues of timeliness may inhere in the class "should defendants be found liable on some or all of these claims." *Id.* at 293. Defendants argue, again, that the district court was wrong to find that the presence of such individual issues did not indicate that individual issues would predominate. Plaintiffs respond that they do not invoke equitable tolling. Plaintiffs are correct: in support of their motion for class certification before the district court, plaintiffs averred that they "do not seek to include as class members persons whose claims accrued outside the statute of limitations for each substantive claim.... Indeed, only individuals whose claims accrued within one year prior to the filing of the Complaint will seek relief on the FDCPA claim." *Sykes v. Mel Harris & Assocs.,* No. 09–cv–8486 (DC), ECF No. 99, at 27.

Defendants point out that the district court had earlier relied on equitable tolling in order to determine that the claims of Sykes and Perez were timely under the FDCPA. They do not claim that plaintiffs are estopped from arguing that equitable tolling does not apply based on the district court's determination that Sykes and Perez could bring actions under the FDCPA on the basis of equitable tolling. *Sykes I,* 757 F.Supp.2d at 413. Rather, the only argument with any impact advanced by any of the defendants with respect to this matter is one made by Mel Harris defendants, who argue that disclaiming equitable tolling "simply trades (without eliminating) a serious Rule 23(b)(3) predominance problem for a Rule 23(a) adequacy problem: Class counsel's decision to abandon equitable tolling may render the remaining claims a marginally better 'fit' for class treatment. But that comes at

the expense of class members they represent who have claims that are timely only because of equitable tolling....”

***90** **[15]** We see no merit in this contention. Under Rule 23(a)(4) of the Federal Rules of Civil Procedure, adequacy is satisfied unless “plaintiff's interests are antagonistic to the interest of other members of the class.” *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 60 (2d Cir.2000). The fact that some class members may advance RICO, GBL, and Judiciary Law claims on the basis of the date that the complaint was filed (as they have longer statutes of limitations, *see Gaidon v. Guardian Life Ins. Co. of America,* 96 N.Y.2d 201, 727 N.Y.S.2d 30, 34, 750 N.E.2d 1078 (2001) (three years for GBL claims), *Lefkowitz v. Appelbaum,* 258 A.D.2d 563, 685 N.Y.S.2d 460, 461 (2d Dep't 1999) (three years for New York Judiciary Law); *Agency Holding Corp. v. Malley–Duff & Assocs.,* 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (four years for RICO)) does not mean the interests of these class members are antagonistic to those other members of the class that also advance FDCPA claims.

While it may be true that disclaiming equitable tolling for Sykes and Perez may necessitate the district court to limit the sorts of claims that these named plaintiffs may bring, that is a determination for the district court to make in the first instance. It is certainly not a justification for reversing the district court's grant of class certification: at the most, if Sykes's and Perez's FDCPA claims are time-barred, this only means that they cannot assert claims under the FDCPA. The practical import of such a rule is that Sykes and Perez may be members of a subclass, advancing only a portion of the claims certified under Rule 23(b)(3). Such subclasses are contemplated by the Federal Rules, *see* Fed.R.Civ.P. 23(c)(5), and may be certified after the original certification order is upheld. *See Marisol,* 126 F.3d at 378 (holding that the district court did not abuse its discretion in certifying the class but suggesting that prior to trial the district court “ensure that appropriate subclasses are identified”).

It is within plaintiffs' prerogative to disclaim equitable tolling, and they may do so without sacrificing the adequacy of representation, especially as defendants make no actual attempt to show why such a disclaimer may be antagonistic. It is for the district court to determine the impact of this disclaimer on the specific claims particular plaintiffs may bring, but it may do that at a future date, without our disturbing the class certification order.[3]

c. Causation

The district court also determined that individual causation issues may exist in this case, *Sykes II,* 285 F.R.D. at 293, but nevertheless found that such causation issues would not predominate. We agree.

Individual issues related to causation in this case are formulated by defendants on appeal as individual issues related to service. Thus, for example, Mel Harris advance the argument that “a class member who was properly served and paid debts that he actually owed has sustained a radically ***91** different ‘injury’ from an unserved member subject to a default judgment for a debt he did not owe.” Likewise, Leucadia defendants submit that “where the entry of judgment resulted from a debtor's failure to appear despite adequate notice, the debtor must articulate a different theory of injury.” None of these contentions are availing.

First, with respect to the FDCPA claims, the district court concluded that the existence of an underlying debt was unnecessary in order to establish liability under that statute. *Sykes II,* 285 F.R.D. at 292. Affidavits of merit, submitted to the Civil Court, were allegedly fraudulent in attesting to “personal knowledge” of the existence of such underlying debt, and were also necessary to obtaining the default judgments that plaintiffs allege were fraudulently obtained. We fail to recognize any individualized causation issues with respect to plaintiffs' claims under the FDCPA. *See Baker,* 677 F.2d at 777 (actual debt is not necessary to bring claims under the FDCPA).

Second, where causation does seem most relevant to us, and where we presume the district court recognized such individualized causation issues, was with respect to plaintiffs' claims under RICO. This is because RICO requires that the alleged injury to plaintiffs' “business or property ... was by reason of the substantive RICO violation.” *In re U.S. Foodservice,* 729 F.3d at 117. This causation analysis will require the district court to identify (1) the property interest that is protected by RICO, as alleged by plaintiffs, and (2) whether the injury to that interest was caused by the RICO violation. The district court at least found that the injuries to plaintiffs included “freezing of personal bank accounts and incurring of legal costs to challenge those default judgments.” *See Sykes I,* 757 F.Supp.2d at 427–28. Defendants do not challenge that this is a sufficient property interest on appeal. Nor do they bring forward any evidence that the damage

to these property interests was not the result of default judgments. What they do argue, however, is that if a debt was actually owed, and a default judgment was achieved by means of proper service, a plaintiff cannot actually be an injured party under RICO to the extent that defendants extracted money based on a default judgment. The argument has force. But it remains a single arguably individual issue among the myriad common issues that we have already noted. We will not upset the district court's determination that plaintiffs have carried their burden to show that common issues predominate on the basis of defendants' construction of this hypothetical class plaintiff alleging one particular claim.

Third, none of the potential causation issues related to service suggest that Samserv is not a proper class defendant in this case. It is true that Samserv was kept in this litigation with respect to the FDCPA claims on the basis that it could not claim the benefits of the FDCPA's exemption for process servers on the grounds that the district court concluded, at the motion to dismiss stage, that plaintiffs adequately alleged that Samserv engaged in sewer service. *Sykes I,* 757 F.Supp.2d at 423. This does nothing to absolve Samserv of claims under RICO, however, which premises Samserv's liability on its participation in a RICO conspiracy. *See Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 495–97, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). Nor, based on our conclusions regarding the amenability of class claims regarding common proof of the falsity of Samserv's affidavits of service, *supra* at pp. 86–87, does it mean that Samserv is not a proper defendant with respect to plaintiffs' FDCPA claims.

***92** In short, the district court properly considered the evidence before it. It concluded that, while individual issues existed in this case, they did not predominate over common issues. Defendants wish the district court had performed this balancing equation differently. But that is not sufficient for us to find that the district court abused its discretion in certifying this class under Rule 23(b)(3).

2. Proceeding by Class is a Superior Method of Adjudication

a. Defendants' Theory of Superiority is Unpersuasive

[16] Mel Harris defendants raise, for the first time on appeal, the novel theory that the district court's superiority analysis was incorrect because it undervalued the obligation to consider the "desirability ... of concentrating the litigation of the claims in the particular forum." Fed.R.Civ.P. 23(b)(3)(C). In particular, Mel Harris suggest that "[i]f the gravamen of this case ... really were the adequacy of the affidavits of merits filed with the New York City Civil Court, surely *that* court is the superior forum to hear the complaint and devise any remedies."[4]

This is a fine rhetorical point that depends for its strength on a complete misreading of (1) the jurisdiction of the New York City Civil Court, (2) the requirements of Rule 23(b)(3), and (3) the gravamen of plaintiffs' complaint.

In the first place, there is no basis to assert that plaintiffs' claims even could be heard as a class in the New York City Civil Court. These courts have jurisdiction only over those actions in which the value of the controversy is $25,000 or less. N.Y.C. Civ.Ct. Act § 202. While individual plaintiffs might seek to bring their actions in such a court based on this amount-in-controversy limitation, there is no basis to conclude that plaintiffs could proceed as a class there. The argument amounts to little more than Mel Harris's expression of a preference that their alleged widespread fraudulent behavior be dealt with in a piecemeal fashion. That is not how plaintiffs have chosen to proceed. The fact that Mel Harris would have preferred plaintiffs to have advanced their claims differently cannot make it a requirement under Rule 23(b)(3).

Second, the forum analysis of Rule 23(b)(3) is not grounded in a consideration of the comparative value of pursuing a claim in federal or state court. Defendants' authorities on this issue, which are apparently the only authorities that have ever conducted a superiority analysis by reference to the availability of relief in a federal or state forum, have not considered claims analogous to those brought by ***93** plaintiffs here. *Kamm v. Cal. City Dev. Corp.,* 509 F.2d 205 (9th Cir.1975) dealt with a case in which putative class plaintiffs had already been represented by the State Attorney General in a prior action with putative class defendants. *Id.* at 207–08. The same was true of two other cases defendants rely on for the proposition that analysis of state court action is required to determine whether a federal forum is superior. *Cartwright v. Viking Indus., Inc.,* 2009 WL 2982887, at *14 (E.D.Cal. Sept. 14, 2009) (referencing ongoing state litigation); *Plant v. Merrifield Town Ctr., Ltd. P'ship,* 2008 WL 4951352, at *3 (E.D.Va. Nov. 12, 2008) (same). While there has been state court litigation in this case, it is not state court litigation which advances the claims that plaintiffs advance now. Further, we will not credit the statement of the United States District Court of the Eastern District of

Louisiana, that "strains on the state judicial system after Hurricane Katrina" supported a federal forum for particular plaintiffs' claims, as support for Mel Harris's contention that analysis of the superiority requires a consideration of the comparative merits of a state or federal court. *Turner v. Murphy Oil USA, Inc.,* 234 F.R.D. 597, 610 (E.D.La.2006). The *Turner* court purported to consider the value of state versus federal court writ large, but did so only in the context of resource strains on state court, which have not been alleged here. And this observation was far from necessary to the holding, given that the district court prefaced this observation by recognizing the value of certifying a class in order to "centralize these proceedings." *Id.* Defendants here seek the opposite of centralization: rather, they seek the fragmentation of each of plaintiffs' claims into, perhaps, hundreds of thousands of actions. The overwhelming weight of authority suggests that the forum requirement is one that centers on geography, rather than a comparative analysis of the benefits available under either federal or state law. Rubenstein, *supra,* § 4.71. Mel Harris's authorities have not convinced us otherwise.

Third, Mel Harris's argument depends on a misreading of the gravamen of plaintiffs' allegations. It is ultimately not the procedures of New York City Civil Court, or the ultimate default judgments, that are at issue in this case. It is, rather, the fraudulent means that defendants employed in order to obtain those judgments. These means are the basis of claims that sound both in federal and in state law. To the extent that the district court had jurisdiction to entertain these claims, we see no basis for rewriting Rule 23(b)(3)(C) to impose a limit on the district court's power.

Even if we were to credit Mel Harris's argument that forum analysis requires us to consider state fora as opposed to federal fora, we would not conclude that the district court abused its discretion in concluding that proceeding by class is superior to alternatives for adjudicating these claims. Fed.R.Civ.P. 23(b)(3). Defendants engage in no other consideration of the 23(b)(3) factors. They do not even engage with the district court's conclusions that a class action "is, without question, more efficient than requiring thousands of debtors to sue individually." *Sykes II,* 285 F.R.D. at 294. Echoing the Supreme Court's concerns in *Amchem,* 521 U.S. at 617, 117 S.Ct. 2231, the district court concluded that "class members' interest[ ] in litigating separate actions is likely minimal given their potentially limited means with which to do so and the prospect of relatively small recovery." *Sykes II,* 285 F.R.D. at 294 (citing Fed.R.Civ.P. 23(b)(3)(A)).

Nor are we convinced that proceeding in state court is, as the dissent suggests, "superior in every way" to class action. *See infra* Op. pp. 98, 101–02. New York law provides for the en masse vacatur of ***94** default judgments obtained through fraud or other illegal means upon the application of an administrative judge, who "*may* bring a proceeding to relieve a party or parties" from such judgments. N.Y. C.P.L.R. § 5015(c) (emphasis added). Having initiated this proceeding, the administrative judge, rather than the judgment defaulter, acts as the petitioner before a different judge who is to decide the application. *See,* N.Y. C.P.L.R. § 5015 (McKinney), Practice Commentaries, C5015:13; *see also, Mead v. First Trust & Deposit Co.,* 90 Misc.2d 930, 397 N.Y.S.2d 295, 297 (N.Y.Sup.Ct.1977) (acknowledging denial of amicus curiae status to legal services corporation that requested proceedings under forerunner provision to § 5015(c) because it "was interested in the outcome of the proceeding"). Notwithstanding its remedial purposes, this discretionary procedure (1) provides plaintiffs no right of action, (2) cannot address the gravamen of the plaintiffs' allegations here as it could only vacate the default judgments against them, and (3) denies plaintiffs any control over the course of the litigation. The dissent's distaste for "hungry lawyers," and aversion to awarding attorneys' fees in class actions, *see infra* Op. pp. 101-02, 103, cannot justify requiring plaintiffs, under the guise of Rule 23(b)(3)'s superiority analysis, to pass through the threshold of the state courthouse to seek relief that cannot seriously be entertained as an adequate, let alone superior, substitute for proceeding by class on these claims.

b. Defendants' *Rooker–Feldman* and Full Faith & Credit Arguments are Unavailing at the Class Certification Stage

Just how far Mel Harris's superiority arguments fall from the mark of requiring reversal of the district court's class certification order under Rule 23(b)(3)(C) becomes even clearer when considered in light of the two doctrinal bases on which defendants argue that class certification was inappropriate in light of federalism concerns, namely, the *Rooker–Feldman* doctrine and the Full Faith and Credit Act. We take these arguments in order.

[17] *Rooker–Feldman* bars the federal courts from exercising jurisdiction over claims "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of

those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). We have clarified that in order to satisfy the requirements of *Rooker–Feldman*, the defendant must satisfy the following four requirements:

> First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by a state-court judgment. Third, the plaintiff must invite district court review and rejection of that judgment. Fourth, the state-court judgment must have been rendered before the district court proceedings commenced.

Hoblock, 422 F.3d at 85 (internal quotation marks and modifications omitted). The causation requirement is only satisfied if "the third party's actions are produced by a state court judgment and not simply ratified, acquiesced in, or left unpunished by it." *Id.* at 88.

[18] The district court concluded, at the motion to dismiss stage, that "plaintiffs assert claims independent of the state-court judgments and do not seek to overturn them." *Sykes I,* 757 F.Supp.2d at 429. We agree. As explained previously, claims sounding under the FDCPA, RICO, and state law speak not to the propriety of the state court judgments, but to the ***95** fraudulent course of conduct that defendants pursued in obtaining such judgments.

Leucadia defendants, for their part, offer the more subtle argument that the causation components of *Rooker–Feldman* required the district court to exclude from its class certification order "remittance" damages, by which Leucadia means the compensatory damages that plaintiffs claim defendants have extracted as a result of the entry of a default judgment. We disagree.

The crux of the issue, as identified by Leucadia, is not simply *Rooker–Feldman*, but rather the requirement that the district court's certification order "define the class and the class claims, issues, or defenses, and must appoint class counsel." Fed.R.Civ.P. 23(c)(1)(B). Leucadia's argument is that the certification order under Rule 23(b)(3), which identifies all of the above but does not exclude the certain category of damages that Leucadia believes is not cognizable under *Rooker–Feldman*, finds no basis in the text of Rule 23, nor in the class certification decisions that we have identified.

Even if we credited Leucadia's contention that the state court judgment satisfied the causal requirements of *Rooker–Feldman*, rather than acting as ratification of a harm that resulted from fraudulent conduct on behalf of defendants, *Hoblock,* 422 F.3d at 85, the contention would have no merit. There is no textual basis to endorse Leucadia's view that certain categories of damages must be carved out of a class certification order under Rule 23(c)(1)(B). The requirements are that the class, the class claims, and issues, be identified. Fed.R.Civ.P. 23(c)(1)(B). The district court's class certification order did just that: it identified a class of individuals that it defined as "all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants." Special App'x at 47. It further identified the claims as those arising under RICO, the FDCPA, GBL § 349, and New York Judiciary Law § 487. Special App'x at 47.

There are good reasons for these limited requirements. The district court's order is not a final statement of the merits, just as class certification is not an opportunity to "engage in free-ranging merits inquiries." *Amgen,* 133 S.Ct. at 1194–95. We see no use in a class certification order that is required to list all possible defenses to all possible damage claims, nor do we see, in the text of Rule 23, any requirement for it.

[19] Nor, in our view, do defendants' arguments sounding under the Full Faith and Credit Act fare much better. The act requires that state court proceedings must be afforded "the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. § 1738. Defendants urge that such doctrine bars us from considering plaintiffs' damages claims seeking the return of default judgments, because state courts treated judgments entitling them to recovery as valid. We decline to consider this argument, however, for the same reasons that the district court declined to carve out specific damages that might be available to the class based on its certification order: such a determination is simply not required under Rule 23(c)(1)(B).[5]

***96** A word may be in order, however, to illustrate how far afield defendants' arguments sounding in federalism require us to go from the ultimate merits of plaintiffs' claims. The parties remonstrate over whether or not Fabacher's declaration as to "personal knowledge" was in fact required to make out an application for a default judgment in New York Civil Court. Thus, Mel Harris in particular have asked us to consider a Directive of the New York Civil Court, issued in 2009. This directive imposes burdens on third-party creditors seeking default judgments in addition to those imposed under Section 3215 of the CPLR. N.Y.C. Civ.Ct. Directive DRP–182 (May 2009). This Directive requires, in particular, that a third-party debt collector include "[a]n Affidavit of a Witness

of the Plaintiff, which includes a chain of title of the accounts, completed by the plaintiff/plaintiff's witness." *Id.* This form affidavit only requires the witness to attest to the chain of title "to the best of [his or her] knowledge." *Id.* Plaintiffs, for their part, point to a checklist prepared by the New York City Civil Court, which directs parties pursuing a default judgment to submit "an Affidavit of Facts from a person with personal knowledge of the facts." New York City Civil Court, *Entering Civil Judgments,* http://www.courts.state.ny.us/COURTS/nyc/civil/judgments_atty.shtml #checklist (last visited Feb. 6, 2015).

Whether or not Fabacher was required to attest to personal knowledge of the underlying debt in his affidavit of merit, as plaintiffs contend, or whether a more lax standard governs his affidavits, as Mel Harris contend, is ultimately irrelevant to adjudicating liability under any of the claims that plaintiffs have brought. What matters is that, in hundreds of thousands of forms, he did attest to this knowledge, despite the undisputed fact, at the class certification stage, that he did not in fact actually review underlying documentation related to these loans. Whatever was required in New York City Civil Court will not decide the issue of liability for these defendants. The conduct of defendants, and the question of whether this conduct was ultimately fraudulent, will decide their liability. The federal system, with its guarantees of concurrent jurisdiction, and the federal laws under which plaintiffs seek relief, permit as much.

3. We Decline to Decide, in the First Instance, Whether the FDCPA Permits Claims for the False Statements Alleged Here

Defendants raise a final issue related to the propriety of class certification, namely, the question of whether or not the FDCPA permits a plaintiff to assert claims for a false statement that was made to a party other than the debtor.

[20] We must determine the propriety of making a decision on this issue at this stage in the proceedings. Plaintiffs point out that we are not to "engage in free-ranging merits inquiries at the certification stage." *Amgen,* 133 S.Ct. at 1194–95. And it is undisputed that the question of whether false statements, such as those made by Fabacher in his affidavits of merit, made to third parties are actionable under the FDCPA is a question common to the class under both Rule 23(a) and 23(b)(3): resolving that such statements are not actionable would "resolve an issue that is central to the validity" of the FDCPA claim "in one stroke." *Dukes,* 131 S.Ct. at 2551. Indeed, the district court's class certification decision stated that "there is a question of law as to whether ***97** making false representations in court, rather than to a debtor, violates the FDCPA," *Sykes II,* 285 F.R.D. at 290, but ultimately did not pass on the issue. We think this the proper determination, as it is unlikely that the Federal Rules, which require a plaintiff to identify a common question at the class certification stage, also require the district court to resolve that question at the same stage in the litigation. The district court did not commit error in declining to rule definitively on whether the FDCPA covers the false statements at issue in this case.

We decline to address this question, in the first instance,[6] on appeal. *See Dardana Ltd. v. Yuganskneftegaz,* 317 F.3d 202, 208 (2d Cir.2003) ("It is this Court's usual practice to allow the district court to address arguments in the first instance."). We leave it to the district court to decide this issue at a later stage of the litigation.

C. The District Court Did Not Abuse its Discretion in Certifying the Rule 23(b)(2) Class

1. Proposed Injunctive Relief Benefits All Class Members

[21] Injunctive relief is appropriate if "the party opposing the class has acted or refused to act on grounds that apply generally to the class." Fed.R.Civ.P. 23(b)(2). The district court concluded that such relief was appropriate because of "defendants' uniform filing of false affidavits in state court to fraudulently procure default judgments against putative class members." *Sykes II,* 285 F.R.D. at 293. This injunction, as currently sought by plaintiffs, includes four elements: first, a direction that defendants "cease engaging in debt collection practices that violate the FDCPA, RICO, N.Y. GBL § 349, and N.Y. Jud. Law § 487;" second, a direction that defendants locate and notify class members that a default judgment has been entered against them and that "they have the right to file a motion with the court to re-open their case;" third, a direction that defendants "serve process in compliance with the law in any and all future actions;" and fourth, a direction that defendants' affidavits of merit in future actions reflect their personal knowledge of the facts. Joint App'x at 219.

The Supreme Court has clarified that certification of a class for injunctive relief is only appropriate where "a single injunction ... would provide relief to each member of the class." *Dukes,* 131 S.Ct. at 2557; *Amara v. CIGNA Corp.,* 775

F.3d 510, 522 (2d Cir.2014) (noting that the Supreme Court in *Dukes* "simply emphasized that in a class action certified under Rule 23(b)(2), 'each individual class member' is not 'entitled to a *different* injunction' " (emphasis in original) (quoting *Dukes,* 131 S.Ct. at 2557)). Mel Harris submit that this proposed injunctive relief does not satisfy this standard, because individualized issues of service differentiate class members from one another, and the named plaintiffs will not benefit because they "have already had their default judgments vacated."

This claim is without merit. "[R]elief to each member of the class," does not require that the relief to each member of the class be identical, only that it be beneficial. *Dukes,* 131 S.Ct. at 2557–58. And while Mel Harris attempt to refocus the proposed injunctive relief on the affidavits of service, it is clear that the proposed injunctive relief sweeps broadly enough to benefit each class member. There is no support for the contention, for example, that because certain class members received ***98** service, they will not be provided relief by the notification proposed by the injunction as well. *See Amara,* 775 F.3d at 522 (finding decertification of Rule 23(b)(2) class not required where certain class members, who might not benefit from injunction's reformation of retirement plan, received "some benefit in the form of new notice" of changes to the plan). Furthermore, while named plaintiffs have had their default judgments vacated, they might each still be subject to a further action by these same defendants. The district court did not abuse its discretion in concluding that plaintiffs had satisfied the requirements of Rule 23(b)(2).

2. We Decline to Decide, in the First Instance, Whether RICO Permits Private Injunctive Relief

[22] Defendants finally argue that injunctive relief is not available under RICO. For the same reasons that we found the district court did not commit error in declining to rule on the availability of relief under the FDCPA, we find that the district court did not commit error in declining to decide, at the class certification stage, whether RICO permits private injunctive relief.

Because the district court did not reach this question below, we decline to address it for the first time[7] on appeal. *See Dardana,* 317 F.3d at 208.

CONCLUSION

For the foregoing reasons, the opinion and order of the district court is hereby affirmed.

DENNIS JACOBS, Circuit Judge, dissenting:

This class action alleges that the defendant firms cut sharp corners in obtaining default judgments against the class members in the Civil Court of New York City. On this interlocutory appeal from class certification, the panel concludes that the superiority and predominance prerequisites to a Rule 23(b)(3) damages class have been satisfied. I respectfully dissent.

The *superiority* ruling is error because a statutory procedure is available, in the Civil Court itself, for redressing such an allegedly wide-ranging fraud—one that is superior in every way to this unwieldy federal class action. The district court's *predominance* ruling cannot be sustained because the court failed to perform, as is necessary, a rigorous weighing of common and individualized issues. The majority also holds that a Rule 23(b)(2) equitable and declaratory relief class was properly certified even though the named plaintiffs can get no benefit from that supposed relief because they have already achieved vacatur (or discontinuance) of the default judgments against them.

This is class litigation for the sake of nothing but class litigation.

I

Four plaintiffs, on behalf of a class of over 100,000, sued a buyer of bad debts (the "Leucadia defendants"), a law firm (the "Mel Harris defendants"), and a process server ("Samserv"), alleging that they fraudulently obtained default judgments against the class members. The alleged scheme proceeded in two steps: (1) a process server, sometimes a Samserv employee (but more often than not, not) engaged in sewer service, and then prepared a fraudulent affidavit of service; and (2) the debt buyer and the law firm generated and submitted standardized affidavits of merit ***99** falsely attesting to personal knowledge of the debt. *See* N.Y. C.P.L.R. 3215(f) (requiring "proof of the facts constituting the claim, the default and the amount due").

The dominant focus of the complaint is the fraud in service of process;[1] although plaintiffs do not actually deny that many class members received proper service. But service is too individualized an issue for class certification. The point was recognized implicitly by the district court,[2] and acknowledged more directly by its dismissal of one named plaintiff's claim as time-barred because service had been effected more than a year prior to the entry of default. *Sykes v. Mel Harris & Assocs., LLC,* 757 F.Supp.2d 413, 422 (S.D.N.Y.2010) ("*Sykes I* "). Plaintiffs' backstop contention —that irregularities in Samserv's logbooks should allow for a presumption that *all* service was fraudulent—is easily refuted.[3]

To patch this hole, plaintiffs changed focus to the affidavits of merit (all of which were generated by a software program used by a single Mel Harris employee) as the "glue" holding together this miscellaneous and diverse class. *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S.Ct. 2541, 2552, 180 L.Ed.2d 374 (2011). (The putative debts are to Sears, a credit card company, a bank, and a gym.[4])

The district court certified two classes: (1) a Rule 23(b)(3) class seeking money damages for "all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has been obtained"; and (2) a Rule 23(b)(2) class seeking equitable and declaratory relief for "all persons who have been or will be sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has or will be sought." ***100** *Sykes v. Mel Harris & Assocs., LLC,* 285 F.R.D. 279, 294 (S.D.N.Y.2012) ("*Sykes II* "). Plaintiffs in both classes assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[5] New York General Business Law,[6] and (as against the Mel Harris defendants alone) New York Judiciary Law.[7] The damages class also alleges Fair Debt Collection Practices Act ("FDCPA") claims.[8]

II

It is useful and diplomatic to set out first the points of my agreement with the majority. I agree that it was no abuse of discretion to find that the Rule 23(a) prerequisites —numerosity, commonality, typicality, and adequacy of representation—are met. There is a common issue as to whether the affidavits of merit were fraudulent, and the claims asserted about the affidavits of merit are typical. Fed.R.Civ.P. 23(a)(2), (3); *see also, e.g., Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge."). That issue alone is unlikely to be decisive, but the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. Thus, unlike in *Dukes,* all of the claims are held together by "glue," *id.* at 2552—or some dabs of it.

I also agree that the amount of debt owed by each class member, which defendants urge as an individualized issue that defeats certification, is beside the point. The harm can be viewed as the obligation created by a fraudulent default judgment, so that it should not matter that the original debt may remain, and be unaffected. *See Hamid v. Stock & Grimes, LLP,* 876 F.Supp.2d 500, 501–03 (E.D.Pa.2012) ("It is clear from its underlying purpose that debtors may recover for violations of the FDCPA even if they have defaulted on a debt.... If [plaintiff's] payment was not a proper element of actual damages under the FDCPA, a debt collector could harass a debtor in violation of the FDCPA, as a result of that harassment collect the debt, and thereafter retain what it collected."); *accord Abby v. Paige,* No. 10–23589–CIV, 2013 WL 141145, at *8–9 (S.D.Fla. Jan. 11, 2013); *cf. Sparrow v. Mazda Am. Credit,* 385 F.Supp.2d 1063, 1071 (E.D.Cal.2005) ("[S]trong policy reasons exist to prevent the chilling effect of trying FDCPA claims in the same case as state law claims for collection of the underlying debt."); *Isa v. Law Office of Timothy Baxter & Assocs.,* No. 13–cv–11284, 2013 WL 5692850, at *3 (E.D.Mich.2013) ("Congress did not intend for collectors to engage in violations, enter judgments, and use state law on judgment execution to force payment to creditors.").

The last point of my agreement with the majority is that the substantive legal questions the defendants invite us to answer either counsel in favor of commonality and typicality, or are entirely tangential to the class certification decision and best left unanswered at this stage. One such question—what is required for an affidavit of merit under New York law? —is a common question of law in this case. In any event, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that

they are relevant to ***101** determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* —— U.S. ——, 133 S.Ct. 1184, 1194–95, 185 L.Ed.2d 308 (2013).

III

In my view, the damages class was improperly certified. Rule 23(b)(3) requires first, that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" and second, that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). The Rule specifies, as "matters pertinent to these findings," "the desirability or undesirability of concentrating the litigation of the claims *in the particular forum* " and "the likely difficulties in managing a class action." Fed.R.Civ.P. 23(b)(3)(C)-(D) (emphasis added). These very factors counsel against certification here. *See Madison v. Chalmette Refining, LLC,* 637 F.3d 551, 554 (5th Cir.2011) ("The decision to certify a class is within the broad discretion of the district court, but that discretion must be exercised within the framework of Rule 23." (internal quotation marks and alterations omitted)).

A

The district court concluded that a federal class action is a superior method for resolving this litigation over state court proceedings, because: (1) it is more efficient than requiring thousands of individual suits; (2) most class members would not litigate given the small recovery and their limited means; (3) the conduct all occurred in New York; and (4) any problems could be alleviated through use of class management tools. *See Sykes II,* 285 F.R.D. at 294. The majority endorses this analysis. *See supra* Op. pp. 91–94.

Even if a federal class action were a good way to remedy an allegedly massive and pervasive fraud perpetrated on a New York court, it cannot be superior to the adequate remedial scheme already offered by the courts of New York. State law provides that, "on motion of any interested person," a party may be relieved from a judgment based on the grounds of, *inter alia,* "excusable default," "fraud, misrepresentation, or other misconduct of an adverse party." N.Y. C.P.L.R. 5015(a)(1), (3). And, on an application by an administrative judge, vacatur may be granted *en masse* "upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities." *Id.* 5015(c); *cf. Jack Mailman & Leonard Flug DDS, P.C. v. Whaley,* No. 31880/02, 2002 WL 31988623, at *6 (N.Y.C.Civ.Ct. Nov. 25, 2002) (forwarding the court's decision "to the administrative judge for the possible institution of proceedings in conformity with C.P.L.R. 5015(c)"). Because vacatur *en masse* is done by an administrative judge, it is a remedy that is broad, wholesale, effective, and easy. The only remaining salient advantage of this federal class action is attorneys' fees, which do not much help the members of the class.

The majority observes that the availability of recourse to state avenues for relief was not raised in the district court. *See supra* Op. pp. 91 & n. 4. True, defendants' superiority arguments in their opposition to class certification focused on the existence of issues personal to each class member, as well as manageability, and the prospect of "mini-trials just to determine the threshold issue of class membership." *See* Mem. of Law in Opp'n to Class Cert., Dkt. No. 90 at 22–23. But that is because the complaint was chiefly predicated on sewer service, an issue as to which facts ***102** varied from debtor to debtor, whereas class counsel (at least for current purposes) shifted focus to the submission of materially false affidavits of merit. In any event, the district court's ruling on superiority rests on the determination that a class action is "without question, more efficient than requiring thousands of debtors to sue individually." *Sykes II,* 285 F.R.D. at 294. It is this consideration that is obviated by the New York procedure. *See* N.Y. C.P.L.R. 5015(c). "[T]he Legislature has gone so far as to create a special subdivision allowing an administrative judge to bring a proceeding to vacate default judgments *en masse* where obtained by fraud, misrepresentation ... lack of service, ... or other illegalities." *Shaw v. Shaw,* 97 A.D.2d 403, 467 N.Y.S.2d 231, 233 (2d Dep't 1983) (internal quotation marks omitted).

Rule 23 requires consideration of any other "available method[ ] for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3); *see also id.* advisory committee notes (observing the court "ought to assess the relative advantages of alternative procedures" and stating that "[a]lso pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum"). One such "method" that is "available" is afforded by the New York Legislature for redressing harms alleged in this case by recourse to the Civil Court, in which the alleged wrong was done. In the majority's view, "the forum analysis of Rule

23(b)(3) is not grounded in a consideration of the comparative value of pursuing a claim in federal or state court." *Supra* Op. p. 92. That seems to me error, at least when the state court remedy affords relief—available *en masse*—for harm that was suffered in that forum.

Amici briefs filed by consumer advocacy groups explain that unscrupulous debt collection practices abuse the legal process, and demonstrate that this well-documented problem has drawn the attention of all levels of government for years. But that observation does not speak to a need for federal class action remedies. As the parties point out, the Civil Court has recently issued directives regarding "Default Judgments on Purchased Debt," imposing new and additional requirements on third-party debt collectors like the Leucadia defendants.[9] Collectors must now include an "Affidavit of Sale of Account by Original Creditor" and an "Affidavit of the Sale of the Account by the Debt Seller" for each debt re-sale. *Cf. Shaw,* 467 N.Y.S.2d at 234 ("A judgment obtained without proper service of process is invalid, even when the defendant has actual notice of the law suit, because as a prophylactic measure such rule is necessary to prevent 'sewer service' ") (citing *Feinstein v. Bergner,* 48 N.Y.2d 234, 239–41, 422 N.Y.S.2d 356, 397 N.E.2d 1161 (1979)).

The New York court system needs no helping hand from a federal class action initiative. The majority observes that plaintiffs' claims cannot be heard as a class in Civil Court. *See supra* Op. p. 92. But class litigation is not an end in itself. It is simply a "device to vindicate the rights of individuals class members." *In re Gen. Motors Corp. Engine Interchange Litig.,* 594 F.2d 1106, 1127 n. 33 (7th Cir.1979); *see also Blaz v. Belfer,* 368 F.3d 501, 504 (5th Cir.2004) (explaining a class action is merely a procedural device). New York's Civil Court provides such a device. N.Y. C.P.L.R. 5015(c). The majority also discounts the state procedure because it is implemented by judges. *See supra* Op. pp. 93–94. But one would have thought that to be an advantage; it reduces the ***103** burden on plaintiffs and may obviate the need for counsel altogether.

The majority's other critiques of the state procedure are easily disposed of. Vacatur *en masse* is discretionary—so are many aspects of class certification. *See id.* at 94. The majority cites to the district court's observation that a class action is—"without question"—a more efficient way of proceeding. *Id.* at 94. But the state remedy is far more speedy than a cumbersome class action. In state court, all that is needed is to push on an open door. And that, evidently, is what the class representatives themselves did; they have all had their judgments vacated or discontinued. Thus, the door of the state court is open for the vacatur of the default judgments *en masse,* without class certification, subclasses, hungry lawyers, or issues of process and statutes of limitations. *Cf. In re Aqua Dots Prods. Liability Litig.,* 654 F.3d 748, 752 (7th Cir.2011) ("A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests."). The countervailing benefits of a class action accrue almost entirely to the lawyers in a fee-rich environment, and leave trivial benefits for consumption by the class.

B

"Rule 23(b)(3)'s predominance criterion is even more demanding" than the "rigorous analysis" mandated under Rule 23(a), and requires a "close look at whether common issues predominate over individual ones." *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013) (internal quotation marks omitted); *see also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 615, 623–24, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding.").

The district court acknowledged problems that might easily be viewed as fatal: "individual issues may exist as to causation and damages as well as to whether a class member's claim accrued within the applicable statute of limitations." *Sykes II,* 285 F.R.D. at 293. The district court nevertheless hoped that these problems could be dealt with through "a number of management tools," and cited "appointing a magistrate judge or special master to preside over individual damages proceedings, decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages, creating subclasses, or altering or amending the class." *Id.* at 293–94 (internal quotation marks omitted).

No doubt, resourceful judges can seek or find ways to overcome difficulties. But predominance cannot be determined without a careful balancing of the individualized issues against the common issues. It is not enough to discount problems on the basis of hope and confidence. *Compare In re U.S. Foodservice Inc. Pricing Litig.,* 729 F.3d 108, 131 (2d

Cir.2013) ("[C]lose inspection of this case reveals that any class heterogeneity is minimal and is dwarfed by common considerations susceptible to generalized proof.") *with Sykes II,* 285 F.R.D. at 292 ("[U]se of sewer service and false affidavits of service may warrant equitable tolling. Even still, though, the Court can address such issues at later stages of the litigation if necessary." (citation omitted)).

The existence of such management tools, which are always at hand, does not help to distinguish a claim that justifies certification from a claim that does not. *Cf.* ***104** *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.,* 601 F.3d 1159, 1176, 1184 (11th Cir.2010) ("[A] class action with numerous uncommon issues may quickly become unmanageable."); *cf. also In re Initial Pub. Offerings Sec. Litig.,* 471 F.3d 24, 42 (2d Cir.2006) ("Plaintiffs' own allegations and evidence demonstrate that the Rule 23 requirement of predominance of common questions over individual questions cannot be met under the standards as we have explicated them."). The useful inquiries are why such tools will be needed and how they would be used. What proceedings are envisioned for the magistrate judge? The magistrate judge who hears a hundred thousand claims, four a day, would finish work in about a century. What subclasses, or "amended" or "alternative" classes would serve —and who would represent *any* of them, seeing as how all of the default judgments against the present class representatives have already been vacated or withdrawn? A better-considered case-management tool is de-certification. *See* Fed.R.Civ.P. 23(c)(1)(C).

Specifically, many claims in this case may be defeated by the statute of limitations. The issue demands a close scrutiny that has not been given. If members were served (or otherwise notified) of the default judgment more than one year before the class action commenced, they cannot now rely on equitable tolling. *See New York v. Hendrickson Bros.,* 840 F.2d 1065, 1083 (2d Cir.1988) (equitable tolling only appropriate if plaintiff was ignorant of cause of action because of defendant's concealment). A member-by-member inquiry concerning service of process will likely be required. Moreover, all members served after April 1, 2008 were provided supplemental notice by the state court before a default judgment was entered, *see* N.Y. Comp.Codes R. & Regs. tit. 22, § 208.6(h)(2); so what will be required is individualized examination of whether a plaintiff was served and whether notice was effected by the court's new system.

In an effort to skate past this appeal, class counsel now jettison their clients' defense of equitable tolling, and propose to include as class members only persons whose claims are not barred by the statute of limitations. But the district court (for one) seemed to think the plaintiffs were still seeking the benefit of equitable tolling when it certified the class. *See Sykes II,* 285 F.R.D. at 292. Crucially, the class definition does not exclude claims based on the date of filing.

Even if this maneuver succeeds (it appears it has), *see supra* Op. pp. 89–90, plaintiffs are simply trading a commonality problem for problems of typicality and adequacy of representation: the district court earlier relied on equitable tolling in order to save the FDCPA claims of two of the named plaintiffs.

IV

Class certification for equitable and declaratory relief under Rule 23(b)(2) is likewise deeply flawed. Such a class may only be certified if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). In other terms, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes,* 131 S.Ct. at 2557.

The named plaintiffs seek an injunction that would do absolutely nothing for them. The injunction sought would direct defendants to (1) conform their debt collection practices to the laws cited in the complaint, (2) locate and notify class members that a default judgment has been entered against them and that they have the right ***105** to file a motion to re-open, (3) serve process in compliance with law, and (4) produce and file affidavits of merit that truthfully reflect personal knowledge. *See* Third Am. Compl. ¶ 80. *But the default judgments against all of the named plaintiffs were already vacated or discontinued before they asserted these claims. See id.* ¶¶ 131, 161, 215, 330; *Sykes I,* 757 F.Supp.2d at 429 ("In fact, all plaintiffs have had the default judgments against them vacated or discontinued."). They get nothing from the equitable relief they seek (absent any speculation that they will be subject to future suits and default judgments by the Leucadia and Mel Harris defendants). "[A] single injunction or declaratory judgment" will therefore not "provide relief to each member of the class." *Dukes,* 131 S.Ct. at 2557.

V

I cannot figure out what Samserv is doing here. The common thread identified by the district court was the preparation of the allegedly fraudulent affidavits of merit. Samserv had no role in drafting those affidavits. Moreover, fewer than half the class members were served with process (or given sewer service) by Samserv. And though plaintiffs respond that Samserv was still part of the RICO enterprise, the only common RICO issue identified is the affidavits of merit.

A class certification order cannot reach a defendant based on a purportedly common underlying thread unrelated to that defendant's conduct. *See* Fed.R.Civ.P. 23(c)(1)(b) ("An order that certifies a class action must define the class and the class claims, issues, or defenses...."); *see also, e.g., In re Initial Pub. Offerings Sec. Litig.,* 471 F.3d at 41 (stating "a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met").

The majority's proposal that the district court may certify subclasses is no answer to these problems, for reasons set forth above. *See supra* Op. n. 3; *see also Sacred Heart Health Sys.,* 601 F.3d at 1184 (finding subclasses "no answer" when common questions did not predominate and concluding class action was not superior to other available means for fairly adjudicating claims).

Certification of this misbegotten class will generate grinding of gears and spinning of wheels for years to come, notwithstanding an effective, superior, and immediately available remedy in state court.

All Citations

780 F.3d 70, 90 Fed.R.Serv.3d 1793, RICO Bus.Disp.Guide 12,584

Footnotes

1 The Clerk of the Court is directed to amend the caption as above.

2 As previously noted, the Supreme Court has acknowledged that, in certain "context[s] ... '[t]he commonality and typicality requirements of Rule 23(a) tend to merge.' " *Dukes,* 131 S.Ct. at 2551 n. 5 (second alteration in original). The district court analyzed both typicality and commonality and found that the proposed class satisfied the typicality requirement "for many of the same reasons they meet the commonality requirement." *Sykes II,* 285 F.R.D. at 291. Defendants and plaintiffs agree that in this case, the commonality and typicality considerations are sufficiently merged to warrant their consideration in tandem.

3 For similar reasons, defendants'—and the dissent's, *see infra* p. 105 —contentions regarding the inappropriateness of certifying a class to bring claims against Samserv, when Samserv admittedly did not serve process on all individuals who were sued or will be sued in New York City Civil Court by Mel Harris on behalf of Leucadia, are also misplaced. Plaintiffs who were not served by Samserv allege no FDCPA or GBL claims against Samserv—they only bring RICO claims. Carving out such claims may also be the subject of an appropriate subclass under Rule 23(c)(5), but this is for the district court to determine in the first instance. *See Marisol,* 126 F.3d at 379 ("Rule 23 gives the district court flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear.").

4 The dissent intimates that Mel Harris cannot be expected to have previously raised this superiority theory, as their arguments below were tailored to plaintiffs' emphasis on sewer service, which involved questions of fact unique to each debtor. *See infra* Op. p. 101–02. According to the dissent, class counsel's shift in the focus of the complaint, to the submission of false affidavits of merit, accounts for the new state-forum argument. But this explanation falls flat, as any shift in the focus of plaintiffs' allegations has not affected the nature of defendants' contentions. Mel Harris defendants continue to insist that resolution of plaintiffs' claims will require "individualized showings," now related to the affidavits of merit, which will result in "one hundred thousand mini-trials." Further, the state procedural remedy the dissent endorses to address these claims concurrently, *see infra* Op. pp. 101–03, could have been raised by Mel Harris before the district court, as that provision applies to sewer service, *see* N.Y. C.P.L.R. § 5015(c) (providing, upon application of an administrative judge, for en masse vacatur of default judgments obtained, inter alia, by "fraud, misrepresentation, ... *lack of due service,* ... or other illegalities" (emphasis added)).

5 It may also be, on full adjudication of the merits of this issue, that the district court may determine that the issue has not been properly raised. The requirement that federal courts afford full faith and credit to state court judgments is an argument that federal courts must give res judicata effect to the state court judgment. *See* *Kremer v. Chem. Constr. Corp.,* 456 U.S. 461, 481–82, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). Res judicata is an affirmative defense that must be pleaded. *See* Fed.R.Civ.P. 8(c). Defendants have not asserted a res judicata defense in their answers.

6 We have not ruled on whether an FDCPA claim may be brought for misrepresentations made to third parties. *Kropelnicki v. Siegel,* 290 F.3d 118, 128 (2d Cir.2002).

7 We have yet to decide whether RICO allows for private injunctive relief. *See, e.g., Motorola Credit Corp. v. Uzan,* 202 F.Supp.2d 239, 243 (S.D.N.Y.2002).

1 *See* Third Am. Compl. ¶ 4 ("[S]ewer service is the primary reason so few of the people sued by Defendants appear in court to defend themselves."); *see also supra* Op. p. 85 (acknowledging complaint's emphasis on sewer service but concluding "plaintiffs have made clear that this is but one component of the overarching debt collection plan").

2 *See* *Sykes v. Mel Harris & Assocs., LLC,* 285 F.R.D. 279, 290 (S.D.N.Y.2012) ("*Sykes II* ") ("[Plaintiffs'] overarching claim is that defendants *systematically* filed false affidavits of merit and, *in many instances,* false affidavits of service to fraudulently produce default judgments...." (emphasis added)); *id.* at 291 ("[I]ndividualized proof of service or lack thereof is not fatal to the prerequisite of commonality. Here, defendants' uniform course of conduct was to file an allegedly false affidavit of merit and, *at least in some instances,* an allegedly false affidavit of service." (emphases added)).

3 *See* *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S.Ct. 2541, 2555, 180 L.Ed.2d 374 (2011) ("Even if [statistical proof] established ... a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists...."); *id.* at 2556 ("Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory."); *id.* at 2561 ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims." (citations omitted)); *see also* *650 Fifth Ave. Co. v. Travers Jewelers Corp.,* No. LT75766/20, 2010 WL 4187936, at *4 (N.Y.C.Civ.Ct.2010) ("Where a respondent rebuts an affidavit of service with a sworn denial of service, the petitioner must establish jurisdiction by a preponderance of the evidence at a traverse hearing.").

4 *See* Third Am. Compl. ¶¶ 136, 166, 198, 269.

5 *See supra* Op. pp. 83, 86, 91–92; *see also* 18 U.S.C. § 1962(c).

6 *See supra* Op. pp. 93–94, 87; *see also* N.Y. Gen. Bus. Law §§ 349(a), (h).

7 *See supra* Op. p. 84; *see also* N.Y. Jud. Law § 487.

8 *See supra* Op. pp. 82–83, 85–86, 88, 91–92; *see also* 15 U.S.C. §§ 1692e, 1692f, 1692k(a).

9 *Available at* http://www.courts.state.ny. us/courts/nyc/SSI/directives/DRP/drp182.pdf.

Tab 7

729 F.3d 108
United States Court of Appeals, Second Circuit.

In re U.S. FOODSERVICE INC. PRICING LITIGATION.

Catholic Healthcare West, Tomas & King, Inc., Waterbury Hospital o/b/o themselves & others similarly situated, Cason Inc., o/b/o themselves & others similarly situated, Frankie's Franchise Sys Inc., o/b/o themselves & others similarly situated, Plaintiffs–Appellees,

v.

US Foodservice Inc., Defendant–Appellant, Koninklijke Ahold N.V., Gordon Redgate, Brady Schoefield, Defendants.

No. 12–1311–cv
|
Argued: May 29, 2013.
|
Decided: Aug. 30, 2013.

Synopsis
Background: Customers brought putative class action against national food distributor, alleging violation of Racketeer Influenced and Corrupt Organizations Act (RICO) and breach of contract. Customers moved to certify class. The United States District Court for the District of Connecticut, Droney, J., 2011 WL 6013551, granted motion. Distributor appealed.

Holdings: The Court of Appeals, Debra Ann Livingston, Circuit Judge, held that:

[1] common issues predominated with regard to customers' RICO claims;

[2] common issues predominated with regard to customers' contract claims; and

[3] class action is superior to other methods of adjudication.

Affirmed.

West Headnotes (21)

[1] **Federal Courts** Class actions

Court of Appeals reviews a district court's decision to certify a class for abuse of discretion, the legal conclusions that informed its decision de novo, and any findings of fact for clear error. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

3 Cases that cite this headnote

[2] **Federal Courts** Abuse of discretion in general

A district court abuses its discretion when (1) its decision rests on an error of law or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.

[3] **Federal Civil Procedure** Class Actions

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.

4 Cases that cite this headnote

[4] **Federal Civil Procedure** Factors, grounds, objections, and considerations in general

Federal law permits individual claims to be litigated as a class action provided that the party seeking certification affirmatively demonstrates his compliance with the rule governing class actions; the party must demonstrate that the numerosity, commonality, typicality, and adequacy of representation requirements are satisfied, as well as at least one of the three provisions for certification found in the rule. Fed.Rules Civ.Proc.Rule 23(a, b), 28 U.S.C.A.

23 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; certification in general

Federal Civil Procedure Evidence; pleadings and supplementary material

Federal Civil Procedure Consideration of merits

To certify a class, a district court must make a definitive assessment of the class certification rule requirements, notwithstanding their overlap with merits issues, must resolve material factual disputes relevant to each rule requirement, and must find that each requirement is established by at least a preponderance of the evidence. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

41 Cases that cite this headnote

[6] **Racketeer Influenced and Corrupt Organizations** Elements of violation in general

Racketeer Influenced and Corrupt Organizations Business, property, or proprietary injury; personal injuries

Racketeer Influenced and Corrupt Organizations Causal relationship; direct or indirect injury

To prevail on a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, plaintiffs must show (1) a substantive RICO violation; (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation. 18 U.S.C.A. § 1962.

24 Cases that cite this headnote

[7] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Putative class's civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims against national food distributor, alleging distributor systematically overcharged them, were susceptible to generalized proof such that common issues would predominate over individual issues, supporting certification of class of customers; common evidence could be used to show distributor created and employed scheme to inflate invoices so as to overbill each class member in the exact same manner, customers' reliance on distributor's purported misrepresentation of actual costs in invoices, necessary to prove causation, could be shown using common evidence that customers paid allegedly inflated invoices and that distributor concealed its billing practices, and common evidence of difference between the amount customers paid on fraudulently inflated invoices and the amount they should have been billed could be used to show that customers suffered injury to their business or property. 18 U.S.C.A. § 1962; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

33 Cases that cite this headnote

[8] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Class certification rule's predominance requirement is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

86 Cases that cite this headnote

[9] **Racketeer Influenced and Corrupt Organizations** Fraud in general

Racketeer Influenced and Corrupt Organizations Causal relationship; direct or indirect injury

Proof of misrepresentation, even widespread and uniform misrepresentation, only satisfies half of the equation in civil Racketeer Influenced and Corrupt Organizations Act (RICO) actions, since plaintiffs must also demonstrate reliance on a defendant's common misrepresentation to establish causation under RICO. 18 U.S.C.A. § 1962.

16 Cases that cite this headnote

[10] **Federal Civil Procedure** Particular Classes Represented

Certification of a class action alleging civil Racketeer Influenced and Corrupt Organizations Act (RICO) violation is inappropriate where reliance on defendant's alleged misrepresentation is too individualized to admit of common proof; fact that class members will show causation by establishing reliance on a defendant's misrepresentations, however, does not place fraud-based claims entirely beyond the reach of class certification, provided that individualized issues will not predominate. 18 U.S.C.A. § 1962; Fed.Rules Civ.Proc.Rule 23(b), 28 U.S.C.A.

48 Cases that cite this headnote

[11] **Racketeer Influenced and Corrupt Organizations** Damages

Damages as compensation in a civil Racketeer Influenced and Corrupt Organizations Act (RICO) action for injury to property must place the injured parties in the same position they would have been in but for the illegal conduct. 18 U.S.C.A. § 1964(c).

6 Cases that cite this headnote

[12] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Putative class's breach of contract claims against national food distributor, alleging distributor used controlled middlemen to inflate invoice prices and that such a practice departed from prevailing commercial standards of fair dealing, were susceptible to generalized proof such that common issues would predominate over individual issues, supporting certification of class of customers; distributor's "cost-plus" contracts were consistent and were governed by the Uniform Commercial Code (UCC), question of whether distributor had violated its duty of good faith and fair dealing was common to all class members, minimum purchase obligations required by some of the contracts were not material, and did not draw into question the predominance of common issues as to the contract claims, and, while claims involved laws of multiple states, such state laws did not vary materially. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.; U.C.C. §§ 1–203, 2–103(1)(b).

57 Cases that cite this headnote

[13] **Federal Civil Procedure** Particular Classes Represented

Courts properly refuse to certify breach of contract class actions where the claims require examination of individual contract language. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

12 Cases that cite this headnote

[14] **Contracts** What law governs

State contract law defines breach consistently such that the question will usually be the same in all jurisdictions.

9 Cases that cite this headnote

[15] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Even if putative class of customers would be required to rely on national food distributor's alleged fraudulent concealment to toll statutes of limitations applicable to their Racketeer Influenced and Corrupt Organizations Act (RICO) and contract claims, fraudulent concealment could be demonstrated via class-wide, generalized evidence, thus supporting certification of class. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

4 Cases that cite this headnote

[16] **Limitation of Actions** Concealment of Cause of Action

A plaintiff asserting fraudulent concealment to toll limitations periods must prove it exercised some degree of diligence to discover the claims.

[17] **Limitation of Actions** Nature of harm or damage, in general

A plaintiff seeking to toll the statute of limitations for a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim must demonstrate that he was reasonably diligent in trying to discover his cause of action. 18 U.S.C.A. § 1961 et seq.

2 Cases that cite this headnote

[18] **Evidence** Factors, Tests, and Standards in General

Expert testimony is admissible if the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact or issue.

7 Cases that cite this headnote

[19] **Federal Courts** Expert and opinion testimony

Court of Appeals would not disturb district court's determination that expert testimony regarding damages calculation was admissible for purpose of determining whether to certify class of customers in action against national food distributor, alleging civil Racketeer Influenced and Corrupt Organizations Act (RICO) violations and contract claims, even though district court did not conduct *Daubert* hearing, absent a showing of manifest error. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

5 Cases that cite this headnote

[20] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Class action was the superior method of adjudicating customers' civil Racketeer Influenced and Corrupt Organizations Act (RICO) and contract claims against national food distributor; substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof would achieve significant economies of time, effort and expense, and promote uniformity of decision. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

38 Cases that cite this headnote

[21] **Federal Civil Procedure** Superiority, manageability, and need in general

Federal Civil Procedure Common interest in subject matter, questions and relief; damages issues

Class actions based on predominance of common issues can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

28 Cases that cite this headnote

Attorneys and Law Firms

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Glenn M. Kurtz (Douglas P. Baumstein, on the brief), White & Case LLP, New York, New York, for Defendant–Appellant.

Before: STRAUB, LIVINGSTON, and LYNCH, Circuit Judges.

Opinion

***112** DEBRA ANN LIVINGSTON, Circuit Judge:

This case concerns allegations of fraudulent overbilling by U.S. Foodservice, Inc. ("USF"), the country's second largest food distributor whose customers have included the United States government, as well as hospitals, schools, restaurant chains, and small businesses across the United States. This interlocutory appeal requires us to determine whether the district court abused its discretion in certifying a nationwide class consisting of about 75,000 USF "cost-plus" customers. The gravamen of plaintiffs' complaint is that USF devised and executed a fraud to overbill these customers in violation

of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961–68, and state and tribal contract law. Despite the size of the class and the fact that it implicates the laws of multiple jurisdictions, the district court correctly concluded that both the RICO and contract claims are susceptible to generalized proof such that common issues will predominate over individual issues and a class action is superior to other methods of adjudication. Accordingly, we affirm the district court's certification of this class pursuant to Federal Rule of Civil Procedure 23(b)(3).

BACKGROUND

A. USF and Cost–Plus Pricing

Defendant–Appellant USF was a relatively small player in the food distribution industry in the early 1990s, but by 2000 had tripled in size and become the country's second largest food distributor with over 250,000 customers, 75,000 of whom comprise the class here. USF purchases food products, including meats, seafood, produce, and condiments, from suppliers and in turn sells the items to its customers. USF distributes national brands, such as Heinz and Sara Lee, under their own label; non-branded goods, usually meats and produce; and its own private label brands, which are designed to compete with national brands and require USF to invest in marketing, branding, and similar services.

USF sells many of its food products on a cost-plus basis that is common in the industry. Under this pricing model, the final cost to the customer is computed based on the "cost" (also "landed cost" or "delivered cost"), meaning the price at which USF purchases the goods from its supplier, and the "plus," or additional surcharge that USF charges on top of the cost, often expressed as a percentage increase over this cost. Thus, when a customer enters into a contract with USF, its contract does not guarantee it a set price such as $1 per pound of coleslaw, but rather a set increase over the cost at which USF will purchase the coleslaw (*i.e.,* a 5% mark-up). If a supplier increases the price of goods to USF, that cost is passed on to the customer. USF's contracts with its cost-plus customers provide various methods for calculating cost: some contracts base cost on nationally-published price lists, for instance, while others dictate that cost is set by USF's distribution centers based on the local market. This class action centers on contracts that set cost based on the "invoice cost," which refers to the price on the invoice from the supplier to USF.

Finally, promotional allowances—discounts provided to distributors from suppliers generally in exchange for fulfilling certain conditions, such as order minimums—are central to cost-plus pricing in the food service distribution industry. Such allowances are more readily available to large distributors and are offered by many (but not all) suppliers to promote their products. USF's customer contracts typically permit USF to keep the benefit of any promotional allowances for itself ***113** and do not require that it pass these savings on to the customer. According to USF, without the right to retain these promotional allowances, it would not be able to realize a profit in an extremely competitive market with razor thin margins.

B. The Alleged Fraud and Its Discovery

Plaintiffs allege that USF, beginning at least as early as 1998, engaged in a fraudulent scheme by which it artificially inflated the cost component of its cost-plus billing and then disguised the proceeds of its own inflated billing through the use of purported promotional allowances. The scheme centered on six Value Added Service Providers ("VASPs"), which plaintiffs allege were shell companies established and controlled by USF for the purpose of fraudulently inflating USF's cost to its customers.[1] According to plaintiffs, USF executives Mark Kaiser (who was convicted of securities fraud stemming from a separate fraudulent scheme orchestrated while at USF, *see United States v. Kaiser,* 609 F.3d 556 (2d Cir.2010)) and Tim Lee created the VASPs and installed two confederates, Gordon Redgate and Brady Schofield, in leadership positions at the VASPs in order to hide USF's involvement and control. Though Redgate and Schofield ostensibly owned the VASPs, USF funded the VASPs with multimillion dollar, interest-free loans. As noted by the district court, USF retained irrevocable assignment of the VASP shares, controlled "to whom and when the VASPs made payments," and guaranteed their payments to suppliers.

According to plaintiffs, the purpose of the VASPs was not to provide legitimate services, but to permit USF to overcharge its customers via the generation of fraudulent marked-up invoices that misrepresented USF's cost for the goods provided to its customers. USF allegedly negotiated the purchase of goods from suppliers without input from the VASPs. USF then directed suppliers to bill goods to the VASPs, but often to deliver them directly to USF.[2] The VASPs then generated a second invoice, ostensibly to "sell" the goods to USF, using a higher price dictated by Kaiser or Lee. USF purported to pay the VASPs and

then used the higher VASP prices in setting the landed cost for its cost-plus pricing. USF customers unwittingly paid the inflated amounts and the VASPs then completed the scheme by kicking back the fraudulent mark-ups to USF disguised as legitimate promotional allowances. The VASPs retained nominal transaction fees sufficient to cover operating expenses, including handsome salaries for Redgate and Schofield.

Plaintiffs contend that the operation of the VASP fraud was known only to a small cadre of USF employees. According to plaintiffs, the VASP kickbacks, unlike legitimate promotional allowances, were deposited into a single account that Kaiser and Lee controlled. As for USF customers, they were also kept in the dark. Although some of these customers had the right to audit USF's invoices, the invoices generated by the VASPs revealed nothing about the kickbacks to USF or USF's funding and control of the shell companies. The district court cited evidence, moreover, ***114** "that USF actually took steps to conceal the VASP system from its customers." The court's opinion refers, among other things, to a contemporaneous email in which Rob Soule, USF's Chief Accounting Officer, noted that the company's auditors were raising concerns about funds advanced to one of the VASPs: "They do not understand why USF would advance funds to any vendor." Soule further observed that the VASP in question "is not just any 'vendor,' but we do not want to publicize this fact." J.A. at 623.

In 2000, The Royal Ahold Group ("Ahold") presented USF with a proposal to acquire the rapidly growing company. In the course of conducting due diligence for the purchase, Paul Ekelschot, head of Ahold's audit committee, sent a memo to members of Ahold's executive board in which he noted that USF used brokers for its private label products in order to earn promotional allowance rebates on these products and "shelter" these rebates from its clients' auditors.[3] The memo concluded that "[t]his **technique needs to be researched** to assess the tax and legal implications and associated business risks." J.A. at 795. One recipient of the memo, reacting to this information, wrote in the margin "AVISO! MOLTO PELIGROSA," meaning "Warning! Very Dangerous" in Italian. Ahold nonetheless went forward with the acquisition, and the fraud, according to plaintiffs, thereafter continued.

In January 2003, Ahold management and its auditors, Deloitte & Touche, received an anonymous letter warning that: "US Foodservice ... ha[s] been requiring some of [its] suppliers to ship product to Ahold companies, but send the invoices to companies[ ] which are not owned by Ahold." J.A. at 902. The letter identified three of the VASPs at issue here as companies to which the suppliers were directed to send invoices. Deloitte subsequently conducted an inquiry and produced a memo regarding USF's VASP transactions in which it observed that the "primary beneficiary of the VASP transactions appears to be USF," but that USF has no legal ownership interest in the VASPs. J.A. at 901. The memo queried whether the VASPs should be consolidated into USF's financial statements and whether "the practice of using the VASP's invoice cost to USF as USF's invoice cost for billing customers under cost plus contracts create[s] any legal exposure." *Id.*

Ahold thereafter procured a letter from its outside counsel, White & Case, concluding that USF faced no "serious exposure to damages from any potential claims arising from USF's use of VASPs." J.A. at 927. The opinion, however, was based on assurances from USF, *inter alia:* that USF had no affiliation with the VASPs and none of its officers, directors, or employees had any ties, directly or indirectly, with them; that "[t]itle to products procured for USF by a VASP pass[ed] through the VASP"; that USF's cost-plus customers were "aware that USF is utilizing the VASPs to service their account"; and, finally, that the VASPs provided valuable services, that USF had "legitimate business reasons for outsourcing certain functions to independent VASPs," and that there was "no improper motive" behind the arrangement. *Id.* White & Case withdrew the letter in March 2003, citing "reason ***115** to doubt whether the assumptions on which we based our conclusions are valid." J.A. at 939.

Also in 2003, following the discovery of other accounting irregularities at USF, Ahold's audit committee retained the law firm of Morvillo, Abramowitz, Grand, Iason & Silberberg, which in turn engaged PricewaterhouseCoopers LLP ("PwC") to conduct an independent forensic accounting investigation of USF to address, among other things, whether consolidation of the VASPs was required and "whether legal issues exist relative to cost-plus contracts vis a vis VASP passback earnings." PwC's subsequent report concluded that USF effectively controlled the VASPs, which raised "significant questions" concerning USF's potential liability to its cost-plus customers; PwC concluded that USF's control of the VASPs "clearly required" consolidation. J.A. at 1258, 1295.

On October 17, 2003, Ahold publicly disclosed the VASP system and consolidated the VASPs into restated financial statements for the relevant years. Its filings outlined the

financial relationship between USF and the VASPs, asserted that the "VASPs provide varying degrees of support to USF," and concluded that Generally Accepted Accounting Principles "require the recognition ... of the VASPs within [Ahold's] consolidated financial statements." J.A. at 2684. Shortly thereafter, Ahold ordered USF to phase out its use of VASPs. It subsequently sold the company for $7.1 billion, agreeing to indemnify USF for any liability to cost-plus customers over $40 million arising from the VASP scheme.

C. The Class Action

The first lawsuit against USF in the wake of Ahold's disclosures was filed by Waterbury Hospital, a community and teaching hospital in Connecticut. Other plaintiffs followed suit, including Thomas & King, the owner and operator of 88 Applebee's franchises, and Catholic Healthcare West, the largest not-for-profit hospital system in California.[4] The pending cases were found to involve "common factual questions concerning the propriety of USF's performance of cost-plus contracts" and were consolidated for pretrial proceedings in the District of Connecticut, *see In re U.S. Foodservice, Inc. Pricing Litig.,* 528 F.Supp.2d 1370 (J.P.M.L.2007), after which a consolidated amended class action complaint was filed. The district court subsequently denied USF's motion to dismiss the RICO and breach-of-contract claims. *See In re U.S. Foodservice Inc. Pricing Litig.,* Nos. 3:07–md–1894, 3:06–cv–1657, 3:08–cv–4, 3:08–cv–5, 2009 WL 5064468 (D.Conn. Dec. 15, 2009).

Following class discovery, plaintiffs moved to certify the class on these claims on July 31, 2009. Both sides submitted considerable evidence at the class certification stage, including representative samples of the contracts at issue, evidence as to the structure, operation, and concealment of the VASPs, and competing expert testimony on industry standards and damages calculations. USF argued, in particular, that the VASPs provided legitimate services; that because VASPs are common in the industry, customers were aware that ***116** USF could set cost in the manner it did; and that its customers based their purchasing decisions on the total prices USF charged—which were competitive with the prices available from competitors—and not on a belief that the "cost" component of USF's invoice price reflected the price at which the supplier provided the goods.

After hearing oral arguments, the district court granted the motion for class certification in full and certified a Rule 23(b)(3) class as:

> Any person in the United States who purchased products from USF pursuant to an arrangement that defined a sale price in terms of a cost component plus a markup ("cost-plus contract"), and for which USF used a VASP transaction to calculate the cost component.

In re U.S. Foodservice Inc. Pricing Litig., Nos. 3:07–md–1894, 3:06–cv–1657, 3:08–cv–4, 3:08–cv–5, 2011 WL 6013551, at *1 (D.Conn. Nov. 29, 2011). The district court found that plaintiffs had presented evidence that supported their fraud allegations, including: (1) that USF placed orders directly with the suppliers for "delivery" to the VASPs; (2) that USF "intentionally concealed the VASPs from its cost-plus customers"; and (3) that USF controlled the VASPs' finances, guaranteeing their obligations, dictating to whom and when they made payments, and funding many of the VASPs through short-term, interest-free loans. *Id.* at *2–3. The court noted that the magnitude of the VASP operation was "substantial," with one VASP alone passing back over $58 million to USF in a single year based on about $500 million in sales. PwC, the district court observed, "found that the '[t]otal VASP pass-back receipts over the period from April 2000 to December 2002 were $388 million.' " *Id.* at *3.

The court did not reach the merits whether the VASPs were shell companies created to perpetrate a fraud or whether, as USF contends, they were employed to provide legitimate services to USF in keeping with industry practice. The court noted that the legitimacy of USF's use of the VASPs is contested and that evidence in the record indicates that some VASPs performed legitimate business functions, including: "(1) quality control services; (2) purchasing; (3) brand and product development; (4) merchandising services; (5) marketing support; and (6) customer service." *Id.* Regardless, the court determined that certification was appropriate because plaintiffs had demonstrated, and USF had failed to rebut, that the relevant issues were susceptible to generalized proof such that individualized questions would not predominate and render the class unmanageable.

USF moved this court for leave to file an interlocutory appeal challenging class certification, and that motion was granted on April 3, 2012.

Discussion

[1] **[2]** We review a district court's decision to certify a class under Rule 23 for abuse of discretion, the legal

conclusions that informed its decision *de novo,* and any findings of fact for clear error. *Parker v. Time Warner Entm't Co., L.P.,* 331 F.3d 13, 18 (2d Cir.2003); *In re Initial Pub. Offerings Sec. Litig.,* 471 F.3d 24, 40–41 (2d Cir.2006). A district court abuses its discretion when "(1) its decision rests on an error of law ... or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Parker,* 331 F.3d at 18 (alteration in original) (quoting *Zervos v. Verizon N. Y., Inc.,* 252 F.3d 163, 168–69 (2d Cir.2001)).

***117** **[3]** **[4]** "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013) (internal quotation marks and citation omitted). Federal law permits individual claims to be litigated as a class action provided that the party seeking certification "affirmatively demonstrate[s] his compliance with Rule 23." *Id.* (internal quotation marks omitted). The party must establish that the four threshold requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—are satisfied and demonstrate "through evidentiary proof" that the class satisfies at least one of the three provisions for certification found in Rule 23(b). *Id.* USF does not dispute that the Rule 23(a) factors are met, but protests that the district court erred in finding Rule 23(b)(3)'s requirements satisfied.

[5] To certify a class pursuant to Rule 23(b)(3), a plaintiff must establish: (1) predominance—"that the questions of law or fact common to class members predominate over any questions affecting only individual members"; and (2) superiority—"that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). To certify a class, a district court must "make a 'definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues,' ... must resolve material factual disputes relevant to each Rule 23 requirement," and must find that each requirement is "established by at least a preponderance of the evidence." *Brown v. Kelly,* 609 F.3d 467, 476 (2d Cir.2010); *Myers v. Hertz Corp.,* 624 F.3d 537, 548 (2d Cir.2010) (plaintiffs bear the burden of "establish[ing] by a preponderance that common questions [will] predominate over individual ones"); *see also, In re IPO,* 471 F.3d at 33 ("[T]he important point is that the requirements of Rule 23 must be met, not just supported by some evidence.").

Upon a complete review of the record, we conclude that the district court conducted a rigorous analysis based on the relevant evidence, properly resolved factual disputes, and did not abuse its discretion in concluding that common issues predominate as to plaintiffs' RICO and breach of contract claims and that a class action is a superior method of litigating these claims.

* * *

[6] We first briefly outline the substance of plaintiffs' claims against USF. To prevail on their civil RICO claim, plaintiffs must show "(1) a substantive RICO violation under § 1962; (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation." *UFCW Local 1776 v. Eli Lilly & Co.,* 620 F.3d 121, 131 (2d Cir.2010) (citation omitted). Here, plaintiffs allege that USF and its VASPs constituted an enterprise as defined in 18 U.S.C. § 1961(4) that engaged in a pattern of racketeering activity, namely mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1344, in violation of 18 U.S.C. § 1962(c).[5] Specifically, they assert that USF devised a scheme to defraud its customers in which it mailed to customers phony invoices generated by the VASPs to inflate prices ***118** above what the customers were contractually obligated to pay. Similarly, the plaintiffs assert that USF breached the terms of its cost-plus contracts by using the VASP invoices to calculate the cost component of the amounts billed to customers, thereby causing these customers to pay prices higher than they should have paid under the contracts.

A. Predominance

i) The RICO Claim

[7] **[8]** The predominance requirement is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Eli Lilly & Co.,* 620 F.3d at 131 (quoting *Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1252 (2d Cir.2002)); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* —— U.S. ——, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013) (in securities fraud class action, explaining that "Rule 23(b)(3) ... does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof [,]" but rather, requires "that common questions *predominate* over any questions affecting only individual class members" (internal quotation marks

and alterations omitted)). USF argues that this has not been shown as to the RICO claim because: (1) a misrepresentation necessary to prove mail or wire fraud cannot be established through common evidence; (2) plaintiffs' reliance on any purported misrepresentation by USF, necessary here to prove causation, cannot be shown using common evidence; and (3) plaintiffs suffered no injury to their business or property that can be shown with common evidence. We disagree with each of these contentions.

a) Misrepresentation

We have previously observed that fraud claims based on uniform misrepresentations to all members of a class "are appropriate subjects for class certification" because, unlike fraud claims in which there are material variations in the misrepresentations made to each class member, uniform misrepresentations create "no need for a series of mini-trials." *Moore,* 306 F.3d at 1253. Here, the district court did not abuse its discretion in determining that USF's alleged misrepresentation was uniform and susceptible to generalized proof. Specifically, plaintiffs allege that the VASP-related invoices mailed from USF to its cost-plus customers included the same fraudulent misrepresentation: namely, that the cost component of USF's billing was based on the invoice cost from a legitimate supplier and not from a shell VASP controlled by USF and established for the purpose of inflating the cost component. While each invoice obviously concerned different bills of goods with different mark-ups, the material misrepresentation—concealment of the fact of a mark-up inserted by the VASP—was the same in each.

The allegations here are most akin to those in *Klay v. Humana, Inc.,* where plaintiffs alleged that defendant HMOs systemically underpaid doctors by uniformly misrepresenting to them that the HMOs were "honestly pay[ing] physicians the amounts to which they were entitled." 382 F.3d 1241, 1258 (11th Cir.2004), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.,* 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008). There, the Eleventh Circuit upheld certification of the physician class on the basis that the doctors' RICO claims were "not simply individual allegations of underpayments lumped together," but rather focused on a centralized corporate conspiracy ***119** to defraud, which could be proven through generalized evidence—and which, absent certification, would have to be re-proven in each case. *Id.* at 1257–58. Similarly here, the thrust of the RICO claim is USF's scheme to create and employ the VASPs to inflate the invoices so as to overbill each class member *in the exact same manner.*

USF contends that the customer invoices cannot be deemed to misrepresent cost without reference to the parties' underlying contractual arrangement, defeating any resort to generalized proof. But even assuming *arguendo* that this is correct, the district court specifically found after reviewing the evidence that USF's cost-plus contracts are substantially similar in all material respects. *In re U.S. Foodservice,* 2011 WL 6013551, at *14. This finding is supported, moreover, by Deloitte, Ahold's auditor, which reviewed the contracts to determine USF's potential legal exposure and concluded that the key term of "invoice cost" is "consistently defined." J.A. at 900–01. In short, because the question whether the invoices materially misrepresented the amounts due USF is common to all plaintiffs, the class will "prevail or fail in unison" on this point—rendering certification appropriate. *Amgen,* 133 S.Ct. at 1191.

b) Causation

USF next contends that reliance is "a necessary part of the causation theory advanced by the plaintiffs," *Eli Lilly,* 620 F.3d at 133, and that individualized issues will predominate as to reliance because "the key issue in this case is customer knowledge of the alleged pricing practice at issue," Appellant's Br. at 25. USF argues that the district court simply "assumed" that USF's customers were "ignorant of USF's influence or control over the landed cost and [promotional allowances]" and that it failed to analyze or even acknowledge evidence to the contrary. Customer reliance on its supposedly inflated invoices, USF maintains, "can be determined only by adducing evidence from the 75,000 customers," and not by generalized proof. Appellant's Br. at 26–27. We disagree.

[9] **[10]** As we have noted, "proof of misrepresentation—even widespread and uniform misrepresentation—only satisfies half of the equation" in cases such as this because plaintiffs must also demonstrate reliance on a defendant's common misrepresentation to establish causation under RICO.[6] *McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 223 (2d Cir.2008), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.,* 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008). Certification is inappropriate where "reliance is too individualized to admit of common proof." *Id.* at 224–25 (concluding that certification was improper where many factors other than defendants'

alleged misrepresentations about health consequences of light cigarettes may have led individuals to purchase them). The fact that class members will show causation by establishing reliance on a defendant's misrepresentations, however, does not place fraud-based claims entirely beyond the reach of Rule 23, provided that individualized issues will not predominate. *See id.*

Such is the case here. First, payment, as we have said, "may constitute circumstantial proof of reliance upon a financial representation." *Id.* at 225 n. 7. As in ***120** *Klay,* the defendant here is alleged to have sent the plaintiffs false billing information (albeit in this case misrepresenting the amount of money due rather than, as in *Klay,* that the proper amount had been paid). *Klay,* 382 F.3d at 1259. In cases involving fraudulent overbilling, payment may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed. Fraud claims of this type may thus be appropriate candidates for class certification because "while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue)." *Id.*

USF therefore errs in suggesting that "there is no common evidence of individual customer knowledge" as to its allegedly fraudulent billing scheme. Provided the plaintiffs are successful in proving that USF inflated their invoices and misrepresented the amount due, proof of payment constitutes circumstantial evidence that the plaintiffs *lacked* knowledge of the scheme. Moreover, and as found by the district court, the record also contains generalized proof of USF's *concealment* of its billing practices, including the Ekelschot memo in which the head of Ahold's audit committee observed that USF used the VASPs to earn promotional allowance rebates on private label products and "*to hide [these rebates] from clients' auditors.*" J.A. at 795 (emphasis added). As the district court found, "there is evidence that USF actually took steps to conceal the VASP system from its customers" and "the record lacks evidence that any of USF's customers had knowledge of USF fraudulently inflating the cost component of its products through the operation of the VASPs." *In re U.S. Foodservice,* 2011 WL 6013551, at *9, 11. Upon a review of the record, we conclude that these findings are not in error.

USF claims that this case is not like *Klay,* but like *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.,* 319 F.3d 205 (5th Cir.2003), in which the Fifth Circuit held that a class action premised on the fraudulent overcharge of insurance premiums, supposedly in excess of regulatory rates, had been improperly certified. In *Sandwich Chef,* however, as the Fifth Circuit concluded, the district court "did not adequately account for individual issues of reliance that will be components of defendants' *defense* against RICO fraud." *Id.* at 220 (emphasis added). There, the defendants had produced evidence that class members had individually negotiated premiums, demonstrating awareness that "the amounts being charged varied from rates filed with regulators," and that policyholders had nonetheless "agreed to pay such premiums." *Id.* Such evidence, reflecting individualized arrangements on the part of putative class members wholly aware of the truth regarding the alleged misrepresentations on which the class was said to have relied, "preclude[d] a finding of predominance of common issues of law or fact." *Id.* at 221. Critically, however, the record here contains *no such individualized proof* indicating knowledge or awareness of the fraud by any plaintiffs.

USF contends, to the contrary, that the district court "failed to rigorously analyze or resolve [an] overwhelming evidentiary record" demonstrating that many class members were not deceived as to the nature of its billing practices. Appellant's Br. at 27. We are not persuaded. Much of the evidence contained in the "ten tranches of evidence" on which USF relies is of marginal relevance, at best, to the ***121** question whether USF's customers had knowledge of the disputed billing practices. For example, USF relies heavily on a 2006 email from an employee at Premier, Inc. ("Premier"), a purchasing agent for some of USF's cost-plus customers, alerting clients that USF had been sued "for pricing practices" and noting the employee's belief that USF had been "transparent and ethical" in its relationship with Premier. As the district court noted, Premier was not a cost-plus customer, but a "Group Purchasing Organization" that helped members like Catholic Healthcare West manage and reduce supply costs. And suffice it to say that this single-paragraph email sheds little light on the question whether any USF customer was aware of USF's billing practices during the relevant period.

Upon a review of the record, we conclude that the district court did not err in finding that "there is no evidence that the plaintiffs were aware of the VASP system or its purpose." *In re U.S. Foodservice,* 2011 WL 6013551,

at *9. But even if this were not the case, most of the remaining proof to which USF points hardly draws into question plaintiffs' Rule 23 showing, and for a simple reason: such proof, far from demonstrating that factual questions regarding the knowledge of individual class members will predominate over questions common to the class, is in fact *generalized* proof concerning common arrangements in the food distribution industry. Thus, USF cites the testimony of its expert, Frank Dell, that pursuant to "well-known and common industry practice," USF's customers would have understood that USF had influence over the invoice cost used in the cost-plus formula and that it received promotional allowances. USF relies on survey evidence suggesting, *inter alia,* that USF customers purchasing on a cost-plus basis understand both "that foodservice distributors, such as USF, ha[ve] an internal profit or inside margin in the cost component of their private label sold on a cost plus basis" and that such distributors use middleman vendors.[7]

We agree with the district court that such evidence "does not raise the concern of issues of individual knowledge predominating." *See In re U.S. Foodservice,* 2011 WL 6013551, at *11. As the district court recognized, the parties "dispute the legitimacy and purpose of the VASPs," with USF contending that the VASPs provided service to USF, particularly regarding its private label products; that USF, as is common in the food service industry, legitimately influenced and even set the "cost" component in its cost-plus pricing based on the service provided; and that the monies supposedly funneled back to USF were in fact proper promotional allowances. *Id.* at *2. USF points to generalized proof supporting this defense—proof wholly consistent with class action treatment—but the record does not contain a single piece of evidence suggesting "actual individual knowledge" on the part of a specific customer "of the VASPs' existence and USF's pricing practices." *Id.* at *11; *see Katz v. China Century Dragon Media, Inc.,* 287 F.R.D. 575, 588–89 (C.D.Cal.2012) (finding predominance requirement satisfied in securities fraud class action where there was no evidence indicating "the likely need for individualized assessments of class members with respect to the[ir] knowledge" of alleged misrepresentations); *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.,* 277 F.R.D. 97, 118–19 (S.D.N.Y.2011) ("Sheer conjecture that class members ***122** 'must have' discovered [the misrepresentations] is insufficient to defeat Plaintiff's showing of predominance when there is no admissible evidence to support Defendants' assertions."). In such circumstances, conjectural "individualized questions of reliance," which are "far more imaginative than real[,] ... do not undermine class cohesion and thus cannot be said to predominate for purposes of Rule 23(b)(3)." *Amgen,* 133 S.Ct. at 1197 (internal quotation marks omitted). For if bald speculation that some class members might have knowledge of a misrepresentation were enough to forestall certification, then no fraud allegations of this sort (no matter how uniform the misrepresentation, purposeful the concealment, or evident plaintiffs' common reliance) could proceed on a class basis—a conclusion that this Court has already declined to reach. *See McLaughlin,* 522 F.3d at 224–25.

Whether, as plaintiffs claim, the VASPs were created for the purpose of misrepresenting cost and were then kept secret so as to deceive customers about overbilling or whether, instead, they provided legitimate service to USF for which it appropriately billed its customers, is a question subject to generalized proof—and a question that, barring class action treatment, will have to be endlessly re-litigated in individual actions. We conclude that the class will "prevail or fail in unison" on this point—so that, in either case, questions of fact common to class members will predominate over questions regarding individual customers' reliance. The district court acted well within its discretion in rejecting USF's claim to the contrary. *See Amgen,* 133 S.Ct. at 1191.

c) Injury

USF next contends that the district court abused its discretion in certifying a RICO class because RICO damages cannot be reliably ascertained on a class-wide basis. According to USF, the proper measure of RICO damages here is the difference between the price paid by each plaintiff for the goods it purchased and the market price available when the goods were bought, so that regardless whether USF deceived customers in purporting to carry out its obligations under its cost-plus contracts, plaintiffs were harmed by USF's fraud *only* if they purchased goods from USF that they could have obtained more cheaply elsewhere. Because such a calculation "would require the consideration of the prices for thousands of products, on a daily, weekly and monthly basis, over a period of years, in hundreds of different markets, for tens of thousands of customers," class-wide issues as to damages, USF contends, do not predominate, and certification was inappropriate. Appellant's Br. at 45.

[11] USF again misses the mark. Our case law is clear that "damages as compensation under RICO § 1964(c) for injury to property must, under the familiar rule of law, place [the

injured parties] in the same position they would have been in but for the illegal conduct." *Commercial Union Assurance Co., plc v. Milken,* 17 F.3d 608, 612 (2d Cir.1994). Granted, we have said that because RICO "compensates only for injury to 'business or property,' " a victim who is induced to part with his property by the misrepresentations of a fraudster is generally not entitled to "benefit of the bargain" damages—meaning recovery of what the fraudster promised, as opposed to the property the victim lost. *McLaughlin,* 522 F.3d at 228 (quoting 18 U.S.C. § 1964(c)); *see also Fleischhauer v. Feltner,* 879 F.2d 1290, 1300 (6th Cir.1989); *Heinold v. Perlstein,* 651 F.Supp. 1410, 1412 (E.D.Pa.1987) ("Where, as here, the only property to which a plaintiff alleges injury is an expectation interest that would ***123** not have existed but for the alleged RICO violation, it would defy logic to conclude that the requisite causation exists."). This case, however, is not about such inducement, but concerns a fraud that occurred after plaintiffs already had a protectable interest in their cost-plus contracts with USF. *See Heinold,* 651 F.Supp. at 1411 (distinguishing between RICO violations that induce the formation of a contract and RICO violations that "interfere[ ] with a contract extant at the time of that conduct"); *see also Liquid Air Corp. v. Rogers,* 834 F.2d 1297, 1310 (7th Cir.1987) (holding RICO victim entitled to recover benefits due under contract where defendants engaged in fraud after the formation of contract in order to deprive victim of benefits of its bargain).

USF, having entered into contracts that entitled its customers to "cost-plus" pricing, is alleged to have systematically deceived them into believing they were being afforded such pricing when, in fact, they were being overcharged. The key inquiry in such a circumstance is not what price customers could have procured elsewhere at the point of purchase, but rather the amount of overcharge—the amount customers paid USF as a result of its deception. The measure of damages as compensation for *this* injury is straightforward: customers are entitled to the difference between the amount they paid on fraudulently inflated cost-plus invoices and the amount they should have been billed (or, stated differently, the price increase due to the use of VASPs).[8] We accordingly conclude that USF's contention that the district court abused its discretion in certifying the RICO class because RICO damages cannot be shown on a class-wide basis is without merit.

ii) The Contract Claims

[12] Certifying plaintiffs' breach of contract claims raises additional concerns because the contracts here are not uniform and they implicate the laws of many jurisdictions. USF argues common questions will not predominate as to these claims for three reasons: (1) the contracts vary materially from each other and individualized extrinsic evidence will predominate in the interpretation of key terms; (2) some of the contracts require customers to satisfy minimum purchase requirements before they are entitled to cost-plus pricing, a matter that is not subject to common proof; and, finally, (3) the contracts are governed by the laws of 48 states, as well as tribal law. For the following reasons, we disagree.

a) Contract Variations and Extrinsic Evidence

USF argues, first, that the contracts here have materially different terms and that the variations among them defeat plaintiffs' attempt to establish predominance ***124** as to the contract claims. Moreover, determining the issue of breach pursuant to the "numerous different definitions of the terms 'vendor' and [promotional allowance] in the numerous and varying contracts," USF maintains, will require "reference to individualized extrinsic evidence." Appellant's Br. at 49. USF asserts that resolution of the issue of breach can therefore not be attained through generalized proof and that the district court abused its discretion in ruling that Rule 23(b)(3)'s predominance requirement is satisfied as to the contract claims. We are not persuaded.

[13] To be clear, courts properly refuse to certify breach of contract class actions where the claims require examination of individual contract language. *See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc.,* 155 F.3d 331, 340 (4th Cir.1998); *Spencer v. Hartford Fin. Servs. Grp., Inc.,* 256 F.R.D. 284, 304 (D.Conn.2009) (declining to certify class for breach of contract claims where contracts defined cost and value differently such that the language of each contract "would need to be carefully considered to determine whether defendants breached each contract at issue"); *cf. Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 398 (6th Cir.1998) (decertifying class of early retirees in ERISA case where "side deals" contained myriad variations as to what each retiree was promised). In such cases, however, courts have determined that the language variations were material to the issue of breach. Here, USF's own expert testified that the contracts "essentially all [say] the same thing" and that in the food service industry, "[i]t [is] well understood ... what a cost plus contract is," J.A. at 2938. Similarly, USF's own auditor found

that USF's contracts are consistent in how they define invoice cost, J.A. at 900–01. The district court's conclusion that USF's cost-plus contracts are substantially similar in all material respects, *see In re U.S. Foodservice,* 2011 WL 6013551, at *14, is amply supported by the record.

USF contends that resolving the contract claims will require introduction of evidence of contract negotiations and course of performance evidence to determine whether individual customers knew about USF's use of VASPs and "acquiesce[d] in it without objection." U.C.C. § 1–303(a)(2). To be sure, extrinsic evidence can illuminate the meaning of ambiguous contract terms, and the terms of the contracts here, each of which is governed by the Uniform Commercial Code ("UCC"), may in theory "be explained or supplemented" by extrinsic evidence of the parties' "course of performance, course of dealing, or usage of trade." *Id.* § 2–202; *see also id.* § 1–303(d)–(e) (noting that course of performance, course of dealing, and trade usage are "relevant in ascertaining the meaning of the parties' agreement, ... and may supplement or qualify the terms of the agreement"); *accord Allapattah Servs., Inc. v. Exxon Corp.,* 333 F.3d 1248 (11th Cir.2003), *aff'd on other grounds by* 545 U.S. 546, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005).[9] USF's argument as to the importance ***125** of individualized extrinsic evidence as to the contract claims, however, simply mimics its claim that the issue of individual customer knowledge defeats certification of the RICO class, and it fails for the same reason. Just as the record contains no evidence regarding individualized customer knowledge, it likewise includes no evidence of any USF customer's contract negotiations or individualized conduct in performing pursuant to the contract that tends to show either that the customer understood his contract to authorize the VASP arrangements or that he otherwise acquiesced in them. USF proffers expert testimony regarding accepted industry practice (namely, that it is common knowledge that food distributors employ VASP-like arrangements), but this is generalized trade usage evidence appropriately considered on a class-wide basis.

The fact that each of these contracts is governed by the UCC, moreover, further supports the district court's conclusion that common issues will predominate in the adjudication of these contract claims. Plaintiffs allege, *inter alia,* that USF breached its cost-plus contracts because the use of VASPs to inflate costs was dishonest, commercially unreasonable, and a breach of USF's implied duty of good faith. *See* Cmplt. ¶¶ 152–53; *see also* U.C.C. § 1–203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). The UCC's implied duty of good faith, in turn, requires not only "honesty in fact" between contracting parties but also "the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2–103(1)(b) (defining "good faith" for merchants); *see id.* § 1–201(b)(20) (defining "good faith" for non-merchants). *See also* U.C.C. § 1–203 cmt. (explaining that the duty of good faith is implemented by the provisions on course of dealing and trade usage, and "directs a court toward interpreting contracts within the commercial context in which they are created, performed, and enforced."); 1B Larry Lawrence, *Lawrence's Anderson on the Uniform Commercial Code* § 1–304:42 (3d ed. 2012) ("U.C.C. § 1–201(b)(20) establishes an objective test for good faith: whether the party acted in observance of reasonable commercial standards of fair dealing. The commercial reasonableness of the party's behavior relates solely to the fairness of the behavior.").

We agree with the district court that the question of breach with regard to plaintiffs' contract claims will focus predominantly on common evidence to determine whether, in fact, USF used controlled middlemen to inflate invoice prices and whether such a practice departs from prevailing commercial standards of fair dealing so as to constitute a breach. *See* U.C.C. § 2–103(1)(b). In this regard, we find the Eleventh Circuit's decision in *Allapattah Services, Inc. v. Exxon Corp.,* 333 F.3d 1248, instructive. There, plaintiffs alleged that Exxon breached its contracts with its dealers by overcharging them on fuel purchases. *Id.* at 1252. Though the contracts were not identical, the Eleventh Circuit affirmed the class certification because the dealer agreements were materially uniform insofar as they imposed the same duty of good faith on Exxon. Thus, the question of whether Exxon had violated its duty was common to all class members. *Id.* at 1261. The same holds true here.

Like the district court, we anticipate that adjudication of the breach of contract ***126** claims will largely parallel adjudication of the RICO claims. The common issues will include USF's creation and control of the VASPs, the actual services, if any, the VASPs provided, USF's efforts to hide the true nature of the VASPs from its customers (which in the breach of contract setting is circumstantial proof that customers did not know of and never acquiesced in USF's course of performance), and trade usage concerning controlled middlemen like the VASPs. Since the record does not indicate the existence of material differences in contract language or other significant individualized evidence, we conclude that the district court did not abuse its discretion

in concluding that common issues will predominate over any individual issues, and that USF's claim to the contrary should be rejected.

b) Minimum Purchase Requirements

USF next contends that many of the contracts impose minimum purchase requirements on customers as a precondition to their entitlement to cost-plus pricing. Compliance with this "condition precedent" to USF's obligation to provide cost-plus pricing, USF contends, raises individualized issues not subject to generalized proof, defeating predominance as to the contract claims. The district court concluded, to the contrary, that these minimum purchase obligations are not material, and do not draw into question the predominance of common issues as to the contract claims. We agree with the district court.

The minimum purchase requirements at issue here stipulate that to be entitled to the benefits of the contract, including cost-plus pricing, customers must purchase a minimum percentage of their food supplies from USF. For instance, the Thomas & King contract provides that the specified margins are contingent on Thomas & King "purchasing 85% of [its] total purchases in each specified product category from [USF]," J.A. at 1544. We agree with USF that if the minimum purchase requirements in many of its contracts had ever been enforced, individualized questions could potentially predominate regarding these contracts, as each plaintiff might be required to introduce evidence showing that it had complied with the requirements set forth in its contract to establish USF's breach.

But that is not this case. Here, the district court found that the minimum purchase requirements in the contracts were not enforced by USF and thus are not material to the question whether USF breached its agreements. The factual finding of non-enforcement is entitled to deference unless clearly erroneous. *See Parker,* 331 F.3d at 18. Given the absence of any evidence showing that USF ever enforced these requirements, as well as testimony from USF's own expert describing such requirements as "dream figure[s]" that food distributors do not even monitor for customer compliance, we cannot say that the district court's determination was clearly erroneous. In light of this factual finding, the district court did not abuse its discretion in determining that the provisions are not material to the question of breach, and thus that they create no need for individualized evidence of compliance.

c) Variations in State Contract Law

USF next argues that certification was improper because this multi-state class action implicates the laws of many jurisdictions. We agree that putative class actions involving the laws of multiple states are often not properly certified pursuant to Rule 23(b)(3) because variation in the legal issues to be addressed overwhelms the issues common to the ***127** class. *See, e.g., Castano v. Am. Tobacco Co.,* 84 F.3d 734, 741 (5th Cir.1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.,* 601 F.3d 1159, 1183 (11th Cir.2010). However, these concerns are lessened where the states' laws do not vary materially. *See Klay,* 382 F.3d at 1262 ("[I]f the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate."). Thus, the crucial inquiry is not whether the laws of multiple jurisdictions are implicated, but whether those laws differ in a material manner that precludes the predominance of common issues. *See Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1017 (D.C.Cir.1986) ("[N]ationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.' " (quoting *In re Sch. Asbestos Litig.,* 789 F.2d 996, 1010 (3d Cir.1986))).

[14] Here, they do not. As courts have noted, state contract law defines breach consistently such that the question will usually be the same in all jurisdictions. *See Klay,* 382 F.3d at 1263 ("A breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey."); *see also Am. Airlines, Inc. v. Wolens,* 513 U.S. 219, 233 n. 8, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) ("[C]ontract law is not at its core diverse, nonuniform, and confusing" (internal quotation marks omitted)). The uniformity is even more pronounced in this matter, moreover, as all the jurisdictions implicated have adopted the UCC. USF's principal contention to the contrary is that despite such adoption, state and tribal laws differ as to the admissibility of extrinsic evidence. But plaintiffs' papers in support of their motion for class certification demonstrate that all the relevant jurisdictions have adopted U.C.C. § 1–303, governing the introduction of such evidence. *See* J.A. at 2648–50. In the absence of any showing by USF disputing this, we

conclude that the district court did not abuse its discretion in determining that variations in state contract law do not preclude certification.

iii) Fraudulent Concealment and Tolling

In yet another effort to refute the district court's conclusion that plaintiffs have established predominance for the purpose of Rule 23(b)(3), USF argues: (1) that plaintiffs must rely on USF's alleged fraudulent concealment to toll the various statutes of limitations implicated in this action, in order to render timely their RICO and contract claims; (2) that different jurisdictions employ various legal standards for tolling statutes of limitations; and (3) that, as a result, common issues of law or fact do not predominate, and the district court abused its discretion in concluding otherwise. For the following reasons, we disagree.[10]

***128** **[15]** **[16]** **[17]** At the start, we agree with the district court that fraudulent concealment can be demonstrated via class-wide, generalized evidence. Granted, some jurisdictions whose law may apply to plaintiffs' contract claims require that a "plaintiff asserting fraudulent concealment prove it exercised some degree of diligence" to discover the claims. *See In re U.S. Foodservice,* 2011 WL 6013551, at *19. Similarly, a plaintiff seeking to toll the statute of limitations for a civil RICO claim must demonstrate that he was "reasonably diligent in trying to discover his cause of action." *Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 182, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997). The district court found, however, that plaintiffs "produced common evidence showing that USF intended to conceal the VASPs and, therefore, it cannot reasonably be expected that the plaintiffs could have discovered the injury until they became more fully aware of VASPs['] existence and purpose." *In re U.S. Foodservice,* 2011 WL 6013551, at *17. And while some contracts provided customers audit rights, common evidence indicates that USF purposefully designed the VASP system to be invisible to customer audits, and USF's own expert testified that an audit could not have uncovered the VASP arrangements. In the absence of any individualized evidence that plaintiffs were not deceived by USF's attempts to conceal the truth about the VASPs or that plaintiffs had the necessary tools to uncover the fraud prior to public disclosure of the VASP system in 2003, the district court did not abuse its discretion in determining that common evidence of this concealment will predominate in resolving whether the relevant statutes of limitations were tolled. *Cf. McLaughlin,* 522 F.3d at 233–34 (decertifying class in part because defendants introduced evidence indicating that plaintiffs knew truth about light cigarettes and were not deceived by false advertising).

The other variations among potentially applicable tolling standards identified by USF do not change this analysis. First, surveys of state law conducted by both parties reveal that all but three states apply the doctrine of fraudulent concealment or the related doctrine of equitable estoppel to toll the statute of limitations for contract claims. USF points out that 14 of these states provide that a statute of limitations is tolled for fraudulent concealment only if the plaintiff relied on a misrepresentation by the defendant, and that five states require that plaintiffs demonstrate fraudulent concealment by clear and convincing evidence.[11] *See* J.A. at 3201–33. But just as payment of inflated invoices constitutes circumstantial evidence that can be used to establish, for RICO purposes, that plaintiffs relied on the invoices' misrepresentation as to the cost component of USF's pricing, so too may such evidence be used to establish reliance for fraudulent concealment purposes. And the mere fact that five states impose a ***129** heightened standard of proof for fraudulent concealment does not draw into question the district court's conclusion as to predominance, but instead suggests simply the possibility that the district court, in a case in which generalized proof will resolve many issues, may choose to handle other less numerous and less substantial issues through the creation of a limited number of homogeneous subclasses. *See* Fed.R.Civ.P. 23(c)(5) (authorizing creation of subclasses); *Marisol A. v. Giuliani,* 126 F.3d 372, 379 (2d Cir.1997) ("Rule 23 gives the district court flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear."). In sum, fraudulent concealment issues may sometimes preclude certification under Rule 23(b)(3), but they do not do so here.

B. Expert Testimony

[18] USF also challenges the district court's reliance on the plaintiffs' damages expert John Damico, who testified that individual damages could be calculated on a class-wide basis with a simple formula using data extracted from USF's databases, and plaintiff's industry expert Stacy Moore, who testified that the VASP system "was not common industry practice and [USF's] customers would not—and by USF's design, could not—have known that USF was engaging in such conduct," J.A. at 2986. USF argues that the district court erred by considering this testimony without first conducting a *Daubert* hearing to determine the evidence's

admissibility.[12] The record establishes, however, that the district court performed its gatekeeping function and that it resolved the disputes regarding expert testimony in plaintiffs' favor.

The Supreme Court has not definitively ruled on the extent to which a district court must undertake a *Daubert* analysis at the class certification stage.[13] In *Wal–Mart Stores, Inc. v. Betty Dukes,* the Court offered limited dicta suggesting that a *Daubert* analysis may be required at least in some circumstances. *See* —— U.S. ——, 131 S.Ct. 2541, 2553–54, 180 L.Ed.2d 374 (2011) ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so...." (internal citation omitted)). In *In re IPO,* we disavowed our earlier statement that "an expert's testimony may establish a component of a Rule 23 requirement simply by not being fatally flawed," 471 F.3d at 41, without deciding whether or when a *Daubert* analysis forms a necessary component of a district court's rigorous analysis. *But see id.* at 41 (noting that ***130** a district judge must be afforded "considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements").

[19] We need not reach that question here either, as the record indicates that even though the district court did not conduct a *Daubert* hearing, it considered the admissibility of the expert testimony on the papers after USF had indicated that it was "happy to rely on the papers." S.A. at 608, 719; *see United States v. Williams,* 506 F.3d 151, 161 (2d Cir.2007) (noting that the "formality of a separate hearing" is not always required for a district court to "effectively fulfill[ ] its gatekeeping function under *Daubert* "). As its opinion makes clear, the district court did make the requisite findings, concluding with respect to Damico's proposed damages model that it is appropriately "based on USF's alleged fraudulent pricing," "provides for a universal calculation of damages" because USF "almost always used an invoice to calculate prices," and that "the only feasibility-related issue is the potential need for manual input of certain customers." *In re U.S. Foodservice,* 2011 WL 6013551, at *15–16. Similarly the court concluded that industry practice can be used to establish whether "USF customer[s] had any reason to know of" USF's VASP pricing. *Id.* at *11.[14] We therefore see no reason to disturb the district court's considered conclusions on the issue of expert testimony. *See United States v. Farhane,* 634 F.3d 127, 158 (2d Cir.2011) (noting that *Daubert* inquiry is flexible, that "district courts enjoy considerable discretion in deciding on the admissibility of expert testimony," and that "[w]e will not disturb a ruling respecting expert testimony absent a showing of manifest error").

C. Superiority

[20] USF asserts, finally, that even if common issues predominate in this class action, so that the district court did not err in reaching this conclusion, certification was still improper because a class action is not a superior method of adjudicating these claims. USF does not address any of the Rule 23(b)(3) factors,[15] however, and argues only that no economies would be achieved over individual litigation because absent this action individual customers would not bring suit. We do not find this reasoning persuasive.

[21] As the Supreme Court has said, Rule 23(b)(3) class actions can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery. *See Amchem Prods., Inc.,* 521 U.S. at 617, 117 S.Ct. 2231. Here, substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof will achieve significant economies of "time, effort and expense, and promote uniformity of decision." Fed.R.Civ.P. 23 advisory ***131** committee's notes. USF raises no significant argument to the contrary.

Conclusion

Despite the size and geographic scope of this class, close inspection of this case reveals that any class heterogeneity is minimal and is dwarfed by common considerations susceptible to generalized proof. The claims of each class member will be governed by the same substantive law, either RICO or the UCC. Moreover, the uniform nature of USF's alleged fraud and USF's concerted effort to shield its scheme from scrutiny place each customer in the same position as to these issues and ensure the cohesiveness of the class. USF itself, moreover, relies heavily on common proof—namely, trade usage evidence—in articulating its defense and has identified no individualized evidence or legal issues drawing into question the district court's conclusion that common issues will predominate. We discern no abuse of discretion in the district court's determination that certification was appropriate. Accordingly, for the foregoing reasons, we affirm the district court's order certifying the class.

All Citations

729 F.3d 108, 86 Fed.R.Serv.3d 702, RICO Bus.Disp.Guide 12,397

Footnotes

1 The six VASPs in questions are: (1) Seafood Marketing Specialists, Inc.; (2) Frozen Farms, Inc.; (3) Produce Solutions, Inc.; (4) Private Label Distribution, Inc.; (5) Speciality Supply and Marketing, Inc.; and (6) Commodity Management Systems, Inc.

2 Title for the purchased goods often passed directly from suppliers to USF without being transferred to the VASPs.

3 Earlier in the year, when USF's finance department became concerned about large payments between USF and the VASPs, David Eberhardt, USF's Deputy General Counsel, drafted agreements to formalize the relationship between USF and the entities created by Kaiser and Lee. Notably, a provision in each of the agreements prohibited the VASPs from publicly indicating any affiliation with USF and required them, if asked, to disavow any suggestion that they acted on USF's behalf.

4 The United States also brought suit, alleging that USF "falsely and fraudulently inflated the prices it charged the United States under its cost-based contracts to supply agencies of the United States with food products." Complaint, *United States v. U.S. Foodservice, Inc.,* 1:10–cv–06782 (S.D.N.Y. Sept. 13, 2010). These claims were brought pursuant to the False Claims Act, 31 U.S.C. § 3729, and the common law of fraud and unjust enrichment. *See id.* The parties settled upon USF's agreement to pay approximately $30 million. Appellee's Br. at 2.

5 Section 1962(c) makes it "unlawful for any person employed by or associated with" an enterprise engaged in or affecting interstate or foreign commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). "Racketeering activity" is in turn defined to include a litany of so-called predicate acts, including "any act which is indictable" under the mail and wire fraud statutes. 18 U.S.C. § 1961(1)(B).

6 While the Supreme Court has clarified that first-party reliance is not an element of a RICO claim predicated on mail fraud, *see Bridge,* 553 U.S. at 649, 128 S.Ct. 2131, it may be, as it is here, "a necessary part of the causation theory advanced by the plaintiffs." *Eli Lilly,* 620 F.3d at 133.

7 USF additionally points to the testimony of plaintiffs' expert, Thomas Maronick, to the effect that pursuant to industry practice, USF would have a "say" in determining the price of their private label products.

8 Plaintiffs' proposed measure for damages is thus directly linked with their underlying theory of classwide liability (that the misrepresentations on the invoices caused overpayments) and is therefore in accord with the Supreme Court's recent decision in *Comcast v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013), which reversed a Rule 23(b)(3) class certification on the ground that plaintiffs' theory of damages was flawed. *Id.* at 1432–33. In *Comcast,* the Supreme Court held that courts should examine the proposed damages methodology at the certification stage to ensure that it is consistent with the classwide theory of liability and capable of measurement on a classwide basis. *Id.* at 1433–35 (finding that plaintiffs' damages "model failed to measure damages from the particular antitrust injury on which petitioners' liability in this action is premised"). As discussed in Part B, *infra,* the district court carefully examined plaintiffs' damages model, finding it appropriate and feasible to redress the common harms alleged, and therefore did not abuse its discretion in determining that common issues predominate.

9 The UCC defines "course of performance" as the parties' conduct in the transaction in question provided that "(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection." U.C.C. § 1–303(a). In contrast, "course of dealing" focuses on the parties' conduct in previous transactions that can "fairly be regarded as establishing a common basis of conduct for interpreting their expressions and other conduct" in the transaction in question. *Id.* § 1–303(b). Finally, "usage of trade"

does not involve any inquiry into the conduct of the individual parties, but rather covers "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." *Id.* § 1–303(c).

10 Both parties presented the district court with an analysis of the relevant statute of limitations principles in all 50 states, though plaintiffs argue, *inter alia,* that upon proper application of choice of law principles, the law of only one to three states will be germane. Like the district court, we do not reach this choice of law issue in light of our conclusion that even assuming the laws of multiple jurisdictions apply, common issues predominate.

With regard to variations in the statutes of limitations themselves, the district court found that such variations did not pose an insuperable obstacle to class certification because only one state imposes a statute of limitations less than four years and subclasses may be created as needed to manage statute of limitations issues. *See In re U.S. Foodservice,* 2011 WL 6013551, at *17. USF does not dispute the propriety of this ruling on appeal.

11 USF also highlights variations in state law as to (1) whether an affirmative act of concealment by defendants is required as opposed to simple silence; (2) whether intent / knowledge on behalf of the defendant is required; and (3) whether the statute of limitations begins to run on actual discovery or constructive discovery. We find no error, however, in the district court's conclusion that these differences are immaterial. Plaintiffs allege an affirmative act by defendants who acted with an intent to deceive, and "the point at which plaintiffs should have discovered the breach is the same point at which they did discover the breach." *In re U.S. Foodservice,* 2011 WL 6013551, at *19.

12 Under *Daubert v. Merrell Dow Pharmaceuticals Inc.,* expert testimony is admissible if the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact or issue. 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592–93, 113 S.Ct. 2786; *see also* Fed.R.Evid. 702; *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (extending *Daubert* to non-scientific testimony).

13 The Supreme Court certified this precise question in *Comcast Corp., see* —— U.S. ——, 133 S.Ct. 24, 183 L.Ed.2d 673 (2012) (mem.) (certifying question "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis"), but did not reach it because the defendant had not objected to consideration of the expert testimony below, *see* 133 S.Ct. at 1435–36 (Ginsburg, *J.,* dissenting).

14 USF's argument that the district court erred in relying on Moore's testimony is actually a red herring. The district court cited Moore only once in its opinion—referring to her only as a "purported expert"—and its analysis regarding the predominance of industry standards over questions of individual customer knowledge was not dependent on her declaration. *See In re U.S. Foodservice,* 2011 WL 6013551, at *11.

15 Rule 23 instructs that matters pertinent to a finding of superiority include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3).

End of Document

Tab 8

CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 2697
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220505

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	*Jeremy Dacks Shawn Irving, Marc Wasserman* and *Michael De Lellis*, for the Applicants
– and –	
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSONENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG	*Ryan Jacobs* and *Jane Dietrich*, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders *David Botter, Sarah Schultz* and *Abid Quereshi*, US Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders *Heather Meredith* and *James Gage*, Canadian Counsel to the Agent and the Credit Facility Lenders *Ken Rosenberg* and *Danielle Glatt*, Counsel to US Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*; Counsel to US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.* *Steven Wittels* and *Susan Russell*, US Counsel for the Respondent Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*; US Counsel for Trevor Jordet, in his capacity as proposed

MARKETING LLS, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT.	)	class representative in *Jordet v. Just Energy Solutions Inc.*
	)	*Howard Gorman* and *Ryan Manns*, for Shell Energy North American (Canada) Inc. and Shell Energy North America (US)
	)	*Alexandra McCawley*, for FortisBC Energy Inc.
	)	*Mike Weinczok*, for Computershare Trust Company of Canada
Applicants	)	
– and –	)	*Robert Thornton, Rebecca Kennedy, Rachel Nicholson* and *Puya Fesharaki*, for FTI Consulting Canada Inc., as Monitor
MORGAN STANLEY CAPITAL GROUP INC.	)	
	)	*John F. Higgins* and *Megan Young-John*, U.S. Counsel to FTI Consulting Canada Inc., as Monitor
Respondents	)	
	)	**HEARD:** April 21, 2022

ENDORSEMENT

MCEWEN, J.

[1] The Applicant Just Energy Group, Inc. ("Just Energy"), in its capacity as the foreign representative (the "Foreign Representative")[1] of the Applicants and the partnerships listed in Schedule "A" of the Initial Order (collectively, the "Just Energy Entities"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "CCAA") brings this motion seeking an order that the Foreign Representative and other Just Energy Entities, as the case may be, are authorized and empowered to pursue claims pursuant to s. 36.1 of the CCAA (the "Section 36.1 Claims") in the proceedings commenced in the United States Bankruptcy Court for

[1] For ease of reference I will hereinafter refer to the moving party as the "Foreign Representative".

the South District of Texas (the "U.S. Bankruptcy Court") bearing case no. 21-04399 (the "Adversary Proceeding") *nunc pro tunc.*

[2] The Foreign Representative further seeks an order that FTI Consulting Canada Inc. (the "Monitor") be authorized to take whatever actions or steps it deems advisable to assist and supervise the Foreign Representative (and the other Just Energy Entities, as the case may be) with respect to the prosecution of the Section 36.1 Claims in the Adversary Proceeding.

[3] Last, in the alternative, the Foreign Representative submits that the Monitor ought to be authorized to jointly serve as the foreign representative in the matters before the U.S. Bankruptcy Court (the "Chapter 15 Cases") to jointly prosecute the Section 36.1 Claims in the Adversary Proceeding, *nunc pro tunc*.

[4] For the reasons that follow I grant the relief sought. I therefore do not need to deal with the alternative relief sought by the Foreign Representative.

BACKGROUND

[5] In March 2021 the Applicants obtained protection under the CCAA pursuant to the issuance of the Initial Order of this Court. The Initial Order granted protections and authorizations to the partnerships listed in Schedule "A" to the Initial Order and also, amongst other things, appointed the Monitor.

[6] Just Energy was further appointed in the Initial Order as the Foreign Representative in connection with the proposed recognition of the CCAA proceeding under Chapter 15 of the U.S. Bankruptcy Code. The CCAA proceeding was thereafter formally recognized by the U.S. Bankruptcy Court by way of an order dated April 2, 2021.

[7] In November 2021, the Foreign Representative, along with Just Energy Texas LP, Fulcrum Retail Energy LLC and Hudson Energy Services LLC (the "Plaintiffs") commenced the Adversary Proceeding against the Electricity Reliability Council of Texas ("ERCOT") and the Texas Public Utilities Commission ("PUCT") in the U.S. Bankruptcy Court. The Plaintiffs challenge the approximately USD $274 million paid under protest by or on behalf of the Just Energy Entities in respect of invoice obligations incurred with respect to ERCOT and payments made (collectively, the "Transfers") for electricity purchased by the Just Energy Entities in connection with the winter storm event that occurred in Texas in February 2021.

[8] Subsequently, in January 2022 ERCOT and PUCT moved to dismiss the Initial Complaint filed in the Adversary Proceeding. PUCT was successful. The Court also dismissed some of the claims against ERCOT and directed the Plaintiffs to file an amended complaint with respect to certain claims in the Initial Complaint. The Plaintiffs filed an amended complaint (the "First Amended Complaint").

[9] In March 2022 ERCOT filed a motion to dismiss the First Amended Complaint on the basis that, amongst other things, the Foreign Representative did not have standing to advance the Section 36.1 Claims.

[10] The motion proceeded before Judge David R. Jones on April 4, 2022. At the hearing Judge Jones requested that the Foreign Representative seek direction from this Court with respect to the question of the proper party to advance the Section 36.1 Claims. Thereafter Judge Jones stayed the Adversary Proceeding pending further order so that the parties could seek direction from this Court.

[11] This led to the motion before me.

SECTION 36.1 CLAIMS

[12] Section 36.1 was added to the CCAA in 2009. It is intended to allow fraudulent preferences and transfers undervalue ("TUVs") to be investigated and clawed back for the benefit of the debtor's estate in the CCAA proceeding. The relevant provisions of s. 36.1 read as follows:

> 36.1 (1) Sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act apply, **with any modifications that the circumstances require**, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.
>
> Interpretation
>
> (2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*
>
> (a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";
>
> (b) **to "trustee" is to be read as a reference to "monitor"**; and
>
> (c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company". (emphasis added)

[13] As can be seen, s. 36.1 incorporates ss. 38 and 95-101 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") to ensure consistency with the BIA. Section 36.1(2) was inserted for clarity to assist with the interpretation of the terminology contained in the BIA in the context of a CCAA proceeding: see Industry Canada, *Bill C-12: Clause by Clause Analysis*, which describes the government's rationale for the addition of section 36. 1.

[14] In its motion to dismiss the Adversary Proceeding, ERCOT relied upon s. 36.1(2)(b) to argue that only the Monitor has standing to pursue Section 36.1 Claims. As noted, Judge Jones referred the issue to this Court.

THE MOTION

Standing

[15] ERCOT refused to attorn to the jurisdiction of this Court. It therefore did not make submissions. ERCOT did provide a letter outlining its position to the Monitor.

[16] The Monitor advised at the motion that the letter from ERCOT did not raise any cases or points of law that were not included in the Applicant's factum. The Monitor took the position that the letter should not be placed in the court file since it would place the Monitor in a position where it was advocating for a party that did not wish to attorn to this Court's jurisdiction. I agreed with the argument and the letter was not placed before me.

Position of ERCOT in Adversary Proceeding

[17] As I understand it, from reviewing the Applicants' materials which include ERCOT's Motion to Dismiss First Amended Complaint and For Abstention, ERCOT relied upon s. 36.1(2)(b) of the CCAA to argue that only the Monitor has standing to pursue Section 36.1 Claims in the Adversary Proceeding.

[18] Sections 95-101 of the BIA are available to a trustee in bankruptcy to pursue certain transactions that are considered to be a preference. Section 96(1) also provides, in certain circumstances, for the trustee to pursue TUVs. The trustee steps into the shoes of the bankrupt by the operation of law so that the bankrupt cannot maintain control over its own property. As noted above, s. 36.1(2)(2) notes that in the CCAA a reference to the provisions of the BIA is to be read as a reference to the monitor.

[19] Based on the foregoing, ERCOT took the position that only the Monitor, pursuant to s. 36.1(2)(b) could bring Section 36.1 Claims in the CCAA proceeding and s. 36.1 does not provide that a foreign representative can bring such a claim.

[20] In this regard, ERCOT relied up on four CCAA cases.

[21] Two of the cases simply involved cases where the Monitor pursued the claims under s. 36.1: see *Ernst & Young Inc. v. Aquino*, 2021 ONSC 527, aff'd 2022 ONCA 202 and *Urbancorp Cumberland 2 GP Inc.*, 2017 ONSC 7156.

[22] In two other cases the Court refused to grant standing to third parties to pursue Section 36.1 Claims: see *Cash Store Financial Services, Re*, 2014 ONSC 4326, aff'd 2014 ONCA 834 and *Verdellen v. Monaghan Mushrooms Ltd.*, 2011 ONSC 5820.

Position of the Foreign Representative

[23] I begin by noting that the Court-appointed Monitor supports the Foreign Representative's position.

[24] The Just Energy Entities have kept the Monitor apprised of the steps taken in the Adversary Proceeding and representatives of the Monitor have attended all relevant hearings before the U.S. Bankruptcy Court. The Monitor is of the view that the Plaintiffs' claim has merit and that there may be recoveries from the Adversary Proceeding.

[25] Insofar as the Foreign Representative's position is concerned, it submits that ERCOT's submission is purely technical in nature. It further submits that in cross-border CCAA proceedings in which Canada is the main centre of interest there is no requirement under the CCAA that the Monitor act as foreign representative in foreign proceedings. It points to a number of cases where an applicant company has acted as the foreign representative: *Xerium Technologies (Re)*, 2010 ONSC 3974; *Cinram International (Re)*, 2012 ONSC 3767.

[26] Insofar as s. 36.1 and its interplay with BIA is concerned, the Foreign Representative submits that it generally makes sense under the BIA to have the trustee step into the shoes of the bankrupt so as to deprive the bankrupt of control over its property during the duration of the bankruptcy. The Foreign Representative, however, submits that the same rationale does not apply to CCAA proceedings where the debtor remains in possession.

[27] The Foreign Representative also stresses that it is well established in Canadian case law that the CCAA is to be read broadly and liberally with a view to facilitating its objectives – namely, to allow the debtor to restructure its affairs to the benefit of its stakeholders: see *Century Services Canada Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70. In this regard it points to s. 11 of the CCAA which provides this Court with the jurisdiction to "make any order that it considers appropriate in the circumstances" and that the broad language of s. 11 "should not be read as bring restricted by the availability of more specific orders": see *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 at para. 118 citing *US Steel Canada (Re)*, 2016 ONCA 662 at para. 79; *Century Services Canada Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[28] The Foreign Representative further submits that it is important to note that s. 36.1(2) was inserted to assist in transplanting the BIA provisions into the CCAA and that s. 36.1(1) of the CCAA contemplates that the application of the BIA provisions in a CCAA proceeding will be subject to "any modification that the circumstances require" (as emphasized above in para. 12).

[29] The Foreign Representative therefore submits that a reasonable modification should be made to allow it to pursue the Section 36.1 Complaints. Otherwise, it would be inconsistent with CCAA principles to read s. 36.1(2)(b) as a prohibition against the prosecution of Section 36.1 Claims by the Foreign Representative simply because it is not the Monitor. It stresses that this would be particularly perverse since the Monitor has expressly supported its position and the Foreign Representative's position is to the benefit of the Applicants and all stakeholders.

[30] I pause to note that the Monitor, in support of the Foreign Representative's position, also points to s. 101.1(1) of the BIA which states:

> Sections 95 to 101 apply, with any **modifications that the circumstances require**, to a proposal made under Division I of Part III unless the proposal provides otherwise. (emphasis added)

[31] The Monitor submits that s. 101.1(1) deals with the incorporation of these sections into a proposal and allows for "any modifications that the circumstances require." The Monitor therefore argues that it is contemplated that modifications can be made where there is a debtor in possession such as is the case in this matter. This allows the debtor, such as Just Energy as Foreign Representative, to pursue claims where it remains in possession. This is particularly sensible, submits the Monitor, where a claim is being pursued for the benefit of the debtor and the stakeholders, which is the case here.

[32] The Monitor points out that there are instances where the Monitor should pursue a claim, for example where the debtor company may be uninterested, but in the circumstances of this case the Foreign Representative, supported by the Monitor, is fully engaged in pursuing the Adversary Proceeding for the benefit of its estate and all stakeholders. It should not be defeated by a narrow and restrictive reading of s. 36.1 and the relevant provisions of the BIA. This would run contrary to a broad and liberal reading that the case law endorses.

[33] The Foreign Representative submits that all of the cases relied on by ERCOT in its motion to dismiss are distinguishable.

[34] First, the Foreign Representative submits that *Ernst & Young Inc. v. Aquino* and *Urbancorp Cumberland 2 GP Inc* are cases in which the Monitor did act as a party in pursuing a s. 36 claim. However, the issue of standing was not addressed in either case as it did not arise on the facts and therefore did not have to be considered by the court.

[35] In the latter two cases, *Cash Store* and *Verdellen*, the Foreign Representative does not dispute that the courts refused standing to a third party to pursue claims under s. 36.1 but both are distinguishable from this case in that they did not address the issue of standing of a foreign representative.

[36] For example, in *Cash Store*, the DIP lender sought to pursue Section 36.1 Claims before the monitor had completed its review of the purported preferences. The court held that the DIP lender could not proceed because the monitor had not yet refused to pursue Section 36.1 claims, and thus the provisions of s. 36.1 could not be utilized. The Foreign Representative therefore submits that *Cash Store* is entirely distinguishable. It also submits that the *Verdellen* case is distinguishable as the Court simply determined that a person who is not a creditor could not apply under s. 36 of the CCAA. The Foreign Representative therefore submits that neither of these cases address the issue of its standing but simply make general statements of law concerning a monitor's right to advance Section 36.1 Claims.

[37] Last, the Foreign Representative submits that allowing it to pursue the Section 36.1 Claims is the most cost efficient and economical way to proceed. If the Monitor were to proceed with this claim instead, it would require an extensive and duplicative documentary review which would not assist in obtaining a maximum recovery. The Monitor agrees.

ANALYSIS

[38] I accept the submissions of the Foreign Representative.

[39] The law is settled that the provisions of the CCAA are to be read broadly and liberally with a view to allow the debtor to restructure its affairs to the benefit of its stakeholders. When one considers the intersection of Section 36.1 Claims and the relevant provisions of the BIA it is entirely consistent with the provisions of the BIA and CCAA to allow a foreign representative to pursue Section 36.1 Claims. Both s. 101.1(1) of the BIA and s. 36.1(1) of the CCAA allow for modifications as circumstances require. I pause here to note that, although I am not being asked to determine the issue of whether only a trustee is able to bring a s. 95 action, I can see no provisions in the BIA that state that a trustee is the only party that can bring such an action . This seems to run contrary to the provisions of s. 101.1(1) of the BIA. Further, under s. 38 a creditor can take an assignment from a trustee. In my view this demonstrates the harmony between the BIA and the CCAA in which both are trying to achieve fairness in recovering assets for the benefit of the debtor and all stakeholders.

[40] In this case, where the Foreign Representative seeks to pursue the claim on behalf of the Just Energy Entities, with the support of the Monitor and for the benefit of all stakeholders, it is fair and reasonable to allow the necessary modification to allow the Foreign Representative to pursue the Adversary Proceeding. It further makes sense, as requested by the Foreign Representative, to have the Monitor take whatever actions or steps it deems advisable to assist and, importantly, supervise the Foreign Representative with respect to the prosecution of Section 36.1 Claims in the Adversary Proceeding. This allows the court-appointed Monitor to be kept abreast of all developments in the Adversary Proceeding, supervise the Foreign Representative as necessary and report to this Court. In my view, this undoubtedly benefits the Applicants and all stakeholders.

[41] The position advanced by ERCOT runs contrary to the spirit of the CCAA as well as the wording of the relevant provisions of the BIA and CCAA which allow for, as noted, modifications which ought to be allowed in this case for the reasons noted above.

[42] I further accept the submissions of the Foreign Representative that the case law relied upon by ERCOT in the Adversary Proceeding is entirely distinguishable and not of assistance in this case.

[43] Given the fact that I am allowing the Foreign Representative to pursue the Section 36.1 Claims in the Adversary Proceeding, it is likely unnecessary to determine whether the order should be made *nunc pro tunc*. I am prepared to grant the order, however, since the Foreign

Representative has acted in this capacity throughout the Adversary Proceeding and the Section 36.1 Claims. It would be sensible, therefore, for this to be recognized by way of a *nunc pro tunc* order to avoid any uncertainty.

[44] In conclusion, I see no mischief in allowing the Foreign Representative to pursue the Section 36.1 Claims in the Adversary Proceeding. It is consistent with the broad and liberal reading that should be afforded to the CCAA. This is provided for in the relevant wording of the BIA and CCAA and is to the benefit of the Applicants and stakeholders. For the reasons above, the Monitor will maintain its supervisory capacity. The Monitor's assistance would also be useful to the Foreign Representative as it maintains its duties as a court-appointed officer.

DISPOSITION

[45] The order shall therefore go allowing the Foreign Representative and other Just Energy Entities, as the case may be, to pursue the Section 36.1 Claims in the Adversary Proceeding, *nunc pro tunc*, with the Monitor being authorized and directed to take whatever actions and steps it deems advisable to assist and supervise the Just Energy Entities with respect to the prosecution of the Section 36.1 Claims in the Adversary Proceeding.

[46] I have reviewed the draft order provided to me by the Foreign Representative. The terms of the order are fair and reasonable. I have signed the order and will provide it to counsel. I attach a copy of the order to this Endorsement as Schedule "A".

McEwen, J.

Released: May 5, 2022

Schedule "A"

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY THE 5th
	)	
JUSTICE MCEWEN	)	DAY OF MAY, 2022

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT. (each, an "**Applicant**", and collectively, the "**Applicants**")

ORDER
(Motion re Authorization to Pursue Section 36.1 Claims in Adversary Proceeding)

THIS MOTION, made by Just Energy Group, Inc. ("**Just Energy**"), in its capacity as the foreign representative (the "**Foreign Representative**") of the Applicants and the partnerships listed on Schedule "A" of the Initial Order (collectively, the "**Just Energy Entities**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for various relief was heard this day by judicial video conference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

ON READING the Notice of Motion of the Foreign Representative, the Affidavit of James Tecce affirmed April 14, 2022, including the exhibits thereto (the "**Tecce Affidavit**") and the Ninth Report of FTI Consulting Canada Inc., in its capacity as monitor (the "**Monitor**"), dated April 18, 2022 (the "**Ninth Report**"), and on hearing the submissions of respective counsel for the Foreign Representative, the Monitor, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Emily Paplawski, affirmed April 14, 2022, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

STANDING TO PURSUE ADVERSARY PROCEEDING

2. **THIS COURT ORDERS** that:

   (a) the Foreign Representative and other Just Energy Entities, as the case may be, are hereby authorized and empowered to pursue the Section 36.1 Claims (as defined in the Tecce Affidavit) in the adversary proceeding commenced in the United States Bankruptcy Court for the Southern District of Texas (the "**U.S. Bankruptcy Court**") bearing adversary proceeding no. 21-4399 (MI) (the "**Adversary Proceeding**"), *nunc pro tunc*; and

   (b) the Monitor is hereby authorized and directed to take whatever actions or steps it deems advisable to assist and supervise the Just Energy Entities with respect to the prosecution of the Section 36.1 Claims in the Adversary Proceeding.

GENERAL

3. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces

and territories in Canada.

4. **THIS COURT HEREBY REQUESTS** the aid and recognition of the U.S. Bankruptcy Court, and any other court, tribunal, regulatory or administrative body, having jurisdiction in Canada or in the United States of America to give effect to this Order and to assist the Applicants, 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 Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

Court File No: CV-21-00658423-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., *et al.*

Applicants

5 May 22

Order to go as per the draft filed and signed.

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER
(Motion re Authorization to Pursue Section 36.1 Claims in Adversary Proceeding)

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CITATION: Just Energy Group Inc. et. al., 2022 ONSC 2697
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220505

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

– and –

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSONENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLS, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING

CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants

ENDORSEMENT

McEwen, J.

Released: May 5, 2022

Tab 9

See paras. 18, 75, Appendix "A" paras. 17, 26(d)

CITATION: Cline Mining Corporation (Re), 2014 ONSC 6998
COURT FILE NO.: CV-14-10781-00CL
DATE: 2014-12-03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 COMPROMOISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick* and *Logan Willis*, for the Applicants

J. Swartz, for the Secured Noteholders

Marc Wasserman and Michael De Lellis, for FTI Consulting Canada Inc., Proposed Monitor

HEARD: December 3, 2014

ENDORSEMENT

[1] Cline Mining Corporation ("Cline"), New Elk Coal Company LLC ("New Elk"), North Central Energy Company ("North Central") and, together with Cline and New Elk (the "Applicants") are in the business of locating, exploring and developing mineral resource properties, with a focus on gold and metallurgical coal (the "Cline Business"). The Applicants, along with their wholly-owned subsidiary, Raton Basin Analytical LLC ("Raton Basin") and, together with the Applicants (the "Cline Group") have interests in resource properties in Canada, the United States and Madagascar.

[2] The Applicants apply for an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("CCAA") and, if granted, the Applicants also seek an order (the "Claims Procedure Order") approving a claims process (the "Claims Procedure") for the identification and determination of claims against the Applicants and their present and former directors and officers. The Applicants also seek an order (the "Meetings Order") *inter alia*: (i) accepting the filing of a plan of compromise and arrangement in respect of the Applicants (the "Plan"); (ii) authorizing the Applicants to call, hold and conduct meetings (the "Meetings") of creditors whose claims are to be affected by the Plan for the purpose of enabling such creditors to consider and vote on a resolution to approve the Plan; and (iii) approving the procedures to be followed with respect to the calling and conduct of the Meetings.

[3] The Cline Group has experienced financial challenges that necessitate a recapitalization of the Applicants under the CCAA. As set out in the affidavit of Mr. Matthew Goldfarb, Chief Restructuring Officer and Acting Chief Executive Officer of Cline, the performance of the Cline Business has been adversely affected by the broader industry wide challenges, particularly the protracted downturn in prevailing prices for metallurgical coal. Operations at the New Elk metallurgical coal mine in Colorado (the "New Elk Mine") were suspended in July 2012 because the mine could not operate profitably as a result of a decline in the market price of metallurgical coal. The suspension of mining activities was intended to be temporary. However, Mr. Goldfarb contends that market conditions in the coal industry have not sufficiently recovered and the suspension of full scale mining activities is still in effect.

[4] Mr. Goldfarb contends that the Cline Group's other resource investments remain at the feasibility, exploration and/or development stages and the Cline Group's current inability to derive profit from the New Elk Mine has rendered the Applicants unable to meet their financial obligations as they become due.

[5] Cline is in default of its 2011 series 10% Senior Secured Notes (the "2011 Notes") as well as its 2013 series 10% Senior Secured Notes (the "2013 Notes", and collectively with the 2011 Notes, the "Secured Notes"). As at December 1, 2014, total obligations in excess of $110 million are owed in respect of the Secured Notes, which matured on June 15, 2014. The Secured Notes were subject to Forbearance Agreements that expired on November 28, 2014 and Mr. Goldfarb contends that the Applicants do not have the ability to repay the Secured Notes.

[6] The Secured Notes are issued by Cline and guaranteed by New Elk and North Central. The indenture trustee in respect of the Secured Notes (the "Trustee") holds a first ranking security interest over substantially all the assets of Cline, New Elk and North Central. Mr. Goldfarb states that the amounts owing under the Secured Notes exceed the value of the Cline Business and that there would be no recovery for unsecured creditors if the Trustee were to enforce its security against the Applicants in respect of the Secured Notes.

[7] The Secured Notes are held by beneficial owners whose investments are managed by Marret Asset Management Inc. ("Marret"). Marret exercises all discretion and authority in respect of the holders of the Secured Notes (the "Secured Noteholders"). Cline has engaged in discussions with representatives of Marret regarding a consensual recapitalization of the Applicants and these discussions have resulted in a proposed recapitalization transaction that is supported by Marret, on behalf of the Secured Noteholders (the "Recapitalization").

[8] Mr. Goldfarb states that if implemented, the Recapitalization would:

a. maintain the Cline Group as a unified corporate enterprise;

b. reduce the Applicants' secured indebtedness by more than $55 million;

c. reduce the Applicants' annual interest expense in the near term;

d. preserve certain tax attributes within the restructured company; and

e. effectuate a reduced debt structure to enable the Cline Group to better withstand prolonged weakness in the price of metallurgical coal.

[9] Mr. Goldfarb also states that the Recapitalization would also provide a limited recovery for the Applicants' unsecured creditors, who would otherwise receive no recovery in a security enforcement or asset sale scenario. It is contemplated that the Recapitalization would be implemented pursuant to a plan of compromise and arrangement under the CCAA (the "CCAA Plan) that is recognized in the United States under Chapter 15, Title 11 of the United States Bankruptcy Code ("Chapter 15").

[10] Cline and Marret have entered into a Support Agreement dated December 2, 2014 that sets forth the principal terms of the proposed Recapitalization. Based on Marret's agreement to the Recapitalization (on behalf of the Secured Noteholders), the Applicants have achieved support from their senior ranking creditors, which represent in excess of 95% of the Applicants' total indebtedness.

[11] The Applicants seek the Initial Order to stabilize their financial situation and to proceed with the Recapitalization as efficiently as possible, and to this end, the Applicants request that the Court also grant the Claims Procedure Order and the Meetings Order.

[12] Cline is a public company incorporated under the laws of British Columbia, with its registered head office located in Vancouver. Cline commenced business under the laws of Ontario in 2003 and Mr. Goldfarb states that its principal office, which serves as the head office and nerve centre of the Cline Group is located in Toronto.

[13] Cline is the direct or indirect parent company of New Elk, North Central and Raton Basin. Cline also holds minority interests in Iron Ore Corporation in Madagascar SARL, Strike Minerals Inc. and UMC Energy plc, all of which are exploration companies.

[14] Cline is the sole shareholder of New Elk, a limited liability company incorporated pursuant to the laws of Colorado. New Elk holds mining rights in the New Elk Mine and maintains a Canadian bank account with the Bank of Montreal in Toronto.

[15] New Elk is the sole shareholder of North Central and Raton Basin, both of which are incorporated pursuant to the laws of Colorado. North Central holds a fee-simple interest in certain coal parcels on which the New Elk Mine is situated and maintains a Canadian bank account with the Bank of Montreal in Toronto. Raton Basis in inactive and is not an applicant in the proceedings.

[16] Cline Group prepares its financial statements on a consolidated basis. The required financial statements are in the record. As at August 31, 2014, the Cline Group's liabilities were approximately $99 million. The primary secured liabilities were the 2011 Notes in the principal amount in excess of $71 million, plus accrued and unpaid interest, and the 2013 Notes in the principal amount of approximately $12 million, plus accrued and unpaid interest. Both the 2011 Notes and the 2013 Notes matured on June 15, 2014.

[17] Pursuant to an Inter-Creditor Agreement, the 2011 Notes and the 2013 Notes have a first ranking security interest on the property and undertakings of the Applicants and rank *pari passu* as between each other.

[18] Cline and New Elk are defendants in an uncertified class action lawsuit alleging that they violated the *WARN Act* by failing to provide personnel who provided services to New Elk with at least 60 days advance written notice of the suspension of both scale production at the New Elk Mine. These allegations are disputed.

[19] The Applicants are aware of approximately $3.5 million in other unsecured claims.

[20] On December 16, 2013, Cline was unable to make semi-annual interest payments in respect of both the 2011 and 2013 Notes. A Forbearance Agreement was entered into. During the forbearance period, the Applicants engaged Moelis & Company to conduct a comprehensive sale process in an effort to maximize value for the Applicant and its stakeholders (the "Sales Process"). No offers or expressions of interest were received in the Sale Process.

[21] The forbearance period expired on November 28, 2014 and Mr. Goldfarb has stated that Marret has confirmed that the Secured Noteholders have given instructions to the Trustee to accelerate the Secured Notes.

[22] Accordingly, Cline is immediately required to pay in excess of $110 million in respect of the Secured Notes. Mr. Goldfarb states that the Cline Group does not have the ability to pay these amounts and consequently the Trustee is in a position to enforce its security over the assets and property of the Applicants.

[23] In light of these financial conditions, Mr. Goldfarb states that the Applicants are insolvent.

[24] Mr. Goldfarb also contends that without the benefit of CCAA protection, there could be an erosion of the value of the Cline Group and that the stay of proceedings under the CCAA is required to preserve the value of the Cline Group.

[25] The Applicants are seeking the appointment of FTI Consulting Canada Inc. ("FTI") as the proposed monitor in these proceedings (the "Monitor").

[26] The proposed Initial Order also provides for a court ordered charge (the "Administration Charge") to be granted in favour of the Monitor, its counsel, counsel to the Applicants, the Chief Restructuring Officer (the "CRO") and counsel to Marret in respect of their fees and disbursements incurred at the standard rates and charges. The proposed Administration Charge is an aggregate amount of $350,000.

[27] The directors and officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities. Mr. Goldfarb states that in order to continue to carry on business during the CCAA proceedings and in order to conduct the Recapitalization most effectively, the Applicants require the active and committed involvement

of the board and, accordingly, the proposed Initial Order provides for a court ordered charge (the "Directors' Charge") in the amount of $500,000 to secure the Applicants' indemnification of its directors and officers in respect of liabilities they may incur during the CCAA proceedings. The amount of the Directors' Charge has been calculated based on the estimated exposure of the directors and officers and has been reviewed with the prospective Monitor. The proposed Directors Charge would only apply to the extent that the directors and officers do not have coverage under the D&O insurance policy with AIG Insurance Company of Canada.

[28] The Applicants seek to complete the Recapitalization as quickly as reasonably possible and they anticipate that their existing cash resources will provide the Cline Group with sufficient liquidity during the CCAA proceedings.

[29] It is also contemplated that foreign recognition proceedings will be sought in Colorado pursuant to Chapter 15. The Applicants seek the authorization for the Monitor to act as the foreign representative of the Applicants in the CCAA proceedings and to seek recognition of these proceedings in the United States pursuant to Chapter 15.

[30] Having reviewed the record, including the affidavit of Mr. Goldfarb and the pre-filing report submitted by FTI, I am satisfied that each of the Applicants is "a debtor company" within the meaning of the defined term in s. 2 of the CCAA.

[31] Cline is a "company" within the meaning of the CCAA. It is incorporated under the laws of British Columbia with gold development assets in Ontario and does business from its head office in Toronto.

[32] New Elk and North Central are incorporated in Colorado, have assets in Canada, namely bank accounts in Toronto and are directed from Cline's head office in Toronto. In my view, each of New Elk and North Central is a "company" within the meaning of the CCAA because it is an incorporated company having assets in Canada.

[33] I am also satisfied that the Applicants meet both the traditional test for insolvency under the *Bankruptcy and Insolvency Act* and the expanded test for insolvency based on a looming liquidity condition given that Cline has been unable to make interest payments under the Secured Notes, the Secured Notes have matured, the Forbearance Agreement has expired and the Trustee is in a position to enforce its security over the property of the Applicants. Further, I am satisfied that the Applicants are unable to obtain traditional or alternative financing to support the day-to-day operations and there is no reasonable expectation that the Applicants will be able to generate sufficient cash flow from operations to support their existing debt obligations (see: *(Re) Stelco Inc.* (2004), 48 CBR (4^{th}) 299 (Ont. Sup. Ct. (Commercial List)); leave to appeal to CA refused (2004) O.J. No. 1903; leave to appeal to SCC refused (2004) SCC No. 336).

[34] It is also clear that the Applicants' liabilities far exceed the $5 million threshold amount under the CCAA.

[35] In my view, the CCAA applies to the Applicants' as "debtor companies" in accordance with s. 3(1) of the CCAA.

[36] The Applicants have filed the required financial information, including audited financial statements and the cash-flow forecast.

[37] The Applicants in the Initial Order seek authorization (but not a requirement) to make certain pre-filing payments, including, *inter alia*:

a. payments to employees of effective wages, benefits and related amounts;

b. the amounts owing to respective individuals working as independent contractors;

c. the fees and disbursements of any consultants, agents, experts, accountants, counsel or other persons currently retained by the Applicants in respect of the CCAA; and

d. certain expenses incurred by the Applicants in carrying on the business in the ordinary course, that pertains to the period prior to the date of the Initial Order, if, in the opinion of the Applicants and with the consent of the Monitor, the applicable supplier or service provider is critical to the Cline Business and the ongoing operations of the Cline Group.

[38] The court has jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor's companies (see: *(Re) Canwest Global Communications Corp.* (2009), 59 CBR (5^{th}) 72; *(Re) Cinram International Inc*., 2012 ONSC 3767 and *(Re) Skylink Aviation Inc*., 2013 ONSC 1500). In granting such authorization, the courts consider a number of factors, including:

a. whether the goods and services were integral to the business of the applicants;

b. the applicants' need for the uninterrupted supply of the goods or services;

c. the fact that no payments would be made without the consent of the monitor;

d. the monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate;

e. whether the applicants had sufficient inventory of goods on hand to meet their needs; and

f. the effect on the debtor's ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[39] In this case, the Applicants are of the view that their employees and certain of their independent contractors, certain suppliers of goods and services and certain providers of permits and licences are critical to the operation of the Cline Business. Mr. Goldfarb believes that such

persons should be paid in the ordinary course, including in respect of pre-filing amounts, in order to avoid disruption to the Applicants' operations during the CCAA proceedings.

[40] I am satisfied that it is appropriate in the present circumstances to grant the Applicants the authority to pay certain pre and post-filing obligations, subject to the terms and conditions in the proposed Initial Order.

[41] Turning now to the request for the Administration Charge, s. 11.52 of the CCAA expressly provides the court with the jurisdiction to grant the Administration Charge. In *(Re) Canwest Publishing Inc.*, 2010 ONSC 222, the court noted that s. 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provide a list of non-exhaustive factors to consider in making such an assessment. The list of factors to consider include:

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

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

c. whether there is unwarranted duplication of roles;

d. whether the quantum of the proposed charge appears to be fair and reasonable;

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

f. the position of the monitor.

[42] The Applicants submit that the Administration Charge is warranted and necessary for the reasons set forth in Mr. Goldfarb's affidavit at paragraphs 133 – 140.

[43] I am satisfied that in these circumstances, the granting of the Administration Charge is warranted and necessary and that it is appropriate for the court to exercise its jurisdiction to grant the Administration Charge in the amount of $350,000.

[44] The Applicants also seek a Directors' Charge in the amount of $500,000.

[45] Section 11.51 of the CCAA affords the court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis. The court has granted director and officer charges in a number of cases including *Canwest Global, supra*, *Canwest Publishing, supra*, *Cinram, supra* and *Skylink, supra*.

[46] The Applicants submit that the Directors' Charge is warranted and necessary and that it is appropriate in the present circumstances for the court to exercise its jurisdiction and grant the charge in the amount of $500,000.

[47] For the reasons set out in Mr. Goldfarb's affidavit at paragraphs 134 - 138, I accept these submissions.

[48] The Applicants have also indicated that, with the assistance of the Monitor as foreign representative, they intend to commence Chapter 15 proceedings in the United States Bankruptcy Court for the District of Colorado. Pursuant to s. 56 of the CCAA, the court has the authority to appoint a foreign representative of the Applicants for the purpose of having these proceedings recognized in a jurisdiction outside of Canada.

[49] The Applicants seek authorization for each of the Applicants and the Monitor to apply to any court for recognition of the Initial Order and authorization for the Monitor to act as representative in respect of these CCAA proceedings for the purpose of having the CCAA proceedings recognized outside of Canada.

[50] I am satisfied that it is appropriate to appoint the Monitor as foreign representative of the Applicants with respect to these proceedings.

[51] The Applicants, in their factum, also address the issue of the Applicants' "center of main interest" as being in Ontario. These submissions are set out at paragraphs 77 – 84 of the Applicants' Factum.

[52] Although the submissions are of interest, the determination of the Applicants' "center of main interest" ("COMI") is an issue to be considered by the United States Bankruptcy Court for the District of Colorado, rather than this court.

[53] The Applicants also seek a postponement of the Annual Shareholders Meeting. The previous Annual Meeting of Cline was held on August 15, 2013 and therefore Cline was required by statute to hold an annual general meeting by November 15, 2014.

[54] Mr. Goldfarb states that it would serve no purpose for Cline to call and hold its annual meeting of Shareholders given that the Shareholders of Cline no longer have an economic interest in Cline as a result of the insolvency. The Applicants submit that it is appropriate for the court to exercise its jurisdiction to relieve Cline from its obligation to call and hold its annual meeting of Shareholders until after the termination of the CCAA proceedings or further order of the court. In support of this request, the Applicants reference *Canwest Global, supra* and *Skylink, supra*.

[55] In my view, the request to postpone the annual Shareholders meeting is appropriate in the circumstances and is granted.

[56] In the result, I am satisfied that the Applicants meet all of the qualifications required to obtain the requested relief under the CCAA and the Initial Order is granted in the form presented.

[57] The Applicants also request two additional orders that they believe are necessary to advance the Recapitalization:

a. an order establishing a process for the identification and determination of claims against the Applicants and their present and former directors and officers (the Claims Procedure Order); and

b. an order authorizing the Applicants to file the Plan and to convene meetings of their affected creditors to consider and vote on the Plan (the Meetings Order).

[58] The Applicants seek the Claims Procedure Order and the Meetings Order at this stage because they wish to effectuate the recapitalization as efficiently as possible. Further, the Applicants submit that the "comeback clauses" included in the draft Claims Procedure Order and Meetings Order ensure that no party is prejudiced by the granting of such order at this time.

[59] The Applicants have submitted a factum in support of the Claims Procedure Order and Meetings Order. In the factual background to the Recapitalization and proposed Plan, the Claims Procedure and the meeting of creditors is set out at paragraphs 8 – 29 of the factum. For informational purposes, these paragraphs are set out in Appendix "A" to this Endorsement.

[60] The issues to be considered on this motion are whether:

(a) it is appropriate to proceed with the Claims Procedure;

(b) it is appropriate to permit the Applicants to file the Plan and call the meetings;

(c) the proposed classification of creditors is appropriate; and

(d) a consolidated plan is appropriate in the circumstances.

[61] In *(Re) Skylink, supra* at paragraph 35, I noted that while it is not the usual practice for applicants to request claims procedure and meetings order concurrently with an initial CCAA application, the court has granted such relief in appropriate circumstances. The support for a restructuring proposal from the only creditors with an economic interest, and the existence of a comeback hearing at which any issues in respect of the orders can be addressed, are two factors that militate in favour of granting the Claims Procedure and Meetings Order concurrently with the initial application.

[62] In my view, the foregoing comment is applicable in these proceedings.

[63] I also note that both the Claims Procedure Order and the Meetings Order provide that any interested party that wishes to amend the Claims Procedure Order or the Meetings Order, as applicable, can bring a motion on a comeback date to be set by the court.

[64] I also accept that most of the Applicants' known creditors are familiar with the Applicants and the Cline Business and the determination of most of the claims against the Applicants would be carried out by the Applicants using the Notice of Claim Procedure. As

such, the Applicants submit that a claims bar date of January 13, 2015 will provide sufficient time for creditors to assert their claims and will not result in any prejudice to said creditors.

[65] Based on the submissions of the Applicants, I accept this submission.

[66] Accordingly, I am satisfied that the court should exercise its discretion and grant the requested Claims Procedure Order at this time.

[67] Turning now to the issue as to whether it is appropriate to permit the Applicants to file the Plan and call the meetings, the court is not required to address the fairness and reasonableness of the Plan at this stage.

[68] In these circumstances, I am satisfied that it is appropriate to grant the Meetings Order at this time in order to allow the Meetings Procedure to proceed concurrently with the Claims Procedure, with a view to completing the Recapitalization as efficiently as possible.

[69] Commencing at paragraph 42 of the factum, the Applicants make submissions with respect to the proposed classification of creditors for voting purposes.

[70] The Applicants submit that the holders of the 2011 Notes and the 2013 Notes have a commonality of interest in respect of their *pro rata* share of the Secured Noteholders Allowed Secured Claim and should be placed in the same class for voting purposes.

[71] For the purposes of the motion today, I am prepared to accept that it is appropriate for the Secured Noteholders to vote in the same class in respect of their Secured Noteholders Allowed Secured Claim.

[72] The Affected Unsecured Creditors' Class includes creditors with unsecured claims against the Applicants, including the Secured Noteholders in respect of their Secured Noteholders Allowed Unsecured Claim and, if applicable, Marret in respect of the Marret Unsecured Claim. The Applicants submit that the affected Unsecured Creditors have a commonality of interest and should be placed in the same class for voting purposes.

[73] It is noted that the determination of the Secured Noteholders Allowed Unsecured Claim has been determined by the Applicants and Marret and, for purposes of voting at the Secured Noteholders Meeting, is set at $17.5 million.

[74] For the purposes of the motion today, I am prepared to accept the submissions of the Applicants including their determination of the affected Unsecured Creditors class.

[75] The *WARN Act* plaintiffs class consists of potential members of an uncertified class action proceeding. The Applicants submit that the *WARN Act* claims have been asserted by only two *WARN Act* plaintiffs on behalf of other potential members of the class and these claims have not been proven and are contested by the Applicants.

[76] Due to the unique nature and status of these claims, the Applicants have offered the *WARN Act* plaintiffs consideration that is different than the consideration offered to the Affected Unsecured Creditors.

[77] I accept, for the purposes of this motion, that the *WARN Act* plaintiffs should be placed in a separate class for voting purposes.

[78] With respect to holders of "Equity Claims", the Meetings Order provides that any person with a claim that meets the definition of "equity claim" under s. 2(1) of the CCAA will have no right to, and will not, vote at meetings; and the Plan provides that equity claimants will not receive a distribution under the Plan or otherwise recover anything in respect of their equity claims or equity interest.

[79] For the purposes of this motion, I accept the submission of the Applicants that it is appropriate for equity claimants to be prohibited from voting on the Plan.

[80] The Plan as proposed by the Applicants is a consolidated plan of arrangement that is intended to address the combined claims against all the Applicants. Courts will authorize a consolidated plan of arrangement to be filed for two or more related companies in appropriate circumstances (see, for example: *(Re) Northland Properties Ltd.* (1988), 69 CBR (NS) 226 (BCSC)*; (Re) Lehndorff General Partners Ltd.* (1993), 17 CBR (3d) 24).

[81] In this case, the Applicants submit that a consolidated plan is appropriate because:

a. New Elk is a wholly-owned subsidiary of Cline and North Central is a wholly-owned subsidiary of New Elk;

b. the Applicants are integrated members of the Cline Group, and there is significant sharing of business functions within the Cline Group;

c. the Applicants have prepared consolidated financial statements;

d. all three of the Applicants are obligors in respect of the Secured Notes;

e. the Secured Noteholders are the only creditors with an economic interest in any of the three Applicants and have a first ranking security interest over all or substantially all of the assets, property and undertakings of each of the Applicants;

f. the *WARN Act* claims are asserted against both Cline and New Elk under a "single employer" theory of liability;

g. North Central has no known liabilities other than its obligations in respect of the Secured Notes;

h. Unsecured Creditors of the Applicants would receive no recovery outside of the Plan; and

i. the filing of a consolidated plan does not prejudice any affected Unsecured Creditor or *WARN Act* plaintiff, since a consolidated plan will not eliminate any veto position with respect to approval of the plan that such creditors would have if separate plans of arrangement were filed in respect of each of the Applicants.

[82] For the purposes of the motion today, I accept these submissions and consider it appropriate to authorize the filing of a consolidated plan.

[83] In the result, I am satisfied that it is appropriate to grant both the Claims Procedure Order and the Meetings Order at this time.

[84] It is specifically noted that the "comeback clause" that is included in both the Claims Procedure and the Meetings Orders will allow parties to come back before this court to amend or vary the Claims Procedure Order or the Meetings Order. The comeback hearing has been scheduled for Monday, December 22, 2014.

_____

Regional Senior Justice G.B. Morawetz

Date: December 3, 2014

APPENDIX "A"

A. RECAPITALIZATION AND PROPOSED PLAN

(1) Overview of the Recapitalization

8. The Applicants have been actively engaged in discussions with Marret, on behalf of the Secured Noteholders, regarding a possible recapitalization of the Applicants. The Applicants believe that that the Recapitalization, in the circumstances, is in the best interests of the Applicants and their stakeholders. The Recapitalization provides for, *inter alia*, the following:

(a) the Secured Noteholders Allowed Secured Claim will be compromised, released and discharged as against the Applicants upon implementation of the Plan (the "**Plan Implementation Date**") for new Cline common shares representing 100% of the equity in Cline (the "**New Cline Common Shares**"), and new indebtedness in favour of the Secured Noteholders in the principal amount of $55 million (the "**New Secured Debt**");

(b) Cline will be the borrower and New Elk and North Central will be the guarantors of the New Secured Debt, which will be evidenced by a credit agreement with a term of seven (7) years, bearing interest at a rate of 0.01% per annum plus an additional variable interest payable only once the Applicants have achieved certain operating revenue targets;

(c) the claims of Affected Unsecured Creditors, which exclude the WARN Act Plaintiffs but include the Secured Noteholders in respect of the Secured Noteholders Allowed Unsecured Claim, will be compromised, released and discharged as against the Applicants on the Plan Implementation Date in exchange for an unsecured, subordinated, non-interest bearing entitlement to receive $225,000 from Cline on the date that is eight (8) years from the Plan Implementation Date (the "**Unsecured Plan Entitlement**");

(d) notwithstanding the Secured Noteholders Allowed Unsecured Claim, the Secured Noteholders will waive their entitlement to the proceeds of the Unsecured Plan Entitlement, and all such proceeds will be available for distribution to the other Affected Unsecured Creditors with valid claims who are entitled to the Unsecured Plan Entitlement, allocated on a *pro rata* basis;

(e) all Affected Unsecured Creditors with Affected Unsecured Claims of up to $10,000 will, instead of receiving their *pro rata* share of the Unsecured Plan Entitlement, be paid in cash for the full value of their claim and will be deemed to vote in favour of the Plan unless they indicate otherwise, provided that this cash payment will not apply to any Secured Noteholder with respect to its Secured Noteholders Allowed Unsecured Claim;

(f) all WARN Act Claims will be compromised, released and discharged as against the Applicants on the Plan Implementation Date in exchange for an unsecured, subordinated, non-interest bearing entitlement to receive $100,000 from Cline on the date this is eight (8) years from the Plan Implementation Date (the "**WARN Act Plan Entitlement**");

(g) certain claims against the Applicants, including claims covered by insurance, certain prior-ranking secured claims of equipment providers and the secured claim of Bank of Montreal in respect of corporate credit card payables, will remain unaffected by the Plan;

(h) existing equity interests in Cline will be cancelled for no consideration; and

(i) the shares of New Elk and North Central will not be affected by the Recapitalization and will remain owned by Cline and New Elk, respectively.

Goldfarb Affidavit at para. 124; Application Record, Tab 4.

9. Any Affected Creditor with a Disputed Distribution Claim will not be entitled to receive any distribution under the Plan with respect to such Disputed Distribution Claim unless and until such Claim becomes an Allowed Affected Claim. A Disputed Distribution Claim will be resolved in the manner set out in the Claims Procedure Order.

Plan, Section 3.6.

10. Unaffected Creditors will not be affected by the Plan and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

Plan, Sections 1.1, 2.3 and 3.5.

11. If implemented, the Recapitalization would result in a reduction of over $55 million in interest-bearing debt.

Goldfarb Affidavit at para. 126; Application Record, Tab 4.

12. The proposed Recapitalization is supported by Marret, which has the ability to exercise all discretion and authority of the Secured Noteholders. Consequently, the proposed Recapitalization is supported by 100% of the Secured Noteholders, both as secured creditors of the Applicants and as unsecured creditors of the Applicants in respect of the portion of their claims that is unsecured.

Goldfarb Affidavit at paras. 63, 67 and 145; Application Record, Tab 4.

(2) Classification for Purposes of Voting on the Plan

13. The only classes of creditors for the purposes of considering and voting on the Plan will be (i) the Secured Noteholders Class, (ii) the Affected Unsecured Creditors Class, and (iii) the WARN Act Plaintiffs Class.

Plan, Section 3.2.

Goldfarb Affidavit at para. 153; Application Record, Tab 4.

14. The Secured Noteholders Class consists of the Secured Noteholders in respect of the Secured Noteholders Allowed Secured Claim, being the portion of the Secured Noteholders Allowed Claim against the Applicants that is designated as secured. Each Secured Noteholder will be entitled to vote its *pro rata* portion of that amount in the Secured Noteholders Class.

Goldfarb Affidavit at para. 154; Application Record, Tab 4.

15. The Affected Unsecured Creditors Class consists of the unsecured creditors of the Applicants who are to be affected by the Plan, excluding the WARN Act Plaintiffs (who are addressed in a separate class). The Affected Unsecured Creditors Class includes the Secured Noteholders in respect of the Secured Noteholders Allowed Unsecured Claim, being the portion of the Secured Noteholders Allowed Claim that is designated as unsecured. Each Secured Noteholder will be entitled to vote its *pro rata* portion of the Secured Noteholders Allowed Unsecured Claim in the Affected Unsecured Creditors Class.

Goldfarb Affidavit at para. 155; Application Record, Tab 4.

16. Within the Affected Unsecured Creditors Class, unsecured creditors with Affected Unsecured Claims of up to $10,000 will be paid in full and will be deemed to vote in favour of the Plan, unless they indicate otherwise.

Goldfarb Affidavit at para. 156; Application Record, Tab 4.

17. The WARN Act Plaintiffs Class consists of all WARN Act Plaintiffs in the WARN Act Class Action who may assert WARN Act Claims against the Applicants. Each WARN Act Plaintiff will be entitled to vote its *pro rata* portion of all WARN Act Claims.

Goldfarb Affidavit at para. 157; Application Record, Tab 4.

18. Unaffected Creditors and Equity Claimants are not entitled to vote on the Plan at the Meetings in respect of their Unaffected Claims and Equity Claims, respectively.

Plan, Sections 3.4(3) and 3.5.

19. The Plan provides that, if the Plan is not approved by the required majorities of both the Unsecured Creditors Class and the WARN Act Plaintiffs Class, or the Applicants determine that such approvals are not forthcoming, the Applicants are permitted to withdraw the Plan and file an amended and restated plan with the features described on Schedule "B" to the Plan (the "Alternate Plan"). The Alternate Plan would provide, *inter alia*, that all unsecured claims and all WARN Act Claims against the Applicants would be treated as unaffected claims, the only voting class under the Alternate Plan would be the Secured Noteholders Class, and all assets of the Applicants would be transferred to an entity designated by the Secured Noteholders in exchange for a release of the Secured Noteholders Allowed Secured Claim.

Goldfarb Affidavit at para. 125; Application Record, Tab 4.

B. CLAIMS PROCEDURE

20. The Applicants wish to commence the Claims Procedure as soon as possible to ascertain all of the Claims against the Applicants for the purpose of voting and receiving distributions under the Plan.

21. Liabilities and claims against the Applicants that the Applicants are aware of, include, *inter alia*, secured obligations in respect of the Secured Notes, secured obligations in respect of leased equipment used at the New Elk Mine, contingent claims for damages and other amounts in connection with certain pending litigation claims against the Applicants, and unsecured liabilities in respect of accounts payable relating to ordinary course trade and employee obligations.

Goldfarb Affidavit at paras. 52-57; Application Record, Tab 4.

22. The draft Claims Procedure Order provides a process for identifying and determining claims against the Applicants and their directors and officers, including, *inter alia*, the following:

(a) Cline, with the consent of Marret, will determine the aggregate of all amounts owing by the Applicants under the 2011 Indenture and the 2013 Indenture up to the Filing Date, such aggregate amounts being the "**Secured Noteholders Allowed Claim**";

(b) the Secured Noteholders Allowed Claim will be apportioned between the Secured Noteholders Allowed Secured Claim and the Secured Noteholders Allowed Unsecured Claim (being the amount of the Secured Noteholders Allowed Claim that is designated as unsecured in the Plan);

(c) the Monitor will send a Claims Package to all Known Creditors, which Claims Package will include a Notice of Claim specifying the Known Creditor's Claim against the Applicants for voting and distribution purposes, as valued by the Applicants based on their books and records, and specifying whether the Known Creditor's Claim is secured or unsecured;

(d) the Claims Procedure Order contains provisions allowing a Known Creditor to dispute its Claim as set out in the applicable Notice of Claim for either voting or distribution purposes or with respect to whether such Claim is secured or unsecured, and sets out a procedure for resolving such disputes;

(e) the Monitor will publish a notice to creditors in The Globe and Mail (National Edition), the Denver Post and the Pueblo Chieftain to solicit Claims against the Applicants by Unknown Creditors who are as yet unknown to the Applicants;

(f) the Monitor will deliver a Claims Package to any Unknown Creditor who makes a request therefor prior to the Claims Bar Date, containing a Proof of Claim to be completed by such Unknown Creditor and filed with the Monitor prior to the Claims Bar Date;

(g) the proposed Claims Bar Date for Proofs of Claim for Unknown Creditors and for Notices of Dispute in the case of Known Creditors is January 13, 2015;

(h) the Claims Procedure Order contains provisions allowing the Applicants to dispute a Proof of Claim as against an Unknown Creditor and provides a procedure for resolving such disputes for either voting or distribution purposes and with respect to whether such claim is secured or unsecured;

(i) the Claims Procedure Order allows the Applicants to allow a Claim for purposes of voting on the Plan without prejudice to whether that Claim has been accepted for purposes of receiving distributions under the Plan;

(j) where the Applicants or the Monitor send a notice of disclaimer or resiliation to any Creditor after the Filing Date, such notice will be accompanied by a Claims Package allowing such Creditor to make a claim against the Applicants in respect of a Restructuring Period Claim;

(k) the Restructuring Period Claims Bar Date, in respect of claims arising on or after the date of the Applicants' CCAA filing, will be seven (7) days after the day such Restructuring Period Claim arises;

(l) for purposes of the matters set out in the Claims Procedure Order in respect of any WARN Act Claims: (i) the WARN Act Plaintiffs will be treated as Unknown Creditors since the Applicants are not aware of (and have not quantified) any bona fide claims of the WARN Act Plaintiffs; and (ii) Class Action Counsel shall be entitled to file Proofs of Claim, Notices of Dispute of Revision and

Disallowance, receive service and notice of materials and to otherwise deal with the Applicants and the Monitor on behalf of the WARN Act Plaintiffs, provided that Class Action Counsel shall require an executed proxy in order to cast votes on behalf of any WARN Act Plaintiffs at the WARN Act Plaintiffs' Meeting; and

(m) Creditors may file a Proof of Claim with respect to a Director/Officer Claim.

Goldfarb Affidavit at para. 151; Application Record, Tab 4.

23. As further discussed below, the Applicants may elect to proceed with the Meetings notwithstanding that the resolution of Claims in accordance with the Claims Procedure may not be complete. The Meetings Order provides for the separate tabulation of votes cast in respect of Disputed Voting Claims and provides that the Monitor will report to the Court on whether the outcome of any vote would be affected by votes cast in respect of Disputed Voting Claims.

Goldfarb Affidavit at paras. 161(f)-(h) and 162; Application Record, Tab 4.

24. The Claims Procedure Order includes a comeback provision providing interested parties who wish to amend or vary the Claims Procedure Order with the ability to appear before the Court or bring a motion on a date to be set by this Court.

Goldfarb Affidavit at para 149; Application Record, Tab 4.

C. MEETINGS OF CREDITORS

25. It is proposed that the Meetings to vote on the Plan will be held at Goodmans LLP, 333 Bay Street, Suite 3400, Toronto, Ontario on January 21, 2015 at 10:00 a.m. for the WARN Act Plaintiffs Class, 11:00 a.m. for the Affected Unsecured Creditors Class, and 12:00 p.m. for the Secured Noteholders Class.

Goldfarb Affidavit at para. 160; Application Record, Tab 4.

Meetings Order, Section 20.

26. The draft Meetings Order provides for, *inter alia*, the following in respect of the governance of the Meetings:

(a) an officer of the Monitor will preside as the chair of the Meetings;

(b) the only parties entitled to attend the Meetings are the Eligible Voting Creditors (or their proxyholders), representatives of the Monitor, the Applicants, Marret, all such parties' financial and legal advisors, the Chair, the Secretary, the Scrutineers,

and such other parties as may be admitted to a Meeting by invitation of the Applicants or the Chair;

(c) only Creditors with Voting Claims (or their proxyholders) are entitled to vote at the Meetings; provided that, in the event a Creditor holds a Disputed Voting Claim as at the date of a Meeting, such Disputed Voting Claim may be voted at the Meeting but will be tabulated separately and will not be counted for any purpose unless such Claim is ultimately determined to be a Voting Claim;

(d) each WARN Act Plaintiff (or its proxyholder) shall be entitled to cast an individual vote on the Plan as part of the WARN Act Plaintiffs Class, and Class Action Counsel shall be permitted to cast votes on behalf of those WARN Act Plaintiffs who have appointed Class Action Counsel as their proxy;

(e) the quorum for each Meeting is one Creditor with a Voting Claim, provided that if there are no WARN Act Plaintiffs voting in the WARN Act Plaintiffs Class, the Applicants will have the right to combine the WARN Act Plaintiffs Class with the Affected Unsecured Creditors Class and proceed without a vote of the WARN Act Plaintiffs Class, in which case there shall be no WARN Act Plan Entitlement under the Plan;

(f) the Monitor will keep separate tabulations of votes in respect of:

i. Voting Claims; and

ii. Disputed Voting Claims, if any;

(g) the Scrutineers will tabulate the vote(s) taken at each Meeting and will determine whether the Plan has been accepted by the required majorities of each class; and

(h) the results of the vote conducted at the Meetings will be binding on each creditor of the Applicants whether or not such creditor is present in person or by proxy or voting at a Meeting.

Goldfarb Affidavit at para. 161; Application Record, Tab 4.

27. The Applicants may elect to proceed with the Meetings notwithstanding that the resolution of Claims in accordance with the Claims Procedure may not be complete. The Meetings Order, if approved, authorizes and directs the Scrutineers to tabulate votes in respect of Voting Claims separately from votes in respect of Disputed Voting Claims, if any. If the approval or non-approval of the Plan may be affected by the votes cast in respect of Disputed Voting Claims, then the Monitor will report such matters to the Court and the Applicants and the Monitor may seek advice and directions at that time. This way, the Meetings can proceed concurrently with the Claims Procedure without prejudice to the Applicants' Creditors.

Goldfarb Affidavit at paras. 161(f)-(h) and 162; Application Record, Tab 4.

28. Like the Claims Procedure Order, the Meetings Order includes a comeback provision providing interested parties who wish to amend or vary the Meetings Order with the ability to appear before the Court or bring a motion on a date to be set by the Court.

Meetings Order, Section 68.

29. By seeking the Claims Procedure Order and the Meetings Order concurrently, the Applicants hope to move efficiently and expeditiously towards the implementation of the Recapitalization.

Goldfarb Affidavit at para. 148; Application Record, Tab 4.

Tab 10

See paras. 7, 15-16

CITATION: Cline Mining Corporation (Re), 2015 ONSC 622
COURT FILE NO.: CV-14-10781-00CL
DATE: 2015-01-30

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick* and *Logan Willis*, for the Applicants Cline Mining Corporation et al.

Michael DeLellis and *David Rosenblatt*, for the FTI Consulting Canada Inc., Monitor of the Applicants

Jay Swartz, for the Secured Noteholders

HEARD: January 27, 2015

ENDORSEMENT

[1] Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "Applicants") seek an order (the "Sanction Order"), among other things:

a. sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and

b. extending the stay, as defined in the Initial Order granted December 3, 2014 (the "Initial Order"), to and including April 1, 2015.

[2] Counsel to the Applicants submits that the Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges and, if implemented, the Recapitalization will maintain the Applicants as a unified corporate enterprise

and result in an improved capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal.

[3] Counsel submits that the Applicants believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

[4] The position of the Applicants is supported by the Monitor, and by Marret, on behalf of the Secured Noteholders.

[5] The Plan has the unanimous support from the creditors of the Applicants. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

[6] The background giving rise to (i) the insolvency of the Applicants; (ii) the decision to file under the CCAA; (iii) the finding made that the court had the jurisdiction under the CCAA to accept the filing; (iv) the finding of insolvency; and (v) the basis for granting the Initial Order and the Claims Procedure Order was addressed in *Cline Mining Corporation (Re)*, 2014 ONSC 6998 and need not be repeated.

[7] The Applicants report that counsel to the WARN Act Plaintiffs in the class action proceedings (the "Class Action Counsel") submitted a class proof of claim on behalf of the 307 WARN Act Plaintiffs in the aggregate amount of U.S. $3.7 million. Class Action Counsel indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Plan dated December 3, 2014 (the "Original Plan") without an enhancement of the recovery. The Applicants report that after further discussions, agreement was reached with Class Action Counsel on the form of a resolution that provides for an enhanced recovery for the WARN Act Plaintiffs Class of $210,000 (with $90,000 paid on the Plan implementation date) as opposed to the recovery offered in the Original Plan of $100,000 payable in eight years from the Plan implementation date.

[8] As a result of reaching this resolution, the Original Plan was amended to reflect the terms of the WARN Act resolution.

[9] The Applicants served the Amended Plan on the Service List on January 20, 2015.

[10] The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

[11] Equity claimants will not receive any consideration or distributions under the Plan.

[12] The Plan provides for the release of certain parties (the "Released Parties"), including:

(i) the Applicants, the Directors and Officers and employees of contractors of the Applicants; and

(ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in sub-paragraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any Claims, any Directors/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matter (collectively, the "Released Claims").

[13] The Plan does not release:

(i) the right to enforce the Applicants' obligations under the Plan;

(ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or

(iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[14] The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants' applicable Insurance Policies.

[15] The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

[16] The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed unanimously in each of the three classes of creditors.

[17] None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of the Disputed Claims in the voting results.

[18] Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan. The effect of the court's approval is to bind the company and its creditors.

[19] The general requirements for court approval of the 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, which is not authorized by the CCAA; and

c. the plan must be fair and reasonable.

(see *Re SkyLink Aviation Inc.*, 2013 ONSC 2519)

[20] Having reviewed the record and hearing submissions, I am satisfied that the foregoing test for approval has been met in this case.

[21] In arriving at my conclusion that the Plan is fair and reasonable in the circumstances, I have taken into account the following:

a. the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;

b. the classification of the Applicants' creditors into three voting classes was previously approved by the court and the classification was not opposed at any time;

c. the results of the Sale Process indicate that the Secured Noteholders would suffer a significant shortfall and there would be no residual value for subordinate interests;

d. the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs;

e. all Affected Creditors that voted on the Plan voted for its approval;

f. the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;

g. Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;

h. the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA; and

i. the Plan is supported by the Applicants (Marret, on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favor of the Plan at the Meetings.

[22] The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring (see: *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587

("*ATB Financial*"); *SkyLink*, *supra;* and *Re Sino-Forest Corporation*, 2012 ONSC 7050, leave to appeal denied, 2013 ONCA 456).

[23] The court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. In this case, the record establishes that the releases were negotiated as part of the overall framework of the compromises in the Plan, and these releases facilitate a successful completion of the Plan and the Recapitalization. The releases cover parties that could have claims of indemnification or contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants have been discharged in the Plan.

[24] I am satisfied that the releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

[25] Further, the releases provided for in the Plan were contained in the Original Plan filed with the court on December 3, 2014 and attached to the Meetings Order. Counsel to the Applicants submits that the Applicants are not aware of any objections to the releases provided for in the Plan.

[26] The Applicants also contend that the releases of the released Directors/Officers are appropriate in the circumstances, given that the released Directors and Officers, in the absence of the Plan releases, could have claims for indemnification or contribution against the Applicants and the release avoids contingent claims for such indemnification or contribution against the Applicants. Further, the releases were negotiated as part of the overall framework of compromises in the Plan. I also note that no Director/Officer Claims were asserted in the Claims Procedure.

[27] The Monitor supports the Applicants' request for the sanction of the Plan, including the releases contained therein.

[28] I am satisfied that in these circumstances, it is appropriate to grant the releases.

[29] The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares. I am satisfied that these amendments are necessary in order to effect the provisions of the Plan and that it is appropriate to grant the amendments as part of the approval of the Plan.

[30] The Applicants also request an extension of the stay until April 1, 2015. This request is made pursuant to section 11.02(2) of the CCAA. The court must be satisfied that:

(i) circumstances exist that make the order appropriate; and

(ii) the applicant has acted, and is acting in good faith and with due diligence.

[31] The record establishes that the Applicants have made substantial progress toward the completion of the Recapitalization, but further time is required to implement same. I am satisfied that the test pursuant to section 11.02(2) has been met and it is appropriate to extend the stay until April 1, 2015.

[32] Finally, the Monitor requests approval of its activities and conduct to date and also approval of its Pre-Filing Report, the First Report dated December 16, 2014 and the Second Report together with the activities described therein. No objection was raised with respect to the Monitor's request, which is granted.

[33] For the foregoing reasons, the motion is granted and an order shall issue in the form requested, approving the Plan and providing certain ancillary relief.

R.S.J. Morawetz

Date: January 30, 2015

Tab 11

See paras. 39, 42-44

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

DATE: April 25, 2018

PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

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

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
Petitioners
and
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED
Mises-en-cause
and
FTI CONSULTING CANADA INC.
Monitor
and
MICHAEL KEEPER, TERENCE WATT,
DAMIEN LEBEL AND NEIL JOHNSON
and
SYNDICAT DES MÉTALLOS, LOCAL 6254,
SYNDICAT DES MÉTALLOS, LOCAL 6285
SYNDICAT DES MÉTALLOS, LOCAL 9996
Objecting parties

RECTIFIED JUDGMENT ON THE AMENDED MOTION FOR THE ISSUANCE OF A PLAN FILING AND MEETINGS ORDER (#642)*

OVERVIEW

[1] The CCAA Parties seek the issuance of a Plan Filing and Meetings Order (the "Meetings Order") which would, *inter alia*, authorize the CCAA Parties to (1) file the Joint Plan of Compromise and Arrangement dated April 16, 2018 (the "Plan") and (2) convene meetings of their creditors for the purpose of considering and voting on the Plan.

[2] The creditors of the CCAA Parties are, for the most part, in agreement that the proposed Meetings Order should be issued.

[3] The Representative Employees and the Union ask the Court to amend the proposed Meetings Order to give their counsel a deemed proxy to vote in counsel's discretion the claims of the salaried employees and retirees and the unionized employees and retirees respectively, unless the employee or retiree opts out by advising the Monitor that he or she will attend the meeting in person or appoints a different person to act as proxy.

CONTEXT

[4] The CCAA Parties[1] sought and received Court protection under the *Companies' Creditors Arrangement Act*[2] on January 27, 2015 (for the Bloom Lake CCAA Parties) and May 20, 2015 (for the Wabush CCAA Parties). That protection has been extended by the Court on a number of occasions. FTI Consulting Canada Inc. was appointed as Monitor.

[5] While under Court protection, the CCAA Parties have liquidated all or virtually all of their assets with the result that the Monitor holds substantial funds. The major remaining assets are (1) the potential preference claim by Cliffs Québec Iron Mining ULC ("CQIM") against various non-filed affiliates ("NFA") arising from the reorganization of CQIM in December 2014 that included a $142 million cash payment by CQIM and the transfer of the Australian subsidiaries of CQIM, and (2) potential preference claims by other CCAA Parties against NFA arising from certain payments in an aggregate amount of approximately US$30.6 million.

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* The Court rectifies its judgment dated April 20, 2018 (1) to correct in paragraph 16 that the Attorney-General of Canada on behalf of the Office of the Superintendent of Financial Institutions did not take any position on the amendment proposed by the Representative Employees and the Union and (2) to make incidental changes to paragraphs 5, 6 and 8 of the Plan Filing and Meetings Order annexed to the judgment to make the Order consistent with the judgment.

1 The Petitioners and the Mis-en-cause.

2 R.S.C. 1985, c. C-36 (the "CCAA").

[6] In March 2018, the Monitor negotiated a settlement of these potential claims. Essentially, the NFA agreed to forego the benefit of any distributions or payments they may otherwise be entitled to receive as secured and unsecured creditors of the CCAA Parties[3] and to make an additional cash contribution of $5 million, in exchange for releases. The Monitor estimates that the overall increase in the aggregate amounts that would be distributed to the third party unsecured creditors of the CCAA Parties as a result of the proposed settlement and the Plan would likely be in the range of approximately $62 million to approximately $100 million.[4]

[7] The Monitor consulted with Quebec North Shore and Labrador Railway Company Inc. ("QNS&L"), the largest single third party unsecured creditor of CQIM, which supports the settlement. The Monitor did not consult with any other creditor. The employees and retirees are not creditors of CQIM.

[8] Based on this settlement, the CCAA Parties prepared the Plan. It is a joint plan on behalf of all of the CCAA Parties.[5] Essentially, the Plan distributes the liquidation proceeds and the settlement proceeds allocated to each CCAA Party amongst its third party unsecured creditors on a *pro rata* basis. The Plan proposes the limited substantive consolidation of certain CCAA Parties for the purposes of voting and distributions under the Plan, such that there are five classes of creditors:

a) Unsecured creditors of CQIM and Quinto Mining Corporation;

b) Unsecured creditors of Bloom Lake General Partner Limited ("BLGP") and The Bloom Lake Iron Ore Mine Limited Partnership ("BLLP");

c) Unsecured creditors of Wabush Iron Co. Limited, Wabush Resources Inc. and Wabush Mines;

d) Unsecured creditors of Arnaud Railway Company;

e) Unsecured creditors of Wabush Lake Railway Company Limited.

[9] The Plan also provides for broad releases in favour of the NFA, the Monitor and the directors, officer, employees, advisors, legal counsel and agents of the CCAA Parties, the Monitor and the NFA. The Plan does not release the NFA and their directors from class actions instituted in Newfoundland and Labrador on behalf of the employees and retirees.

[10] The CCAA Parties seek the issuance of the Meetings Order, which provides, *inter alia*, for:

a) authorizing the filing of the Plan;

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[3] The NFA filed secured and unsecured claims in excess of $1 billion against the CCAA Parties.

[4] Forty-Third Report to the Court submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated March 19, 2018.

[5] 8568391 Canada Limited and Bloom Lake Railway Company Limited ("BLRC"), have no pre-filing creditors and will be dissolved.

b) authorizing the CCAA Parties to convene meetings of the third party unsecured creditors;

c) approval of (i) the notice and documentation to be sent to the third party unsecured creditors in respect of the meetings; and (ii) and the procedure for the conduct of the meetings;

d) the scheduling of a hearing for the sanctioning of the Plan on June 29, 2018;

e) approval of the exclusion of 8568391 and BLRC, which have no pre-filing creditors, and limited substantive consolidation of (i) CQIM and Quinto, (ii) BLGP and BLLP, and (iii) Wabush Iron, Wabush Resources and Wabush Mines for the purposes of voting and distributions under the Plan;

f) approval of the classification of the third party unsecured creditors of each CCAA Party; and

g) other ancillary orders and declarations.

[11] The Monitor has recommended that the Motion should be granted and that the proposed Meetings Order should be issued.[6] The third party creditors of the CCAA Parties are, for the most part, in agreement.

[12] The issue relates to the voting rights of the 2,400 employees and retirees of the Wabush CCAA parties.[7] On June 22, 2015, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson (the "Representative Employees") were appointed as representatives for the non-unionized employees and retirees of the Wabush CCAA Parties. The order provided from an opt-out right, but the Court is advised that no non-unionized employee or retiree opted out of representation by the Representative Employees. The Union has acted on behalf of the unionized employees and retirees since the beginning of the CCAA proceedings pursuant to its right and duty to represent its members. There is no express order of the Court appointing it as representative, but the Court did authorize the Union to file proofs of claim on behalf of its members.

[13] The employees and retirees are significant creditors of the Wabush CCAA Parties. The employees and retirees have filed 1,089 claims totalling $103.8 million against Wabush Iron, Wabush Resources and Wabush Mines, 449 claims totalling $27.9 million against Arnaud Railway and 393 claims totalling $50.5 million against Wabush Lake Railway, with respect to other post-employment benefits ("OPEBs"), including life insurance and health care.[8] In addition, four claims in the aggregate amount of approximately $3.3 million relate to employee grievances, were filed jointly and severally against Arnaud Railway and Wabush Iron, Wabush Resources and Wabush Mines. 2,376 employees and retirees are members of the Wabush pension plans. The Plan Administrator has filed claims of approximately $56 million in the aggregate against Wabush Iron, Wabush Resources and Wabush Mines, Arnaud

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6 Forty-Fourth Report to the Court submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated March 22, 2018, par. 68.

7 Wabush Iron, Wabush Resources, Wabush Mines, Arnaud Railway and Wabush Lake Railway.

8 The claims against Arnaud Railway and Wabush Lake Railway overlap with the claims against Wabush Mines.

Railway and Wabush Lake Railway with respect to the amounts owing to the Wabush pension plans, including the deficit in the plans. The issue of whether those claims are unsecured or benefit from a deemed trust is currently before the Québec Court of Appeal, with a hearing starting June 11, 2018.

POSITION OF THE PARTIES

[14] As described above, the Representative Employees and the Union ask the Court to amend the proposed Meetings Order to give their counsel a deemed proxy to vote in counsel's discretion the claims of the salaried employees and retirees and the unionized employees and retirees respectively, unless the employee or retiree opts out by advising the Monitor that he or she will attend the meeting in person or appoints a different person to act as proxy.

[15] The Union also argues that it has the right to vote on behalf of its members and retirees pursuant to its "monopole de représentation".

[16] The Pension Plan Administrator […] and the Superintendent of Pensions of Newfoundland […] support the amendment.

[17] The CCAA Parties, the Monitor and QNS&L, the largest third party unsecured creditor, oppose the amendment.

ISSUES IN DISPUTE

[18] The issues that the Court must decide can be summarized as follows:

1. Should it issue the Meetings Order?
2. Does the Union have the right to vote on behalf of its members and retirees?
3. Should the Court give counsel for the Representative Employees and counsel for the Union a discretionary deemed proxy to vote the claims of the employees and retirees, subject only to an opt-out right?

ANALYSIS

1. Issuance of the Meetings Order

[19] The standard for issuing a meeting order is low. The Court can refuse to summon a meeting of the creditors if it determines that the plan is contrary to the creditors' interests, lacks economic reality, is unworkable and unrealistic in the circumstances, or is doomed to failure due to a lack of creditor support.[9]

[9] *Unique Broadband Systems (Re)*, 2013 ONSC 676, par. 52 and 95; *Kerr Interior Systems Ltd. (Re)*, 2011 ABQB 214, par. 29; *ScoZinc Ltd. (Re)*, 2009 NSSC 163, par. 7-9; *Re Fracmaster Ltd.*, 1999 ABQB 379, par. 24; *Canadian Red Cros Society/la Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ON SC), par. 37.

[20] The Monitor has reviewed the Plan and the Meetings Order and it recommends that the proposed Meetings Order be issued, based on the following considerations:[10]

- The filing of a joint plan significantly simplifies matters and creates no apparent material prejudice to any creditor;
- The limited substantive consolidation is reasonable and appropriate;
- The Plan provides significant incremental recoveries for the creditors and is in the best interests of all stakeholders;
- The granting of the Meetings Order would provide the forum for the creditors to consider and vote on the Plan;
- There is nothing about the Plan that would render it incapable of being approved by the creditors or sanctioned by the Court;
- The classification of creditors is reasonable and appropriate;
- The Meetings Order provides for reasonable and sufficient notice;
- The deadline for filing proxies is reasonable in the circumstances;
- The provisions of the Meetings Order governing the conduct of the meetings are reasonable and appropriate in the circumstances.

[21] Save for the issue of the voting rights of the employees and retirees, the creditors all agree that the Meetings Order should be issued.

[22] The Court concludes that there should be meetings of creditors to consider and vote on the Plan. It will grant the Meetings Order.

2. Union's right to vote

[23] The Union pleads that it has the right to vote on behalf of the unionized employees and retirees pursuant to its monopoly on representation of its members.

[24] The Union points to Section 69 of the Québec *Labour Code*:[11]

> **69.** A certified association may exercise all the recourses which the collective agreement grants to each employee whom it represents without being required to prove that the interested party has assigned his claim.

[25] The Supreme Court refers to this as the principle of exclusive representation or the monopoly of representation:

> 41 One of the fundamental principles we find in Quebec labour law, and one which it has in common with federal law and the law of the other provinces, is the monopoly that the union is granted over representation. This principle applies in respect of a defined group of employees or bargaining unit,

[10] 44th Report, *supra* note 6, par. 60-68.
[11] CQLR, chapter C-27.

> in relation to a specific employer or company, at the end of a procedure of certification by an administrative tribunal or agency. Once certification is granted, it imposes significant obligations on the employer, imposing on it a duty to recognize the certified union and bargain with it in good faith with the aim of concluding a collective agreement (s. 53 L.C.). Once the collective agreement is concluded, it is binding on both the employees and the employer (ss. 67 and 68 L.C.). For the purposes of administering the collective agreement, the certified association exercises all the recourses of the employees whom it represents without being required to prove that the interested party has assigned his or her claim (s. 69 L.C.).[12]
>
> [Emphasis added]

[26] The Union also points to the Newfoundland and Labrador *Labour Relations Act*,[13] which is very relevant given that more than half of the employees reported for work in Labrador. Section 50 provides:

> **50.** Where a trade union or a council of trade unions is certified, under this Act, as the bargaining agent of a unit,
>
> (a) the bargaining agent so certified immediately replaces another bargaining agent of the unit and has exclusive authority to conduct collective bargaining on behalf of employees in the unit and to bind them by a collective agreement until its certification in respect of employees in the unit is revoked;
>
> […]
>
> [Emphasis added]

[27] Even though the language in the Newfoundland and Labrador statute relates only to the negotiation and conclusion of the collective agreement, the Court will assume that the principle of exclusive representation exists and is just as broad under the laws of Newfoundland and Labrador as it is in Québec.

[28] It is clear that the principle of exclusive representation means that an individual employee or retiree does not have the right to file and to pursue a grievance with respect to a breach of the collective agreement.[14]

[29] The Court is not satisfied, however, that the principle of exclusive representation gives the Union the right to vote the employees' and retirees' claims in the CCAA.

[30] First, the principle of exclusive representation relates to claims under the collective agreement. It does not give the Union the right to vote for the employees and retirees in all circumstances. For example, employees retain the right to vote individually on such important issues as the acceptance of a collective agreement or the decision to strike. The vote on a plan under the CCAA is not the exercise of a claim under the collective agreement. In some cases (although not in the present matter), the vote may determine whether the employer continues its operations and whether the employees keep their jobs.

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12 *Noël* v. *Société d'énergie de la Baie James*, 2001 SCC 39, par. 41.
13 RSNL 1990, chapter L-1.
14 *Québec (Procureur général)* c. *Désir*, 2008 QCCA 1756, par. 8.

[31] Further, the Union was not able to point to any authority extending the principle of exclusive representation to voting on a proof of claim with the result that the union had the right to vote on behalf of its members without any court authorization. There are a few examples of CCAA proceedings where the court has authorized the union to vote the claims of its members,[15] but no example was given to the Court of any case where the court concluded that the union had the right to vote on behalf of its members without such authorization.

[32] Finally, the Court notes that if the right to vote on behalf of the members belongs to the Union pursuant to the principle of exclusive representation, then the proposed opt-out would be a breach of that monopoly and would be invalid.

[33] These arguments lead the Court to dismiss the Union's argument that it has the right to vote on behalf of the unionized employees and retirees pursuant to the principle of exclusive representation.

3. Discretionary deemed proxy

[34] The Court will analyze the appropriateness of a discretionary deemed proxy by asking several questions.

3.1 Is a deemed proxy appropriate?

[35] First, before giving a deemed proxy to anyone, the Court must be satisfied that there is a valid reason to do so.

[36] The Representative Employees and the Union plead that the deemed proxy is necessary to ensure that all of the employees and retirees exercise their right to vote. In his affidavit, Michael Keeper, one of the Representative Employees, states the following:

> 24. Individual voting by the 690 Salaried Members, as advocated by the Monitor and CCAA Parties, is completely inappropriate for our large, vulnerable creditor group who are not sophisticated commercial creditors. The Salaried Members are spread across Canada, many in the remote regions. This will make it impossible to reach many of them with the Proposed Plan, all the related documents, and the associated ballot in time to allow them to cast their vote. Many Salaried Members are old and infirmed, living in nursing home facilities, do not have internet access or fax machines, and many cannot understand complex legal documents, such as the Proposed Plan, the court orders, and the Monitor's Reports. For many, they will not understand the nature or consequences of the Proposed Plan and how it affects them, and it is not practical for Representative Counsel nor the Representatives to contact

[15] See the meeting orders issued with respect to U.S. Steel Canada Inc., Collins & Aikman Canada Inc., Nortel Networks Corporation, Hollinger Canadian Publishing Holdings Co., Co-op Atlantic and NewPage Port Hawkesbury Corp., and the Frequently Asked Questions with respect to Fraser Papers inc.

> every one of them to provide advice and answer their questions in time to ensure that they are able to make an informed decision as to their rights and how the Proposed Plan impacts them.

[37] Nicolas Lapierre, the Union representative responsible for this matter, makes similar comments in his sworn declaration:

> 16. En effet, j'ai lu le Plan et l'ensemble des documents qui l'accompagnent, que je trouve compliqués et difficiles à comprendre;
>
> 17. En raison de cette complexité, plusieurs Membres ne seront pas en mesure de comprendre ce qu'ils doivent faire avec ces documents ou ce qu'ils signifient, d'autant plus que certains de ces travailleurs sont partiellement ou totalement analphabètes, alors que d'autres sont âgés et maladies à un point tel où ils ne sont plus en mesure de s'occuper de leurs affaires par eux-mêmes;
>
> 18. Il y a ainsi de réelles possibilités que les Membres ne soient pas en mesure de voter ou de désigner quelqu'un pour le faire en leur nom, ce qui équivaudrait à les priver de leur droit de vote.

[38] The Court considers these concerns to be somewhat overstated. There is nothing exceptional about the Wabush employees and retirees as compared to the

employees and retirees of other companies. It should be possible to reach the great majority of them. While some of them may not have access to the internet or a fax machine, the Court doubts that the number is large. While some may not have the capacity to make a decision, there is likely someone who can make a decision on their behalf. The Plan itself is a complicated legal document that uses language which is difficult to understand, but the Monitor's reports are much easier to understand and the parties have the opportunity to include in the package that goes to the creditors a letter explaining matters in even simpler terms. The decision that the employees and retirees have to take is a fairly simple yes or no decision and the consequences of each decision can be explained.

[39] Nevertheless, it remains clear that a number of votes will be lost. Each employee and retiree has the right to vote on the Plan and every vote is important. One of the Court's objectives in this matter is to ensure that each employee and retiree is given the opportunity to vote and the Court's hope is that all will vote. The deemed proxy is a way to achieve that result.

[40] In addition to the cases where a deemed proxy was given to the union,[16] the parties point to only three examples of cases where deemed proxies were given to vote on behalf of non-unionized employees and retirees.[17] The CCAA Parties and the Monitor distinguish those cases on the basis that the deemed proxies were to vote in favour of the plan.

[41] These examples of deemed proxies confirm that the Court has jurisdiction to give deemed proxies in the present matter. That jurisdiction is not affected by whether the vote is in favour of the plan or against it.

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16 *Ibid*.

17 See the Nortel, Hollinger and U.S. Steel meeting orders.

[42] The CCAA Parties and the monitor also argue that a deemed proxy gives the proxy holder too much leverage.

[43] The Court does not agree. The deemed proxy simply ensures that the employees and retirees exercise the leverage that they should have, based on their numbers and the value of their claims.

[44] For all of these reasons, the Court concludes that it is appropriate to give a deemed proxy.

3.2 Who should exercise the deemed proxy?

[45] The Representative Employees and the Union argue that their counsel should exercise the deemed proxy.

[46] The Court agrees.

[47] The Representative Employees were appointed by the Court for the purpose of representing the non-unionized employees and retirees. The Union is given that role by statute. They are the appropriate representatives to exercise the deemed proxies.

[48] The Court adopts the following reasoning of Justice Wilton-Siegel in the U.S. Steel CCAA proceedings:

> [15] Further, I am satisfied that it is appropriate that Representative Counsel act as the deemed proxy for the administrator for the non-unionized pension plans and for the current and former non-unionized employees having OPEB claims, given the active involvement of Representative Counsel in these proceedings to date on behalf of, and the commonality of interest of, the current and former non-unionized employees. I note as well that a procedure exists for individuals who have opted to represent themselves, and for individuals who have been represented by Representative Counsel but who choose to participate directly at the creditors meetings, to appoint an alternative proxy or to attend and vote in person at the creditors meetings.[18]

[49] The CCAA Parties and the Monitor argue that there is no commonality of interest in the present matter in that not all of the employees and retirees have both a pension claim and an OPEB claim. They argue that some employees and retirees may want the pension issues pursued rather than the OPEB claims while others may want the opposite, because of their personal circumstances.

[50] Those considerations may be relevant in assessing whether it is appropriate for the Representative Employees and the Union to pursue the deemed trust for the pension claims. However, that matter is not before the Court today and that issue was not raised when the matter was before the Court.

[51] Moreover, these considerations are of no relevance on the deemed proxy issue: the pension issues are excluded from the Plan and the only issue being raised is whether the settlement with the NFA should have generated more for the unsecured creditors. No employee or retiree has a divergent interest on this issue.

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[18] *U.S. Steel Canada Inc. (Re)*, 2017 ONSC 1967, par. 15.

[52] The Court therefore concludes that counsel for the Representative Employees and for the Union are the appropriate persons to hold the deemed proxies.

3.3 Should the deemed proxy be discretionary?

[53] The Representative Employees and the Union say that they have not yet taken a position on whether they will vote for or against the Plan. They have concerns as to whether the settlement with the NFA is the best deal that could be achieved, but they have not had any discussions with the Monitor or with anyone else. They anticipate, as do the CCAA Parties and the Monitor, that there will be further discussions and negotiations right up until the vote. In that context, the Representative Employees and the Union ask that the proxy holder be allowed to vote the claims in his or her discretion. They argue that an employee or retiree who wants to vote for or against the Plan can opt out of the deemed proxy by attending the meeting, by appointing a different proxy, or by indicating his or her vote on the proxy form.

[54] The discretionary deemed proxy is fundamentally undemocratic. The deemed proxy is intended to ensure that all of the employee and retiree claims are voted. But making it discretionary has the effect of taking away the individuals' right to vote or even to know how his or her claim is being voted and giving it to someone else. This is not a good outcome.

[55] The opt-out right suggested by counsel for the Representative Employees and the Union does not solve these problems. If negotiations and discussions continue right up to the vote, as the parties seem to anticipate, the employees and retirees will have to decide whether to opt out on the basis of a Plan that may not the final version and without knowing the final recommendation of the Representative Employees and the Union or the position the proxy holder will take on their behalf if they do not opt out.

[56] The CCAA Parties and the Monitor argue that there is no precedent for such a discretionary deemed proxy. They argue that the few examples of deemed proxies all provide that the proxy holder will vote in favour of the plan. They found no examples of deemed proxies to vote against the plan or to vote in the discretion of the proxy holder. The Representative Employees and the Union did not submit any examples either.

[57] The Representative Employees and the Union plead that there is no difference between a deemed proxy to vote in favour of the plan and a deemed proxy to vote against it. The Court agrees in principle. In the three examples of deemed proxies to vote in favour of the plan, it appears from the materials that the representatives of the employees participated or were consulted in the preparation of the plan and were prepared to support it. The practical reality is that there are no deemed proxies to vote against a plan because if the employees representatives are consulted before the plan is filed and they are opposed to the plan, the plan will likely be modified before it is filed in order to gain their support.

[58] The problem in the present matter is that there were no negotiations or discussions prior to the filing of the Plan and there have been no discussions in the three weeks since the filing of the Plan. Everyone is waiting for this order before they begin serious discussions.

[59] That is unfortunate. The negotiations anticipated by the parties will have the effect of depriving the employees and retirees of any real participation in the process. There will be a meeting to explain the Plan to them, but subsequent negotiations will mean that the Plan as explained to them is not the final version of the Plan. If negotiations continue up until the meeting, there will be no time to explain the final version of the Plan to the employees and retirees.

[60] In other words, the justification for the discretionary deemed proxy is that the Representative Employees and the Union cannot take a final position on the Plan today and that the Plan may be amended up until the vote. The solution is to give them more time to take a final position and to ensure that the Plan is not amended after they take that final position, not to give them the right to vote the individuals' claims in their discretion.

[61] For these reasons, the Court will not authorize a discretionary deemed proxy. The deemed proxy must be either a deemed proxy to vote for the Plan or a deemed proxy to vote against it. The Court will delay the mailing of the Meeting Materials to allow the parties to have the discussions and negotiations that should have taken place before now so that the Representative Employees and the Union can take a final position for or against the Plan.

CONCLUSIONS

[62] As a result, the Court will order the following.

[63] The date of the meetings will remain June 18, 2018. That is two months from now. There is time for the parties to discuss the current version of the Plan and either satisfy themselves that it is reasonable or negotiate changes to it. The Court will give them one month to do so.

[64] The date for mailing the Meeting Materials to the creditors will be pushed back to May 21, 2018 to allow for this month of negotiations. The Meeting Materials will include the final version of the Plan as well as letters from counsel for the Representative Employees and the Union in which they must take a position for or against the Plan. The deemed proxy will be to vote in accordance with that recommendation. That way, the employees and retirees will have the opportunity to make a real choice, based on the final version of the Plan and in full knowledge of how their claim will be voted if they do not execute a proxy.

[65] It follows that there can be no amendments to the Plan after May 18, 2018 without the authorization of the Court. Moreover, any amendment authorized after that date will likely involve the postponement of the creditors' meetings scheduled for June 18, 2018.

FOR THESE REASONS, THE COURT:

[66] **GRANTS** the Plan Filing and Meetings Order as amended by the Court and annexed to this judgment;

[67] **ORDERS** the parties not to amend the Plan after May 18, 2018 without the authorization of the Court;

[68] **RESERVES** the right of the parties to make further representations to the Court with respect to the documents to be mailed to the creditors on May 21, 2018;

[69] **THE WHOLE, WITHOUT COSTS.**

_____
STEPHEN W. HAMILTON, J.S.C.

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Mtre Natalie Bussière
Mtre Emily Hazlett
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Mtre Daniel Boudreault
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For the Objecting parties Syndicat des Métallos Section locale 6254, 6285 et 9996

Mtre Edward Bechard-Torres
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Mtre Gerry Apostolatos
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Mtre Gabriel Serena
CAIN LAMARRE
For Ville de Fermont

Mtre Martin Roy
STEIN MONAST
For Ville de Sept-Ïles

Mtre Ouassim Tadlaoui
BORDEN LADNER GERVAIS
For Groupe UNNU-EBC S.E.N.C.

Hearing date: April 16, 2018

SUPERIOR COURT

C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: **500-11-048114-157**
DATE: **April 20, 2018**

PRESIDING : THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

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

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUÉBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

WABUSH MINES

ARNAUD RAILWAY COMPANY

WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

(Petitioners and Mises-en-cause hereinafter the "**CCAA Parties**")

-and-

FTI CONSULTING CANADA INC.

Monitor

PLAN FILING AND MEETINGS ORDER

HAVING READ the CCAA Parties' (the "**Petitioners**") *Amended Motion for the Issuance of a Plan Filing and Meetings Order,* and the attached exhibits thereof, and

the affidavit in support thereof (the "**Motion**"), the Monitor's Forty-Fourth Report and the submissions of counsels for the Petitioners, the Monitor and other interested parties;

GIVEN the provisions of the Initial Orders granted on January 27, 2015 and May 20, 2015, as subsequently amended, rectified or restated (together, the "**Initial Orders**");

GIVEN the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36 (the "**CCAA**").

THE COURT:

1. **GRANTS** the Motion.

Service

2. **DECLARES** that the Petitioners have given sufficient prior notice of the presentation of this Motion to interested parties and that the time for service of the Motion herein be and is hereby abridged.

Definitions

3. **DECLARES** that the capitalized terms not otherwise defined in this Order shall have the meanings ascribed in **Schedule "A"** attached hereto. The following terms shall have the meanings set out below:

   3.1 "**Chair**" shall have the meaning ascribed to such term in Paragraph 29;

   3.2 "**Creditor Letter**" means the letter (in English and French) sent to Affected Unsecured Creditors in substantially the form of **Schedule "B"** hereto;

   3.3 "**Meeting Materials**" shall have the meaning ascribed to such term in Paragraph 8;

   3.4 "**Notice of Creditors' Meetings and Sanction Hearing**" means the notice which shall be given to the Affected Unsecured Creditors of the Meetings to be held for the approval of the Plan, and of the Sanction Hearing of the Plan, being substantially in the form of **Schedule "C"** hereto;

   3.5 "**Proxy**" means a proxy and instructions to Affected Unsecured Creditors for explaining how to complete same, substantially in the form of **Schedule "D"** hereto;

   3.6 "**Resolution**" means the resolution substantially in the form attached as **Schedule "E**"; and

   3.7 "**Website**" means http://cfcanada.fticonsulting.com/bloomlake.

Joint Plan of Compromise and Arrangement

4. **ORDERS** that the Joint Plan of Compromise and Arrangement pursuant to the CCAA filed by the Participating CCAA Parties dated April 16, 2018, (as may be amended,

supplemented and restated from time to time, the "**Plan**") is hereby accepted for filing, and the Participating CCAA Parties are hereby authorized to seek approval of the Plan from the Affected Unsecured Creditors in the manner set forth herein.

5. **ORDERS** that the Participating CCAA Parties, be, and they are hereby, authorized to file, in accordance with its terms, any amendment, restatement, modification of or supplement to, the Plan (each a "**Plan Modification**") prior to May 18, 2018 pursuant to and in accordance with the terms of the Plan, in which case any such Plan Modification shall, for all purposes, be and be deemed to form part of and be incorporated into the Plan. The Participating CCAA Parties shall […] include any such Plan Modification […] in the Meeting Materials. The Participating CCAA Parties may give notice of any such Plan Modification […] by notice which shall be sufficient if […] provided to those Persons listed on the service list posted on the Website (as amended from time to time, the "**Service List**"). The Monitor shall post on the Website, as soon as practicable, any such Plan Modification, with notice of such posting forthwith provided to the Service List. Any Plan Modification after May 18, 2018 requires Court authorization, and the Court will determine what notice is required and whether the Meetings scheduled for June 18, 2018 will be postponed.

6. **ORDERS** that after the Meetings (and both prior to and subsequent to the obtaining of the Sanction Order), the Participating CCAA Parties may at any time and from time to time effect a Plan Modification pursuant to and in accordance with the terms of the Plan and with the authorization of the Court. The Monitor shall forthwith post on the Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

Form of Documents

7. **ORDERS** that the forms of: (i) the Notice of Creditors' Meetings and Sanction Hearing, (ii) the Creditor Letter, (iii) the Proxy, and (iv) the Resolution are each hereby approved, and the Monitor, in consultation with the Participating CCAA Parties, is authorized to make such minor changes to such forms of documents as it consider necessary or desirable to conform the content thereof to the terms of the Plan or this Order or any further Orders of the Court.

Notification Procedures

8. **ORDERS** that the Monitor shall cause to be sent, by regular mail, courier or email a copy of the Notice of Creditors' Meetings and Sanction Hearing, the Creditor Letter, the Proxy, the Resolution, the Plan, and this Order (collectively, with the Report of the Monitor to be filed in connection with the Meetings, the "**Meeting Materials**") as soon as reasonably practicable after the granting of this Order and, in any event, no later than **5:00 p.m.** (Eastern time) on May 21, 2018 to each Affected Unsecured Creditor known to the Monitor as of the date of this Order at the address for such Affected Unsecured Creditor set out in such Affected Unsecured Creditor's Proof of Claim or to such other address that has been provided to the Monitor by such Affected Unsecured Creditor pursuant to Paragraph 34 or 36.

9. **ORDERS** that the Monitor shall (i) forthwith publish on the Website an electronic copy of the Meeting Materials, (ii) send a copy of the Meeting Materials to the Service List, and (iii) provide a copy to any Affected Unsecured Creditor upon written request by such Affected Unsecured Creditor provided that such written request is received by

the Monitor no later than three (3) Business Days prior to the Meetings (or any adjournment thereof).

10. **ORDERS** that the Participating CCAA Parties and the Monitor be and they are hereby authorized to provide such supplemental information ("**Additional Information**") to the Meeting Materials as the Participating CCAA Parties may determine, with the consent of the Monitor, and the Additional Information shall be distributed or made available by posting on the Website and served on the Service List, and any such other method of delivery that the Participating CCAA Parties, with the consent of the Monitor, determine is appropriate.

11. **ORDERS** that the publications and/or delivery referred to in Paragraphs 8, 9 and 10 hereof, shall constitute good and sufficient service of the Meeting Materials on all Persons who may be entitled to receive notice thereof, or of these proceedings, or who may wish to be present in person or represented by proxy at the Meeting in respect of the Unsecured Creditor Class to which each such Person belongs, or who may wish to appear in these proceedings, and no other form of notice or service need be made on such Persons, and no other document or material need be served on such Persons in respect of these proceedings.

12. **ORDERS** that the non-receipt of a copy of the Meeting Materials beyond the reasonable control of the Monitor shall not constitute a breach of this Order and the non-receipt of a copy of the Meeting Materials shall not invalidate any resolution passed or proceedings taken at the Meetings.

Employee Addresses and Information

13. **ORDERS** that the Monitor is hereby authorized to deliver to Employees with Proven or Unresolved Claims a notice that such Employees must provide their Social Insurance Numbers to the Monitor as a condition to receiving any distributions under the Plan.

Limited Substantive Consolidation of certain Participating CCAA Parties

14. **ORDERS** that the following Participating CCAA Parties shall be substantively consolidated for the purposes of voting and distribution on the Plan, and all references in this Order to Participating CCAA Parties shall mean to such Participating CCAA Parties, as so consolidated:

    14.1 CQIM and Quinto (together, the "**CQIM/Quinto Parties**");

    14.2 BLGP and BLLP (together, the "**BL Parties**"); and

    14.3 Wabush Iron, Wabush Resources and the Wabush Mines (together, the "**Wabush Mines Parties**").

Classes of Unsecured Creditors

15. **ORDERS** that the Affected Unsecured Creditors with respect of each Participating CCAA Party shall be grouped into the following classes for voting (in respect of their Eligible Voting Claims) and distribution purposes (in respect of their Proven Claims) (each an "**Unsecured Creditor Class**" and together the "**Unsecured Creditor Classes**"):

15.1 **CQIM/Quinto Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the CQIM/Quinto Parties;

15.2 **BL Parties Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the BL Parties;

15.3 **Wabush Mines Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the Wabush Mines Parties;

15.4 **Arnaud Unsecured Creditor Class**: being Affected Unsecured Creditors of Arnaud; and

15.5 **Wabush Railway Unsecured Creditor Class**: being Affected Unsecured Creditors of Wabush Railway.

Meetings

16. **DECLARES** that the Participating CCAA Parties are hereby authorized to call, hold and conduct the following Meetings, being understood that there will be a separate Meeting for each Unsecured Creditor Class listed below, in Montréal, Québec, for the purpose of voting upon, with or without variation, the Resolution to approve the Plan:

    1. **Meeting of CQIM/Quinto Unsecured Creditor Class:** June 18, 2018 at 9:30 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

    2. **Meeting of BL Parties Unsecured Creditor Class**: June 18, 2018 at 9:30 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

    3. **Meeting of Wabush Mines Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

    4. **Meeting of Arnaud Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

    5. **Meeting of Wabush Railway Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

17. **DECLARES** that the only Persons entitled to notice of, to attend and speak at a Meeting are Eligible Voting Creditors of such Unsecured Creditor Class (or their respective duly appointed Proxy holders and their legal counsel), representatives of the Monitor, the Participating CCAA Parties, all such parties' financial and legal advisors, Salaried Members Representative Counsel, USW Counsel, the Chair (as defined below), the secretary and any scrutineers appointed in accordance with Paragraph 31 hereof. Any other Person may be admitted to the Meetings on invitation of the Participating CCAA Parties or the Monitor.

18. **ORDERS** that any Proxy which any Eligible Voting Creditor wishes to submit in respect of a Meeting (or any adjournment, postponement or other rescheduling

thereof) must be substantially in the form attached hereto as **Schedule "D"** (or in such other form acceptable to the Monitor or the Chair).

19. **ORDERS** that any Proxy in respect of a Meeting (or any adjournment, postponement or other rescheduling thereof) must be received by the Monitor in accordance with Paragraph 36 hereof by 5:00 p.m. (Eastern time) June 14, 2018 (the "**Proxy Deadline**"), being two (2) Business Days prior to the date set for the Meetings in Paragraph 16 hereof. The Monitor is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which a Proxy is completed.

20. **ORDERS** that, in the absence of instruction to vote for or against the approval of the Resolution in a duly signed and returned Proxy that appoints a representative of the Monitor as Proxy holder, the Proxy shall be deemed to include instructions to vote for the approval of the Resolution, provided the Proxy holder does not otherwise revoke the Proxy by written notice to the Monitor delivered so that it is received by the Monitor no later than the Proxy Deadline.

21. **ORDERS** that the quorum required at each Meeting shall be one Eligible Voting Creditor present at each Meeting in person or by Proxy. If the (a) requisite quorum is not present at any Meeting, or (b) any Meeting is adjourned, postponed or rescheduled by the Chair (whether (i) by the request of the Participating CCAA Parties; (ii) by vote of the majority in value of Affected Unsecured Creditors holding Eligible Voting Claims in person or by Proxy at any Meeting; or (iii) otherwise as determined by the Chair), then any such Meetings shall be adjourned, postponed or rescheduled to such time(s) and place(s) as the Chair deems necessary or desirable.

22. **ORDERS** that the Chair, with the consent of the Participating CCAA Parties and the Plan Sponsors, not to be unreasonably withheld, be and he or she is hereby, authorized to adjourn, postpone or otherwise reschedule any Meeting on one or more occasions to such time(s), date(s) and place(s) as the Chair, with the consent of the Participating CCAA Parties and Plan Sponsors, not to be unreasonably withheld, deem necessary or desirable (without the need to first convene any such Meetings for the purpose of any adjournment, postponement or other rescheduling thereof). None of the Participating CCAA Parties, the Chair or the Monitor shall be required to deliver any notice of the adjournment, postponement or rescheduling of the Meeting(s) or adjourned Meeting(s), as applicable, provided that the Monitor shall:

    22.1 announce the adjournment, postponement or rescheduling of the applicable Meeting(s) or adjourned Meeting(s) to the participants at the applicable Meeting(s) if the commencement of the Meeting(s) has occurred prior to the adjournment, postponement or rescheduling;

    22.2 post notice of the adjournment, postponement or rescheduling at the originally designated time and location of each of the Meeting(s) or adjourned Meeting(s), as applicable;

    22.3 forthwith post notice of the adjournment, postponement or rescheduling on the Website; and

    22.4 provide notice of the adjournment, postponement or rescheduling to the Service List forthwith. Any Proxies validly delivered in connection with the Meeting(s)

shall be accepted as Proxies in respect of any adjourned, postponed or rescheduled Meeting(s).

23. **DECLARES** that the only Persons entitled to vote at a Meeting shall be Eligible Voting Creditors of such Unsecured Creditor Class or their Proxy holders. Each Eligible Voting Creditor will be entitled to a vote with a value equal to the value in dollars of its Voting Claim, and/or the value in dollars of its Unresolved Voting Claim, if any, as determined in accordance with this Paragraph 23 of this Order.

24. **ORDERS** that the dollar value of an Unresolved Voting Claim for voting purposes at the applicable Meeting shall be: (i) the amount set out in such Creditor's Proof of Claim if no Notice of Allowance or Notice of Revision or Disallowance (in each case as defined in the Amended Claims Procedure Order) has been issued; (ii) the amount set out in the Notice of Revision or Disallowance in respect of such Claim if no Notice of Dispute (as defined in the Amended Claims Procedure Order) has been filed and the time for doing so has not expired; (iii) the amount set out in the Notice of Dispute in respect of such Claim if a Notice of Dispute has been timely filed, in all respects without prejudice to the determination of the dollar value of such Affected Unsecured Claim for distribution purposes in accordance with the Amended Claims Procedure Order; or (iv) the amount as may be agreed to between the Monitor and the Affected Unsecured Creditor, or between the Monitor and the Salaried Members Representative Counsel or the Monitor and the USW Counsel, as applicable.

25. **DECLARES** that in respect of the Eligible Voting Claims of the Salaried Members and the USW Members:

    25.1 The Salaried Members Representative Counsel shall be deemed to be a Proxy holder in respect of each Eligible Voting Claim related to or arising from the employment of the Salaried Members and shall be entitled to vote them at a Meeting on their behalf, without the requirement for any Salaried Member to submit a Proxy to the Monitor, save in respect of any Salaried Member who, prior to a Meeting, notifies the Monitor by an instrument in writing that he revokes this deemed Proxy;

    25.2 The USW Counsel shall be deemed to be a Proxy holder in respect of each Eligible Voting Claim related to or arising from the employment of the USW Members and shall be entitled to vote them at a Meeting on their behalf, without the requirement for any USW Member to submit a Proxy to the Monitor, save in respect of any USW Member who, prior to a Meeting, notifies the Monitor by an instrument in writing that he revokes this deemed Proxy; and

    25.3 The Salaried Members Representative Counsel and the USW Counsel shall vote each Eligible Voting Claim in accordance with the recommendation made by the Salaried Members Representative Counsel to the Salaried Members and by USW Counsel to the USW Members in the Meeting Materials.

    For greater certainty, however, only the Pension Plan Administrator or its designated Proxy may vote the Pension claims.

26. **ORDERS** that a Voting Claim or Unresolved Voting Claim shall not include fractional numbers and shall be rounded down to the nearest whole Canadian dollar amount.

27. **ORDERS** that the Monitor shall keep a separate record of the votes cast by Affected Unsecured Creditors holding Unresolved Voting Claims and shall report to the Court with respect thereto at the Sanction Motion.

28. **ORDERS** that the results of any and all votes conducted at the Meetings shall be binding on all Affected Unsecured Creditors, whether or not any such Affected Unsecured Creditor is present or voting at the Meetings.

29. **ORDERS** that a representative of the Monitor shall preside as the chair of each Meeting (the "**Chair**") and, subject to any further order of this Court, shall decide all matters relating to the conduct of such Meeting. The Participating CCAA Party and any Eligible Voting Creditor may appeal from any decision of the Chair to the Court, within three (3) Business Days of any such decision.

30. **DECLARES** that, at each Meeting, the Chair is authorized to direct a vote on the Resolution to approve the Plan, and any amendments thereto made in accordance with Paragraph 5 of this Order.

31. **ORDERS** that the Monitor may appoint scrutineers for the supervision and tabulation of the attendance at, quorum at and votes cast at each Meeting. Person(s) designated by the Monitor shall act as secretary at each Meeting.

32. **ORDERS** that the Monitor shall be directed to calculate the votes cast at each Meeting called to consider the Plan and report the results in accordance with Paragraph 42 of this Order.

33. **ORDERS** that an Affected Unsecured Creditor that is not an individual may only attend and vote at a Meeting if it has appointed a Proxy holder to attend and act on its behalf at such Meeting.

Notice of Transfers

34. **ORDERS** that, for purposes of voting at a Meeting, if an Affected Unsecured Creditor transfers or assigns all of its Affected Unsecured Claim, then the transferee or assignee shall only be entitled to vote and attend the applicable Meeting if the transferee or assignee delivers evidence satisfactory to the Monitor of its ownership of all of such Affected Unsecured Claim and a written request to the Monitor, not later than 5:00 pm on the date that is seven (7) days prior to the date of the Meeting, or such later time that the Monitor may agree to, that such transferee's or assignee's name be included on the list of Eligible Voting Creditors entitled to vote, either in person or by proxy, the transferor's or assignor's Voting Claim or Unresolved Voting Claim, as applicable, at the applicable Meeting in lieu of the transferor or assignor.

35. **ORDERS** that if the holder of an Affected Unsecured Claim or any subsequent holder of the whole of an Affected Unsecured Claim who has been acknowledged by the Monitor as the Affected Unsecured Creditor in respect of such Affected Unsecured Claim, transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person or Persons, such transfer or assignment shall not create a separate Affected Unsecured Claim or Affected Unsecured Claims and such Affected Unsecured Claim shall continue to constitute and be dealt with as a single Claim as if such Claim (or portion of such Claim) had not been transferred or assigned, notwithstanding such transfer or assignment, and the Monitor and the Participating CCAA Parties shall in each such case not be bound to recognize or

acknowledge any such transfer or assignment and shall be entitled to give notices to and to otherwise deal with such Affected Unsecured Claim only as a whole and then only to and with the Person last holding such Affected Unsecured Claim in whole as the Affected Unsecured Creditor in respect of such Affected Unsecured Claim, provided such Affected Unsecured Creditor may by notice in writing to the Monitor delivered so that it is received by the Monitor on or before the tenth day prior to any Meeting or distribution in respect of such Affected Unsecured Claim, direct that subsequent dealings in respect of such Affected Unsecured Claim, but only as a whole, shall be with a specified transferee or assignee and in such event, such Affected Unsecured Creditor and such transferee or assignee of the Affected Unsecured Claim shall be bound by any notices given to the transferor or assignor and prior steps taken in respect of such Claim.

Notices and Communications

36. **ORDERS** that any notice or other communication to be given under this Order by an Affected Unsecured Creditor to the Monitor or the Participating CCAA Parties shall be in writing and will be sufficiently given only if given by pre-paid mail, registered mail, e-mail, courier addressed to:

Monitor:	FTI Consulting Canada Inc. TD Waterhouse Tower 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto, ON M5K 1G8
	Attention: Nigel Meakin
	E-mail: bloomlake@fticonsulting.com

With a Copy to:	Norton, Rose, Fulbright LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
	Attention: Sylvain Rigaud
	E-mail: sylvain.rigaud@nortonrosefulbright.com

Participating CCAA Parties:	Bloom Lake General Partner Limited *et al* c/o Blake, Cassels & Graydon LLP 199 Bay Street Suite 4000, Commerce Court West Toronto Ontario M5L 1A9
	Attention: Clifford T. Smith, Officer
	E-mail: clifford.smith@CliffsNR.com

With a Copy to:	Blake, Cassels & Graydon LLP 199 Bay Street Suite 4000, Commerce Court West Toronto Ontario M5L 1A9
	Attention: Milly Chow
	E-mail: milly.chow@blakes.com

37. **ORDERS** that any document sent by the Monitor or the Participating CCAA Parties pursuant to this Order may be sent by e-mail, ordinary mail, registered mail or courier. A Creditor shall be deemed to have received any document sent pursuant to this Order two (2) Business Days after the document is sent by mail and one (1) Business Day after the document is sent by courier or e-mail. Documents shall not be sent by ordinary or registered mail during a postal strike or work stoppage of general application. For greater certainty, the Monitor shall not be deemed to have received any document unless and until such document is actually received by the Monitor at the address noted above.

38. **ORDERS** that, in the event that the day on which any notice or communication required to be delivered pursuant to this Order is not a Business Day, then such notice or communication shall be required to be delivered on the next Business Day.

39. **ORDERS** that if, during any period during which notices or other communications are being given pursuant to this Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary or registered mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery or e-mail in accordance with this Order.

40. **ORDERS** that all references to time in this Order shall mean prevailing local time in Montréal, Québec and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on the Business Day unless otherwise indicated.

41. **ORDERS** that references to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

Sanction Hearing

42. **ORDERS** that the Monitor shall provide a report to the Court as soon as practicable after the Meetings by no later than June 21, 2018 (the "**Monitor's Report Regarding the Meetings**") with respect to:

    42.1 the results of voting at the Meetings;

    42.2 whether the Required Majority of each Unsecured Creditor Class has approved the Plan;

    42.3 the separate tabulation of the Unresolved Voting Claims as required by Paragraph 27; and

    42.4 in its discretion, any other matter relating to the Participating CCAA Parties' motion(s) seeking sanction of the Plan.

43. **ORDERS** that an electronic copy of the Monitor's Report Regarding the Meetings, the Plan, including any Plan Modification, and a copy of the materials filed in respect of the Sanction Motion shall be posted on the Website prior to the Sanction Motion.

44. **ORDERS** that in the event the Plan has been approved by the Required Majority of each Unsecured Creditor Class, the Participating CCAA Parties may seek the sanction of the Plan before this Court on June 29, 2018 (the "**Sanction Motion**"), or

such later date as the Monitor may advise the Service List in these proceedings, provided that such later date shall be acceptable to the Participating CCAA Parties, the Parent and the Monitor.

45. **ORDERS** that service of this Order by the CCAA Parties to the parties on the Service List, the delivery of the Meeting Materials in accordance with Paragraph 8 hereof and the posting of the Meeting Materials on the Website in accordance with Paragraph 9 hereof shall constitute good and sufficient service and notice of the Sanction Motion.

46. **ORDERS** that in the event that the Sanction Motion is adjourned, only those Persons appearing on the Service List as of the date of service shall be served with notice of the adjourned date.

47. **ORDERS** that, subject to any further Order of the Court, in the event of any conflict, inconsistency, ambiguity or difference between the provisions of the Plan and this Order, the terms, conditions and provisions of the Plan, as sanctioned, shall govern and be paramount, and any such provision of this Order shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference.

48. **ORDERS** that any person who wishes to oppose the Sanction Motion shall serve upon the parties on the Service List, and file with the Court a copy of the materials to be used to oppose the Sanction Motion by no later than 5:00 p.m. (Eastern time) on June 26, 2018 or, if applicable, four days' prior to any adjourned or rescheduled Sanction Motion.

Monitor's Role

49. **ORDERS** that the Monitor, in addition to its prescribed rights and obligations under (i) the CCAA; (ii) the Initial Orders; and (iii) the Amended Claims Procedure Order, is hereby directed and empowered to take such other actions and fulfill such other roles as are authorized by this Order.

50. **ORDERS** that: (i) in carrying out the terms of this Order, the Monitor shall have all the protections given to it by the CCAA, the Initial Orders, the Amended Claims Procedure Order, and any other Order granted in these CCAA Proceedings and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Participating CCAA Parties and any information provided by the Participating CCAA Parties, and any information acquired by the Monitor as a result of carrying out its duties under this Order without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

Aid and Assistance of Other Courts

51. **REQUESTS** the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

General Provisions

52. **ORDERS** that the Monitor shall use reasonable discretion as to the adequacy of completion and execution of any document completed and executed pursuant to this Order and, where the Monitor is satisfied that any matter to be proven under this Order has been adequately proven, the Monitor may waive strict compliance with the requirements of this Order as to the completion and execution of documents.

53. **DECLARES** that the Monitor may apply to this Court for advice and direction in connection with the discharge or variation of its powers and duties under this Order.

54. **ORDERS** the provisional execution of this Order notwithstanding appeal.

55. **THE WHOLE** without costs.

STEPHEN W. HAMILTON J.S.C.

Mtre Bernard Boucher
Mtre Emily Hazlett
(Blake, Cassels & Graydon LLP)
Attorneys for the CCAA Parties

Date of hearing: April 16, 2018

Schedule A: Definitions
Schedule B: Creditor Letter
Schedule C: Notice of Creditor's Meetings and Sanction Hearing
Schedule D: Proxy
Schedule E: Form of Resolution

Schedule "A" to the Plan Filing and Meetings Order
Definitions

"**8568391**" means 8568391 Canada Limited;

"**Administration Charges**" means, collectively, the BL Administration Charge and the Wabush Administration Charge in the aggregate amount of the BL Administration Charge and the Wabush Administration Charge, as such amount may be reduced from time to time by further Court Order;

"**Affected Claim**" means any Claim other than an Unaffected Claim;

"**Affected Creditor**" means any Creditor holding an Affected Claim, including a Non-Filed Affiliate holding an Affected Claim and a CCAA Party holding an Affected Claim;

"**Affected Unsecured Claim**" means an Affected Claim that is an Unsecured Claim, including without limitation, any Deficiency Claims;

"**Affected Unsecured Creditor**" means any Affected Creditor holding an Affected Unsecured Claim, including a Non-Filed Affiliate and a CCAA Party holding an Affected Unsecured Claim;

"**Affiliate**" means, with respect to any Person, any other Person who directly or indirectly controls, is controlled by, or is under direct control or indirect common control with, such Person, and includes any Person in like relation to an Affiliate. A Person shall be deemed to "**control**" another Person if such Person possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of such other Person, whether through ownership of voting securities, by contract or otherwise, and the term "**controlled**" shall have a similar meaning;

"**Allocation Methodology**" means the methodology for the allocation of proceeds of realizations of the CCAA Parties' assets and the costs of the CCAA Proceedings amongst the CCAA Parties and, to the extent necessary, amongst assets or asset categories, which was approved by an Order of the Court on July 25, 2017 as may be amended upon Final Determination of the Fermont Allocation Appeal;

"**Allocated Value**" means, in respect of any particular asset of a Participating CCAA Party, the amount of the sale proceeds realized from such asset, net of costs allocated to such asset all pursuant to the Allocation Methodology and, in respect of any Secured Claim, the amount of such sale proceeds receivable on account of such Secured Claim after taking into account the priority of such Secured Claims relative to other creditors holding a Lien in such asset;

"**Allowed Claim**" shall have the meaning given to it in the Amended Claims Procedure Order;

"**Amended Claims Procedure Order**" means the Amended Claims Procedure Order dated November 16, 2015, approving and implementing the claims procedure in respect of the

CCAA Parties and the Directors and Officers (including all schedules and appendices thereof);

"**Applicable Law**" means any law (including any principle of civil law, common law or equity), statute, order, decree, judgment, rule, regulation, ordinance, or other pronouncement having the effect of law, whether in Canada or any other country or any domestic or foreign province, state, city, county or other political subdivision;

"**Arnaud**" means Arnaud Railway Company;

"**BIA**" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended;

"**BL Administration Charge**" means the charge over the BL Property created by paragraph 45 of the Bloom Lake Initial Order and having the priority provided in paragraphs 46 and 47 of such Court Order in the amount of Cdn.$2.5 million, as such amount may be reduced from time to time by further Court Order;

"**BL Directors' Charge**" means the charge over the BL Property of the BL Parties created by paragraph 31 of the Bloom Lake Initial Order, and having the priority provided in paragraphs 46 and 47 of such Order in the amount of Cdn.$2.5 million, as such amount may be reduced from time to time by further Court Order;

"**BLGP**" means Bloom Lake General Partner Limited;
"**BLLP**" means The Bloom Lake Iron Ore Mine Limited Partnership;
"**Bloom Lake CCAA Parties**" means, collectively, BLGP, Quinto, 8568391, CQIM, BLLP, and BLRC;
"**BL Parties**" means BLGP and BLLP;
"**BL Property**" means all current and future assets, rights, undertakings and properties of the Bloom Lake CCAA Parties, of every nature and kind whatsoever, and wherever situate, including all Cash or other proceeds thereof;

"**BLRC**" means Bloom Lake Railway Company Limited;

"**Business**" means the direct and indirect operations and activities formerly carried on by the Participating CCAA Parties;

"**Business Day**" means a day, other than a Saturday, a Sunday, or a non-juridical day (as defined in article 6 of the Code of Civil Procedure, R.S.Q., c. C-25, as amended);

"**Cash**" means cash, certificates of deposit, bank deposits, commercial paper, treasury bills and other cash equivalents;

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

"**CCAA Charges**" means the Administration Charge and the Directors' Charge;

"**CCAA Parties**" means the Wabush CCAA Parties, together with the Bloom Lake CCAA Parties, and **"CCAA Party**" means any one of the CCAA Parties;

"**CCAA Party Pre-Filing Interco Claims**" means Claims of the Participating CCAA Parties against other Participating CCAA Parties as set out in Schedule "H" hereto;

"**CCAA Proceedings**" means the proceedings commenced pursuant to the CCAA by a Court Order issued on January 27, 2015, bearing Court File No. 500-11-048114-157;

"**Claim**" means:

(a) any right or claim of any Person that may be asserted or made in whole or in part against the Participating CCAA Parties (or any of them), whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, in existence on, or which is based on, an event, fact, act or omission which occurred in whole or in part prior to the applicable Filing Date, at law or in equity, by reason of the commission of a tort (intentional or unintentional), any breach of contract, lease or other agreement (oral or written), any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty), any breach of extra-contractual obligation, any right of ownership of or title to property, employment, contract or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) or for any reason whatsoever against any of the Participating CCAA Parties or any of their property or assets, and whether or not any such indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmetered, disputed, legal, equitable, secured (by guarantee, surety or otherwise), unsecured, present, future, known or unknown, and whether or not any such right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, together with any other rights or claims not referred to above that are or would be claims provable under the BIA had the Participating CCAA Parties (or any one of them) become bankrupt on the applicable Filing Date, including, for greater certainty, any Tax Claim and any monetary claim in connection with any indebtedness, liability or obligation by reason of a breach of a collective bargaining agreement, including grievances in relation thereto, or by reason of a breach of a legal or statutory duty under any employment legislation or pay equity legislation;

(b) a D&O Claim; and

(c) a Restructuring Claim,

provided, however, that Excluded Claims are not Claims, but for greater certainty, a Claim includes any claim arising through subrogation or assignment against any Participating CCAA Party or Director or Officer;

"**Claims Bar Date**" means as provided for in the Amended Claims Procedure Order: (a) in respect of a Claim or D&O Claim, 5:00 p.m. on December 18, 2015, or such other date as may be ordered by the Court; and (b) in respect of a Restructuring Claim, the later of (i) 5:00 p.m. on December 18, 2015 (ii) 5:00 p.m. on the day that is 21 days after either (A) the date that the applicable Notice of Disclaimer or Resiliation becomes effective, (B) the Court Order settling a contestation against such Notice of Disclaimer or Resiliation brought pursuant to Section 32(5)(b) CCAA, or (C) the date of the event giving rise to the Restructuring Claim; or (iii) such other date as may be ordered by the Court;

"**Claims Officer**" means the individual or individuals appointed by the Monitor pursuant to the Amended Claims Procedure Order;

"**CMC Secured Claims**" has the meaning ascribed thereto in the Thirty-Ninth Report dated September 11, 2017 of the Monitor;

"**CNR Key Bank Claims**" has the meaning ascribed thereto in the Thirty-Ninth Report dated September 11, 2017 of the Monitor;

"**Conditions Certificates**" means written notice confirming, as applicable, the fulfilment or waiver, to the extent available, of the conditions precedent to implementation of the Plan as set out in Section 11.3 of the Plan;

"**Construction Lien Claim**" means a Claim asserting a Lien over real property of a Participating CCAA Party in respect of goods or services provided to such Participating CCAA Party that improved such real property;

"**Court**" means the Québec Superior Court of Justice (Commercial Division) or any appellate court seized with jurisdiction in the CCAA Proceedings, as the case may be;

"**Court Order**" means any order of the Court;

"**CQIM**" means Cliffs Québec Iron Mining ULC;

"**CQIM/Quinto Parties**" means CQIM and Quinto together;

"**Creditor**" means any Person having a Claim, but only with respect to and to the extent of such Claim, including the transferee or assignee of a transferred Claim that is recognized as a Creditor in accordance with the Amended Claims Procedure Order, the Plan and the Meetings Order, or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person;

"**D&O Bar Date**" means 5:00 p.m. (prevailing Eastern Time) on December 18, 2015, or such other date as may be ordered by the Court;

"**D&O Claim**" means any right or claim of any Person against one or more of the Directors and/or Officers howsoever arising on or before the D&O Bar Date, for which the Directors and/or Officers, or any of them, are by statute liable to pay in their capacity as Directors and/or Officers or which are secured by way of any one of the Directors' Charges;

"**Deficiency Claim**" means, in respect of a Secured Creditor holding a Proven Secured Claim, the amount by which such Secured Claim exceeds the Allocated Value of the Property secured by its Lien, and for greater certainty, includes, as applicable, the deficiency Claim, if any, of (a) the Pension Plan Administrator arising from any of the Pension Claims being Finally Determined to be a Priority Pension Claim, and (b) the Non-Filed Affiliate Secured Interco Claims;

"**Director**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of any of the Participating CCAA Parties, in such capacity;

"**Directors' Charges**" means, collectively, the BL Directors' Charge and the Wabush Directors' Charge;

"**Eligible Voting Claims**" means a Voting Claim or an Unresolved Voting Claim;

"**Eligible Voting Creditors**" means, subject to Section 4.2(b) of the Plan, Affected Unsecured Creditors holding Voting Claims or Unresolved Voting Claims;

"**Employee**" means a former employee of a Participating CCAA Party other than a Director or Officer;

"**Employee Priority Claims**" means, in respect of a Participating CCAA Party, the following claims of Employees of such Participating CCAA Party:

(a) claims equal to the amounts that such Employees would have been qualified to receive under paragraph 136(1)(d) of the BIA if the Participating CCAA Party had become bankrupt on the Plan Sanction Date, which for greater certainty, excludes any OPEB, pension contribution, and termination and severance entitlements;

(b) claims for wages, salaries, commissions or compensation for services rendered by such Employees after the applicable Filing Date and on or before the Plan Implementation Date together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the Business during the same period, which for greater certainty, excludes any OPEB, pension contribution, and termination and severance entitlements; and

(c) any amounts in excess of (a) and (b), that the Employees may have been entitled to receive pursuant to the *Wage Earner Protection Program Act* (Canada) if such Participating CCAA Party had become a bankrupt on the Plan Sanction Date, which for greater certainty, excludes OPEB and pension contributions;

"**Excluded Claim**" means, subject to further Court Order, any right or claim of any Person that may be asserted or made in whole or in part against the Participating CCAA Parties (or any one of them) in connection with any indebtedness, liability or obligation of any kind which arose in respect of obligations first incurred on or after the applicable Filing Date (other than Restructuring Claims and D&O Claims), and any interest thereon, including any obligation of the Participating CCAA Parties toward creditors who have supplied or shall supply services, utilities, goods or materials, or who have or shall have advanced funds to the Participating CCAA Parties on or after the applicable Filing Date, but only to the extent of their claims in respect of the supply or advance of such services, utilities, goods, materials or funds on or after the applicable Filing Date, and:

(a) any claim secured by any CCAA Charge;

(b) any claim with respect to fees and disbursements incurred by counsel for any CCAA Party, Director, the Monitor, Claims Officer, any financial advisor retained by any of the foregoing, or Representatives' Counsel as approved by the Court to the extent required;

"**Fermont Allocation Appeal**" means the appeal by Ville de Fermont of the judgment of the Court in the CCAA Proceedings approving the Allocation Methodology dated July 25, 2017 under Court File Number 500-09-027026-178;

"**Filing Date**" means January 27, 2015 for the Bloom Lake CCAA Parties, and May 20, 2015 for the Wabush CCAA Parties;

"**Final Determination**" and "**Finally Determined**" as pertains to a Claim, matter or issue, means either:

(a) in respect of a Claim, such Claim has been finally determined as provided for in the Amended Claims Procedure Order;

(b) there has been a Final Order in respect of the matter or issue; or

(c) there has been an agreed settlement of the issue or matter by the relevant parties, which settlement has been approved by a Final Order, as may be required, or as determined by the Monitor, in consultation with the Participating CCAA Parties, to be approved by the Court;

"**Final Order**" means a Court Order, which has not been reversed, modified or vacated, and is not subject to any stay or appeal, and for which any and all applicable appeal periods have expired;

"**Governmental Authority**" means any government, including any federal, provincial, territorial or municipal government, and any government department, body, ministry, agency, tribunal, commission, board, court, bureau or other authority exercising or purporting to exercise executive, legislative, judicial, regulatory or administrative functions of, or pertaining to, government including without limitation any Taxing Authority;

"**Government Priority Claims**" means all claims of Governmental Authorities that are described in section 6(3) of the CCAA;

"**Initial Order**" means, collectively, in respect of the Bloom Lake CCAA Parties, the Bloom Lake Initial Order, and in respect of the Wabush CCAA Parties, the Wabush Initial Order;

"**Liability**" means any indebtedness, obligations and other liabilities of a Person whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due;

"**Lien**" means any lien, mortgage, charge, security interest, hypothec or deemed trust, arising pursuant to contract, statute or Applicable Law;

"**Meetings**" means the meetings of Affected Unsecured Creditors in the Unsecured Creditor Classes in respect of each Participating CCAA Party called for the purposes of considering and voting in respect of the Plan, which has been set by the Meetings Order to take place at the times, dates and locations as set out in the Meetings Order;

"**Meetings Order**" means this Plan Filing and Meetings Order, including the Schedules hereto, as may be amended or varied from time to time by subsequent Court Order;

"**Monitor**" means FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties and not in its personal or corporate capacity;

"**Newfoundland Reference Proceedings**" means the reference proceeding commenced in the Newfoundland Court of Appeal in respect of the Pension Claims as Docket No. 201701H0029, as appealed to the Supreme Court of Canada;

"**Non-Filed Affiliates**" means the Parent, its former and current direct and indirect subsidiaries and its current and former Affiliates who are not petitioners or mises-en-cause in the CCAA Proceedings, and for greater certainty does not include any CCAA Party but does include any subsidiary of a CCAA Party;

"**Non-Filed Affiliate Interco Claims**" means, collectively, the Non-Filed Affiliate Unsecured Interco Claims and the Non-Filed Affiliate Secured Interco Claims;
"**Non-Filed Affiliate Secured Interco Claims**" means, collectively, (a) the CNR Key Bank Claims and (b) the CMC Secured Claims, in each case only to the extent of the Allocated Value of the Property securing such Claims as set out in the Schedule "G" to this Order and to the extent not a Deficiency Claim;
"**Non-Filed Affiliate Unsecured Interco Claims**" means all Claims filed in the CCAA Proceedings by a Non-Filed Affiliate determined in accordance with the Plan (other than Non-Filed Affiliate Secured Claims) as set out in the Schedule "F" to this Order, and for greater certainty, includes any Deficiency Claims held by a Non-Filed Affiliate;
"**Notice of Disclaimer or Resiliation**" means a written notice issued, either pursuant to the provisions of an agreement, under Section 32 of the CCAA or otherwise, on or after the applicable Filing Date of the Participating CCAA Parties, and copied to the Monitor, advising a Person of the restructuring, disclaimer, resiliation, suspension or termination of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral, and whether such restructuring, disclaimer, resiliation, suspension or termination took place or takes place before or after the date of the Amended Claims Procedure Order;

"**Officer**" means any Person who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of any of the Participating CCAA Parties;

"**Parent**" means Cleveland-Cliffs Inc.;

"**Participating CCAA Parties**" means the CCAA Parties, other than 8568391 and BLRC, and **"Participating CCAA Party**" means any of the Participating CCAA Parties;

"**Pension Plan Administrator**" means Morneau Shepell Ltd., the Plan Administrator of the Wabush Pension Plans, or any replacement thereof;

"**Pension Claims**" means Claims with respect to the administration, funding or termination of the Wabush Pension Plans, including any Claim for unpaid normal cost payments, or special/amortization payments or any wind up deficiency and "**Pension Claim**" means any one of them;

"**Pension Priority Proceedings**" means (a) the motion for advice and directions of the Monitor dated September 20, 2016 in respect of priority arguments asserted pursuant to the *Pension Benefits Act* (Newfoundland and Labrador), the *Pension Benefits Standards Act* (Canada) and the *Supplemental Pension Plans Act* (Québec) in connection with the claims arising from any failure of the Wabush CCAA Parties to make certain normal course payments or special payments under the Wabush Pension Plans and for the wind-up deficit under the Wabush Pension Plans currently subject to an appeal of Mr. Justice Hamilton's decision dated September 11, 2017, as may be further appealed, and (b) the Newfoundland Reference Proceedings with regards to the interpretation of the *Pension Benefits Act* (Newfoundland and Labrador) and the applicable pension legislation to members and beneficiaries of the Wabush Pension Plans;

"**Person**" means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust (including a real estate investment trust),

unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity;

"**Plan**" has the meaning given to such term in Paragraph 4;

"**Plan Implementation Date**" means the Business Day on which all of the conditions precedent to the implementation of the Plan have been fulfilled, or, to the extent permitted pursuant to the terms and conditions of the Plan, waived, as evidenced by the Monitor's Plan Implementation Date Certificate to be filed with the Court;

"**Plan Implementation Date Certificate**" means the certificate substantially in the form to be attached to the Sanction Order to be filed by the Monitor with the Court, declaring that all of the conditions precedent to implementation of the Plan have been satisfied or waived;

"**Plan Modification**" shall have the meaning ascribed thereto in the Meetings Order;

"**Plan Sanction Date**" means the date that the Sanction Order issued by the Court;

"**Plan Sponsors**" means the Parent and all other Non-Filed Affiliates;

"**Post-Filing Claims Procedure Order**" means the Post-Filing Claims Procedures Order to be sought by the CCAA Parties, which, *inter alia*, seeks to establish a post-filing claims procedure with respect to post-filing claims, if any, against the CCAA Parties and their Officers and Directors, as such may be amended, restated or supplemented from time to time;

"**Priority Claims**" means, collectively, the (a) Employee Priority Claim; and (b) Government Priority Claims;

"**Priority Pension Claim**" means a Pension Claim that is Finally Determined to have priority over Secured Claims or Unsecured Claims;

"**Proof of Claim**" means the proof of claim form that was required to be completed by a Creditor setting forth its applicable Claim and filed by the Claims Bar Date, pursuant to the Amended Claims Procedure Order;

"**Property**" means, collectively, the BL Property and the Wabush Property;

"**Proven Affected Unsecured Claim**" means an Affected Unsecured Claim that is a Proven Claim;

"**Proven Claim**" means (a) a Claim of a Creditor, Finally Determined as an Allowed Claim for voting, distribution and payment purposes under the Plan, (b) in the case of the Participating CCAA Parties in respect of their CCAA Party Pre-Filing Interco Claims, and in the case of the Non-Filed Affiliates in respect of their Non-Filed Affiliate Unsecured Interco Claims and Non-Filed Affiliate Secured Interco Claims, as such Claims are declared, solely for the purposes of the Plan, to be Proven Claims pursuant to and in the amounts set out in this Order, and (c) in the case of Employee Priority Claims and Government Priority Claims, as Finally Determined to be a valid post-Filing Date claim against a Participating CCAA Party;

"**Proven Secured Claim**" means a Secured Claim that is a Proven Claim;

"**Quinto"** means Quinto Mining Corporation;

"**Representative Court Order**" means the Court Order dated June 22, 2015, as such order may be amended, supplemented, restated or rectified from time to time;

"**Required Majority**" means, with respect to each Unsecured Creditor Class, a majority in number of Affected Unsecured Creditors who represent at least two-thirds in value of the Claims of Affected Unsecured Creditors who actually vote approving the Plan (in person, by proxy or by ballot) at the Meeting;

"**Restructuring Claim**" means any right or claim of any Person against the Participating CCAA Parties (or any one of them) in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Participating CCAA Parties (or any one of them) to such Person, arising out of the restructuring, disclaimer, resiliation, termination or breach or suspension, on or after the applicable Filing Date, of any contract, employment agreement, lease or other agreement or arrangement, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of the Amended Claims Procedure Order, and, for greater certainty, includes any right or claim of an Employee of any of the Participating CCAA Parties arising from a termination of its employment after the applicable Filing Date, *provided, however*, that "**Restructuring Claim**" shall not include an Excluded Claim;

"**Salaried Members**" means, collectively, all salaried/non-Union Employees and retirees of the Wabush CCAA Parties or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses, or group or class of them (excluding any individual who opted out of representation by the Salaried Members Representatives and Salaried Representative Counsel in accordance with the Representative Court Order, if any);

"**Salaried Members Representatives"** means Michael Keeper, Terrence Watt, Damien Lebel and Neil Johnson, in their capacity as Court-appointed representatives of all the Salaried Members of the Wabush CCAA Parties, the whole pursuant to and subject to the terms of the Representative Court Order;

"**Salaried Members Representative Counsel**" means Koskie Minsky LLP and Fishman Flanz Meland Paquin LLP, in their capacity as legal counsel to the Salaried Members Representatives, or any replacement thereof;

"**Salaried Pension Plan**" means the defined benefit plan known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent (Canada Revenue Agency registration number 0343558);

"**Sanction Hearing**" means the hearing of the Sanction Motion;

"**Sanction Motion**" means the motion by the Participating CCAA Parties seeking the Sanction Order;

"**Sanction Order**" means the Court Order to be sought by the Participating CCAA Parties from the Court as contemplated under the Plan which, *inter alia*, approves and sanctions the Plan and the transactions contemplated thereunder, pursuant to Section 6(1) of the CCAA, substantially in the form of Schedule "E" to the Plan or otherwise in form and content acceptable to the Participating CCAA Parties, the Monitor and the Parent, in each case, acting reasonably;;

"**Secured Claims**" means Claims held by "secured creditors" as defined in the CCAA, including Construction Lien Claims, to the extent of the Allocated Value of the Property

securing such Claim, with the balance of the Claim being a Deficiency Claim, and amounts subject to section 6(6) of the CCAA;

"**Service List**" means the service list in the CCAA Proceedings;

"**Secured Creditors**" means Creditors holding Secured Claims;

"**Stay of Proceedings**" means the stay of proceedings created by the Initial Order as amended and extended by further Court Order from time to time;

"**Tax**" or "**Taxes**" means any and all taxes including all income, sales, use, goods and services, harmonized sales, value added, capital gains, alternative, net worth, transfer, profits, withholding, payroll, employer health, excise, franchise, real property, and personal property taxes and other taxes, customs, duties, fees, levies, imposts and other assessments or similar charges in the nature of a tax, including Canada Pension Plan and provincial pension plan contributions, employment insurance and unemployment insurance payments and workers' compensation premiums, together with any instalments with respect thereto, and any interest, penalties, fines, fees, other charges and additions with respect thereto;

"**Tax Claims**" means any Claim against the Participating CCAA Parties (or any one of them) for any Taxes in respect of any taxation year or period ending on or prior to the applicable Filing Date, and in any case where a taxation year or period commences on or prior to the applicable Filing Date, for any Taxes in respect of or attributable to the portion of the taxation period commencing prior to the applicable Filing Date and up to and including the applicable Filing Date. For greater certainty, a Tax Claim shall include, without limitation, (a) any and all Claims of any Taxing Authority in respect of transfer pricing adjustments and any Canadian or non-resident Tax related thereto, and (b) any Claims against any BL/Wabush Released Party in respect of such Taxes;

"**Taxing Authorities**" means Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, any municipality of Canada, the Canada Revenue Agency, the Canada Border Services Agency, any similar revenue or taxing authority of Canada and each and every province or territory of Canada (including Revenu Québec) and any political subdivision thereof and any Canadian or foreign government, regulatory authority, government department, agency, commission, bureau, minister, court, tribunal or body or regulation making entity exercising taxing authority or power, and "**Taxing Authority**" means any one of the Taxing Authorities;

"**Unaffected Claims**" means:

(a) Excluded Claims;

(b) Secured Claims;

(c) amounts payable under Section 6(3), 6(5) and 6(6) of the CCAA;

(d) Priority Claims; and

(e) D&O Claims that are not permitted to be compromised under section 5.1(2) of the CCAA;

"**Union Pension Plan**" means the defined benefit plan known as the Pension Plan Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent (Canada Revenue Agency registration number 0555201);

"**Unresolved Affected Unsecured Claim**" means an Affected Unsecured Claim that is an Unresolved Claim;

"**Unresolved Claim**" means a Claim, which at the relevant time, in whole or in part: (a) has not been Finally Determined to be a Proven Claim in accordance with the Amended Claims Procedure Order and this Plan; (b) is validly disputed in accordance with the Amended Claims Procedure Order; and/or (c) remains subject to review and for which a Notice of Allowance or Notice of Revision or Disallowance (each as defined in the Amended Claims Procedure Order) has not been issued to the Creditor in accordance with the Amended Claims Procedure Order as at the date of this Plan, in each of the foregoing clauses, including both as to proof and/or quantum, and for greater certainty includes a Non-Filed Affiliate Interco Claim or CCAA Party Pre-Filing Interco Claim in respect of the Wabush CCAA Parties prior to the Final Determination of the Pension Priority Proceedings;

"**Unresolved Voting Claim**" means the amount of the Unresolved Affected Unsecured Claim of an Affected Unsecured Creditor as determined in accordance with the terms of the Amended Claims Procedure Order entitling such Affected Unsecured Creditor to vote at the applicable Meeting in accordance with the provisions of the Meetings Order, the Plan and the CCAA;

"**Unsecured Claims**" means Claims that are not secured by any Lien;

"**Unsecured Creditor Class**" means each of the CQIM/Quinto Unsecured Creditor Class, BL Parties Unsecured Creditor Class, Wabush Mines Unsecured Creditor Class, Arnaud Unsecured Creditor Class and Wabush Railway Unsecured Creditor Class;

"**USW Counsel**" means Philion Leblanc Beaudry avocats, in their capacity as legal counsel to the United Steelworkers, Locals 6254, 6285 and 9996;

"**USW Members"** means any Employee or retiree who is or was a member of the United Steelworkers, locals 6254, 6285 or 9996, including any successor of such Employees or retirees;

"**Voting Claim**" means the amount of the Affected Unsecured Claim of an Affected Unsecured Creditor as Finally Determined in the manner set out in the Amended Claims Procedure Order entitling such Affected Unsecured Creditor to vote at the applicable Meeting in accordance with the provisions of the Meetings Order, the Plan and the CCAA;

"**Wabush Administration Charge**" means the charge over the Wabush Property created by paragraph 45 of the Wabush Initial Order and having the priority provided in paragraphs 46 and 47 of such Order in the amount of Cdn$1.75 million, as such amount may be reduced from time to time by further Court Order;

"**Wabush CCAA Parties**" means, collectively, Wabush Iron, Wabush Resources, Wabush Mines, Arnaud and Wabush Railway;

"**Wabush Directors' Charge**" means the charge over the Wabush Property created by paragraph 31 of the Wabush Initial Order, and having the priority provided in paragraphs 46 and 47 of such Court Order in the amount of Cdn$2 million, as such amount may be reduced from time to time by further Court Order;

"**Wabush Iron**" means Wabush Iron Co. Limited;

"**Wabush Mines Parties**" means collectively, Wabush Iron, Wabush Resources and Wabush Mines;
"**Wabush Pension Plans**" means, collectively, the Salaried Pension Plan and the Union Pension Plan;

"**Wabush Property**" means all current and future assets, rights, undertakings and properties of the Wabush CCAA Parties, of every nature and kind whatsoever, and wherever situate, including all Cash or other proceeds thereof;

"**Wabush Railway**" means Wabush Lake Railway Company Limited;
"**Wabush Resources**" means Wabush Resources Inc.;

"**Website**" means www.cfcanada.fticonsulting.com/bloomlake.

[LETTERHEAD OF MONITOR]

May __, 2018

TO: Creditors of Cliffs Québec Iron Mining ULC ("**CQIM**"), Bloom Lake General Partner Limited ("**BLGP**"), The Bloom Lake Iron Ore Mine Limited Partnership ("**BLLP**") and Quinto Mining Corporation ("**Quinto**" and, together with CQIM, BLGP and BLLP, the "**Participating BL CCAA Parties**") and Wabush Iron Co. Limited ("**WICL**"), Wabush Resources Inc. ("**WRI**"), Wabush Mines ("**Wabush Mines**"), Arnaud Railway Company ("**Arnaud**") and Wabush Lake Railway Company Limited ("**Wabush Railway**" and, together with WICL, WRI, Wabush Mines and Arnaud, the "**Wabush CCAA Parties**" and, together with the Participating BL CCAA Parties, as certain of them may be consolidated under the Plan (as defined below), the "**Participating CCAA Parties**").

Dear Sirs/Mesdames:

Proposed Joint Plan of Compromise and Arrangement of the Participating CCAA Parties

Please find attached a Joint Plan of Compromise and Arrangement (as amended, restated or supplemented from time to time in accordance with the provisions thereof, the "**Plan**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") as filed by the Participating CCAA Parties (as defined above) with the Quebec Superior Court on April 16, 2018. Capitalized terms used in this letter not otherwise defined are as defined in Schedule "A" to the Plan.

The Plan seeks to implement the principal terms of a proposed settlement (the "**Settlement**") between the Participating CCAA Parties and Cleveland-Cliffs Inc. (the "**Parent**") and its former and current direct and indirect subsidiaries and affiliates (collectively with the Parent, the "**Non-Filed Affiliates**") as negotiated by FTI Consulting Canada Inc., in its capacity as the independent court-appointed Monitor in the CCAA proceedings (the "**Monitor**") and to distribute remaining assets of the Participating CCAA Parties to their creditors.

If the Plan is approved by the required majorities of creditors and sanctioned by the Court, the Plan will:

- resolve potential claims (collectively, the "**Potential Recovery Claims**") against certain of the Non-Filed Affiliates, without the significant time and expense of litigation and of obtaining payment from defendants in multiple foreign jurisdictions, the whole with an uncertain outcome;
- resolve significant intercompany claims between the CCAA Parties and between the CCAA Parties and certain Non-Filed Affiliates without the significant time and expense that would otherwise be incurred;
- provide significant additional monetary recoveries to third-party creditors which would not be available absent successful litigation in respect of the Potential Recovery Claims; and
- accelerate the payment of interim distributions to third-party creditors.

Pursuant to the Settlement, the Non-Filed Affiliates have agreed to sponsor the Plan by contributing the following to the Participating CCAA Parties' estates for the benefit of Third Party Affected Unsecured Creditors with Proven Claims:

(a) a cash contribution of CDN$5 million, of which CDN$4 million will be allocated to the CQIM/Quinto Unsecured Creditor Class and CDN$1 million will be allocated amongst unsecured creditors of the other Participating CCAA Parties pro-rata based upon the amount of third party Proven Claims against such other CCAA Parties; and

(b) all of the secured and unsecured distributions to which certain Non-Filed Affiliates would otherwise be entitled, which will be contributed to the CQIM/Quinto Parties (such Non-Filed Affiliates, being the "**Designated Non-Filed Affiliates**").

While the value of the distributions to be contributed by the Designated Non-Filed Affiliates cannot be calculated with certainty at this time because of various outstanding issues in the CCAA Proceedings, the Monitor estimates that the total incremental amount available to third-party creditors in the event that the Plan is implemented would be in the range of approximately CDN$62 million to CDN$100 million.

The Plan is a single joint Plan that will be subject to approval by each of the Unsecured Creditor Classes, which are:

(a) CQIM/Quinto Unsecured Creditor Class: Affected Unsecured Creditors of CQIM or Quinto;
(b) BL Parties Unsecured Creditor Class: Affected Unsecured Creditors of BLGP or BLLP;
(c) Wabush Mines Parties Unsecured Creditor Class: Affected Unsecured Creditors of WICL, WRI or Wabush Mines;
(d) Arnaud Unsecured Creditor Class: Affected Unsecured Creditors of Arnaud; and
(e) Wabush Railway Unsecured Creditor Class: Affected Unsecured Creditors of Wabush Railway.

Third Party Affected Unsecured Creditors in each as class will be entitled to vote the amount of their Claim proven in accordance with the Claims Procedure Order. To the extent that a Claim or any part of a Claim remains unresolved, the Affected Unsecured Creditor will also be able to vote its Unresolved Claim and such vote shall be tabulated separately from the votes of Affected Unsecured Creditors with Proven Claims.

Distributions on account of Proven Claims of Affected Unsecured Creditors in each Unsecured Creditor Class will be based on the pro-rata share of the net amounts available in each estate from realizations as determined pursuant to the Allocation Methodology approved by the Court by an Order granted July 25, 2017, as supplemented by the amounts being contributed by the Designated Non-Filed Affiliates. The methodology for calculating the distribution entitlement of individual Affected Unsecured Creditors is the same for each Unsecured Creditor Class.

The Plan provides for customary releases for the Participating CCAA Parties and their respective Directors, Officers, Employees, advisors, legal counsel and agents, the Monitor, FTI and their respective current and former affiliates, directors, officers and employees and all of their respective advisors, legal counsel and agents, and the Non-Filed Affiliates and their respective current and former members, shareholders, directors, officers and employees, advisors, legal counsel and agents. The defendants named in class action proceedings filed in the Supreme Court of Newfoundland and Labrador on behalf of former salaried and union employees are not released from the claims asserted in those class action proceedings. Accordingly, those class action proceedings are not impacted by the Plan.

The Plan does not affect the determination of the Pension Priority Proceedings, which matters are the subject of dispute and must be resolved prior to any distributions to Affected Unsecured Creditors of the Wabush CCAA Parties.

The information provided in this letter is intended to give a high-level overview to help you understand the Plan. You should note, however, that the governing document is the Plan. Accompanying this letter are the following important documents:

- The Plan;
- The Meetings Order, granted April 20, 2018;
- A Notice of Creditors' Meetings and Sanction Hearing;
- A form of Proxy and instructions for its completion;
- The Monitor's Report on the Plan;
- A Letter from Salaried Members Representative Counsel; and
- A Letter from USW Counsel.

You should read each of these documents carefully and in their entirety. You may wish to consult financial, tax or other professional advisors regarding the Plan and should not construe the contents of this letter as investment, legal or tax advice.

The Creditors' Meetings will be held on June 18, 2018 in Montreal, Quebec. Details of the Creditors' Meetings and the Sanction Hearing are contained in the Notice of Creditors' Meetings and Sanction Hearing.

Creditors that are corporations, partnerships or trusts wishing to vote on the Plan must submit a properly completed Proxy by no later than **5:00 p.m. (Eastern time) June 14, 2018** (the "**Proxy Deadline**") appointing a proxy holder to attend and vote at the Creditors' Meeting.

Creditors that are individuals wishing to vote on the Plan may (i) appoint a proxy holder to attend and vote at the Creditor's Meeting by submitting a properly completed Proxy by no later than the Proxy Deadline; or (ii) vote in person at the Creditors' Meeting.

As stated in the Monitor's Report on the Plan, and for the reasons set out therein, the Monitor recommends that creditors vote **FOR** the Plan.

The Salaried Members Representative Counsel (the lawyers representing the salaried/non-Union Employees and retirees of the Wabush CCAA Parties in these proceedings, the

"Salaried Members") and the USW Counsel (the lawyers representing the Employees and retirees of the Wabush CCAA Parties that are or were members of United Steelworkers locals 6254, 6285 or 9996, including any successor of such Employees and retirees, the "USW Members") recommend that you vote **FOR/AGAINST** the Plan. You will find enclosed letters from the Salaried Members Representative Counsel and the USW Counsel explaining their reasons.

If you are a Salaried Member and you **AGREE** with the recommendation of the Salaried Members Representative Counsel, you do NOT have to fill out, sign or return any Proxy or any other form to the Monitor since the Salaried Members Representative Counsel have been authorized by the CCAA Court to attend at the Creditors' Meeting and to vote your employee claims on your behalf according to that recommendation (the "Salaried Members Deemed Proxy"). If however, you **DISAGREE** with the recommendation, you have the right to opt out of the Salaried Members Deemed Proxy by advising the Monitor in writing of your desire to do so and you may vote in person at the Creditors' Meeting in Montreal or you may appoint a different Proxy holder by using the Proxy form.

If you are a USW Member and you **AGREE** with the recommendation of the USW Counsel, you do NOT have to fill out, sign or return any Proxy or any other form to the Monitor since the USW Counsel have been authorized by the CCAA Court to attend at the Creditors' Meeting and to vote your employee claims on your behalf according to that recommendation (the "USW Deemed Proxy"). If however, you **DISAGREE** with the recommendation, you have the right to opt out of the USW Deemed Proxy by advising the Monitor in writing of your desire to do so and you may vote in person at the Creditors' Meeting in Montreal or you may appoint a different Proxy holder by using the Proxy form.

If you have any questions regarding the Plan, the vote, or matters with respect to the Creditors' Meetings or Sanction Hearing, please contact the Monitor by email at bloomlake@fticonsulting.com or by telephone at 1-844-669-6338 or 416-649-8126.

Yours sincerely,

FTI Consulting Canada Inc., solely in its capacity as Court-Appointed
Monitor of the CCAA Parties

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

AND IN THE MATTER OF A JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED
(collectively, the "Participating CCAA Parties")

NOTICE OF MEETINGS AND SANCTION HEARING

TO: The Affected Unsecured Creditors of the Participating CCAA Parties

Capitalized terms used and not otherwise defined in this Notice are as defined in the Joint Plan of Compromise and Arrangement of the Participating CCAA Parties dated April 16, 2018 (as amended, restated and/or supplemented from time to time in accordance with the terms thereof, the "**Plan**").

NOTICE IS HEREBY GIVEN that Meetings of each of the following Unsecured Creditor Classes of the Participating CCAA Parties will be held at the following dates, times and locations:

Unsecured Creditor Class	Meeting Information
Cliffs Québec Iron Mining ULC and Quinto Mining Corporation, voting together as one Unsecured Creditor Class	**June 18, 2018 at 9:30 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Bloom Lake General Partner Limited and The Bloom Lake Iron Ore Mine Limited Partnership, voting together as one Unsecured Creditor Class	**June 18, 2018 at 9:30 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Wabush Iron Co. Limited, Wabush Resources Inc., and Wabush Mines, voting together as one Unsecured Creditor Class	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Arnaud Railway Company	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Wabush Lake Railway Company Limited	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

The purpose of the Meetings is to:

a) consider, and if deemed advisable, to pass, with or without variation, a resolution (the "**Resolution**") approving the Plan; and

b) transact such other business as may properly come before the Meetings or any adjournment or postponement thereof.

The Meetings are being held pursuant to an order (the "**Plan Filing and Meetings Order**") of the Québec Superior Court ("**CCAA Court**") made on April 20, 2018, which establishes the procedures for FTI Consulting Canada Inc. (in such capacity and not in its personal or corporate capacity, the "**Monitor**") to call, hold and conduct the Meetings.

The Plan provides for the compromise of the Affected Claims. The quorum for each Meeting will be one Affected Unsecured Creditor holding a Voting Claim or an Unresolved Voting Claim (each such creditor, an "**Eligible Voting Creditor**") present in person or by proxy.

In order for the Plan to be approved and binding in accordance with the CCAA, the Resolution must be approved by a majority in number of Affected Unsecured Creditors in each Unsecured Creditor Class representing at least two-thirds in value of the Claims of Affected Unsecured Creditors who actually vote (in person or by proxy) on the Resolution at the applicable Meeting (the "**Required Majority**").

All Eligible Voting Creditors will be eligible to attend the applicable Meeting and vote on the Plan. The votes of Eligible Voting Creditors holding Unresolved Voting Claims will be separately tabulated by the Monitor, and Unresolved Claims will be resolved in accordance with the Amended Claims Procedure Order prior to any distribution on account of such Unresolved Claims. Holders of an Unaffected Claim will not be entitled to attend and vote at any Meeting.

Forms and Proxies for Affected Unsecured Creditors

Any Eligible Voting Creditor who is unable to attend the applicable Meeting may vote by proxy. Further, any Eligible Voting Creditor who is not an individual may only attend and vote at the applicable Meeting if a proxyholder has been appointed to act on its behalf at such Meeting. A form of Proxy is included as part of the Meeting Materials being distributed by the Monitor to each Affected Unsecured Creditor.

Proxies, once duly completed, dated and signed, must be sent by email to the Monitor, or if cannot be sent by email, delivered to the Monitor at the address of the Monitor as set out on the Proxy form. Proxies must be received by the Monitor by no later than **5:00 p.m. (Eastern time) June 14, 2018** (the "**Proxy Deadline**").

Notice of Sanction Hearing

NOTICE IS ALSO HEREBY GIVEN that if the Plan is approved by the Required Majority of each Unsecured Creditor Class at the Meetings, the Participating CCAA Parties intend to bring a motion before the CCAA Court on **June 29, 2018 at 9:00 am** (Eastern Time) (the "**Sanction Hearing**"). The motion will be seeking the granting of the Sanction Order sanctioning the Plan under the CCAA and for ancillary relief consequent upon such sanction. Any person wishing to oppose the motion for the Sanction Order must serve upon the parties

on the Service List as posted on the Monitor's Website and file with the CCAA Court, a copy of the materials to be used to oppose the Sanction Order by no later than 5:00 pm (Eastern Time) on June 26, 2018.

This Notice is given by the Participating CCAA Parties pursuant to the Plan Filing and Meetings Order. Additional copies of the Meeting Materials, including the Plan, may be obtained from the Monitor's Website (http://cfcanada.fticonsulting.com/bloomlake), or by requesting one from the Monitor by email at bloomlake@fticonsulting.com.

DATED this _____day of _____, 2018.

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

AND IN THE MATTER OF A JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED (collectively, the "PARTICIPATING CCAA PARTIES")

PROXY

Before completing this Proxy, please read carefully the accompanying instructions for the proper completion and return of the form.

Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Joint Plan of Compromise and Arrangement of the Participating CCAA Parties dated April 16, 2018 (as may be amended, supplemented and/or restated from time to time, the "Plan") filed pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") with the Quebec Superior Court (the "CCAA Court") on April 16, 2018.

In accordance with the Plan, Proxies may only be filed by Affected Unsecured Creditors having a Voting Claim or an Unresolved Voting Claim ("Eligible Voting Creditors").

PROXIES, ONCE DULY COMPLETED, DATED AND SIGNED, MUST BE SENT BY EMAIL TO THE MONITOR, OR IF CANNOT BE SENT BY EMAIL, DELIVERED TO THE MONITOR BY NO LATER THAN 5:00 P.M. (EASTERN TIME) ON JUNE 14, 2018 (THE "PROXY DEADLINE").

THE UNDERSIGNED ELIGIBLE VOTING CREDITOR hereby revokes all Proxies previously given, if any, and nominates, constitutes, and appoints **Mr. Nigel Meakin** of FTI Consulting Canada Inc., in its capacity as Monitor, or such Person as he, in his sole discretion, may designate or, instead of the foregoing, appoints:

_____

Print Name of Proxy holder if wishing to appoint someone other than Mr. Nigel Meakin

to attend on behalf of and act for the Eligible Voting Creditor at the applicable Meeting(s) to be held in connection with the Plan and at any and all adjournments, postponements or other rescheduling of the Meeting(s), and to vote the dollar value of the Eligible Voting Creditor's Eligible Voting Claim(s) as determined by and accepted for voting purposes in accordance with the Meetings Order and as set out in the Plan as follows:

A. (mark one only):

❑Vote FOR approval of the resolution to accept the Plan; or

❑Vote AGAINST approval of the resolution to accept the Plan.

B. If a box is not marked as a vote FOR or AGAINST approval of the Plan:

a) if Mr. Nigel Meakin or his designate is appointed as proxy holder, this Proxy shall be voted

FOR approval of the Plan; or

b) if someone other than Mr. Nigel Meakin or his designate is appointed as proxy holder, the nominee shall vote at his or her discretion and otherwise act for and on behalf of the undersigned Eligible Voting Creditor with respect to any amendments or variations to the matters identified in the notice of the Meeting and in this Plan, and with respect to other matters that may properly presented at Meeting.

Dated this _____day of _____, 2018.

Print Name of Eligible Voting Creditor	Title of the authorized signing officer of the corporation, partnership or trust, if applicable
Signature of Eligible Voting Creditor or, if the Eligible Voting Creditor is a corporation, partnership or trust, signature of an authorized signing officer of the corporation, partnership or trust	Telephone number of the Eligible Voting Creditor or authorized signing officer
Mailing Address of Eligible Voting Creditor	Email address of Eligible Voting Creditor
Print Name of Witness, if Eligible Voting Creditor is an individual	
Signature of Witness	

INSTRUCTIONS FOR COMPLETION OF PROXY

1. This Proxy should be read in conjunction with the Joint Plan of Compromise and Arrangement of the Applicant dated April 16, 2018 (as it may be amended, restated or supplemented from time to time, the "Plan") filed pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") with the Quebec Superior Court (the "CCAA Court") on April 16, 2018 and the Meetings Order. Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan.

2. Each Eligible Voting Creditor has the right to appoint a person (who need not be a Creditor) (a "Proxy holder") to attend, act and vote for and on behalf of such Eligible Voting Creditor and such right may be exercised by inserting the name of the Proxy holder in the blank space provided on the Proxy.

3. If no name has been inserted in the space provided to designate the Proxy holder on the Proxy, the Eligible Voting Creditor will be deemed to have appointed Mr. Nigel Meakin of FTI Consulting Canada Inc., in its capacity as Monitor (or such other Person as he, in his sole discretion, may designate), as the Eligible Voting Creditor's Proxy holder.

4. An Eligible Voting Creditor who has given a Proxy may revoke it by an instrument in writing executed by such Eligible Voting Creditor or by its attorney, duly authorized in writing or, if an Eligible Voting Creditor is not an individual, by an officer or attorney thereof duly authorized, and deposited with the Monitor in each case before the Proxy Deadline.

5. If this Proxy is not dated in the space provided, it shall be deemed to be dated as of the date on which it is received by the Monitor.

6. A valid Proxy from the same Eligible Voting Creditor bearing or deemed to bear a later date than this Proxy will be deemed to revoke this Proxy. If more than one valid Proxy from the same Eligible Voting Creditor and bearing or deemed to bear the same date are received by the Monitor with conflicting instructions, such Proxies shall not be counted for the purposes of the vote.

7. This Proxy confers discretionary authority upon the Proxy holder with respect to amendments or variations to the matters identified in the notice of the Meeting and in the Plan, and with respect to other matters that may properly come before the Meeting.

8. The Proxy holder shall vote the Eligible Voting Claim of the Eligible Voting Creditor in accordance with the direction of the Eligible Voting Creditor appointing him/her on any ballot that may be called for at the applicable Meeting. **IF AN ELIGIBLE VOTING CREDITOR FAILS TO INDICATE ON THIS PROXY A VOTE FOR OR AGAINST APPROVAL OF THE RESOLUTION TO ACCEPT THE PLAN, AND MR. NIGEL MEAKIN OR HIS DESIGNATE IS APPOINTED AS PROXY HOLDER, THIS PROXY WILL BE VOTED FOR THE RESOLUTION TO APPROVE THE PLAN, INCLUDING ANY AMENDMENTS, VARIATIONS OR SUPPLEMENTS THERETO. IF AN ELIGIBLE VOTING CREDITOR FAILS TO INDICATE ON THIS PROXY A VOTE FOR OR AGAINST APPROVAL OF THE RESOLUTION TO ACCEPT THE PLAN AND APPOINTS A PROXY HOLDER OTHER THAN**

MR. NIGEL MEAKIN OR HIS DESIGNATE, THE PROXY HOLDER MAY VOTE ON THE RESOLUTION AS HE OR SHE DETERMINES AT THE APPLICABLE MEETING.

9. If the Eligible Voting Creditor is an individual, this Proxy must be signed by the Eligible Voting Creditor or by a person duly authorized (by power of attorney) to sign on the Eligible Voting Creditor's behalf. If the Eligible Voting Creditor is a corporation, partnership or trust, this proxy must be signed by a duly authorized officer or attorney of the corporation, partnership or trust. If you are voting on behalf of a corporation, partnership or trust or on behalf of another individual at a Meeting, you must have been appointed as a proxy holder by a duly completed proxy submitted to the Monitor by the Proxy Deadline. You may be required to provide documentation evidencing your power and authority to sign this Proxy.

10. PROXIES, ONCE DULY COMPLETED, DATED AND SIGNED, MUST BE SENT BY EMAIL TO THE MONITOR, OR IF CANNOT BE SENT BY EMAIL, DELIVERED TO THE MONITOR BY NO LATER THAN 5:00 P.M. (EASTERN TIME) ON JUNE 14, 2018 (THE "PROXY DEADLINE").

By email: bloomlake@fticonsulting.com

By mail or courier:
FTI Consulting Canada Inc.
Monitor of Bloom Lake General Partners Limited, et al.
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario
M5K 1G8

11. The Applicant and the Monitor are authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which any Proxy is completed and executed, and may waive strict compliance with the requirements in connection with the deadlines imposed by the Meetings Order.

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

AND IN THE MATTER OF A JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED
(collectively, the "Participating CCAA Parties" and each a "Participating CCAA Party")

RESOLUTION OF UNSECURED CREDITOR CLASS

BE IT RESOLVED THAT:

1. the Joint Plan of Compromise and Arrangement dated April 16, 2018 filed by the Participating CCAA Parties under the *Companies' Creditors Arrangement Act*, as may be amended, restated or supplemented from time to time in accordance with its terms (the "**Plan**"), which Plan has been presented to this Meeting, be and is hereby accepted, approved, and authorized;

2. any director or officer of the applicable Participating CCAA Party be and is hereby authorized, empowered and instructed, acting for, and in the name of and on behalf of such Participating CCAA Party, to execute and deliver, or cause to be executed and delivered, all such documents, agreements and instruments and to do or cause to be done all such other acts and things as such director or officer determines to be necessary or desirable in order to carry out the Plan, such determination to be conclusively evidenced by the execution and delivery by such directors or officers of such documents, agreements or instruments or the doing of any such act or thing.

3. notwithstanding that this Resolution has been passed and the Plan has been approved by the Affected Unsecured Creditors and the Court, the directors of the Participating CCAA Parties be and are hereby authorized and empowered to amend the Plan or not proceed to implement the Plan subject to and in accordance with the terms of the Plan.

Tab 12

See para. 13

Date: 19990903
Docket: 190882VA99
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY

IN THE MATTER OF THE PROPOSAL OF

NEW HOME WARRANTY OF BRITISH COLUMBIA INC.

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE SATANOVE

Counsel for New Home Warranty	Margaret R. Sims
Counsel for IBNR Claimants:	John I. McLean
Counsel for The Owners: Strata Corporation NES122	Timothy W. Pearkes
Counsel for KPMG Inc., Trustee	Mary I. Buttery
Counsel for Great West Development Group of Companies and others	William E. Skelly
Counsel for C & J Restorations	J. Cameron McKechnie
Place and Date of Hearing:	Vancouver, B.C. September 2, 1999

[1] New Home Warranty of British Columbia Inc. ("New Home") has made a proposal in bankruptcy under the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3. An issue has arisen as to who has legal status to vote on the proposal.

[2] The applicants who seek a court declaration that they are entitled to vote are all those persons who are covered by New Home warranties and are presently unaware of any defect in construction of their buildings which would entitle them to make a claim, but who may be entitled to make a claim in the future under the warranties. They have been referred to throughout the proceedings as the "IBNRs".

[3] On April 20, 1999, Madam Justice Allan appointed Mr. McLean, an officer of the court, as counsel to protect the interest of the IBNRs. Mr. McLean obtained an actuarial report which estimated New Home's outstanding claim liabilities at about $4.1 million dollars, of which about $20.4 million dollars represented IBNR claims. Mr. McLean has asked the court to declare that the IBNR claimants consist of 362 creditors with provable claims under the ***Act*** to be valued for voting purposes as totalling $20,411,842. He intends to vote on their behalf in approval of the proposal.

[4] There is an understandable concern on the part of non-IBNR creditors that if the relief sought were granted, the IBNRs who represent 50% of the claims would control the process because

it would be impossible to obtain the majority in number and two-thirds majority in value required to approve any proposal to which the IBNRs, through Mr. McLean, did not agree. Further, the non-IBNRs say they have little or no chance of voting down the proposal because it is unlikely they could get sufficient creditors to participate to create the negative vote they would need. They say their vote will be rendered meaningless and the whole process will be undemocratic.

[5] It has been suggested by some of these latter claimants that the proposal should separate the unsecured creditors into two classes so that a majority in number and two-thirds in value vote of approval would have to be obtained from both classes, thereby providing IBNRs and non-IBNRs alike with a veto power.

[6] Counsel referred me to the decision of Tysoe, J. in ***Re Woodward's Ltd.*** (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.) wherein he approved the creation of a separate class under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 for those creditors holding the guarantee of Woodward's holding company. He found that the holders of the guarantees had such different legal rights that they could not vote on the Reorganization Plan with a common interest.

[7] In the case before me, the legal rights underlying the nature of the claims of the IBNRs and other unsecured creditors

should be the same. They are all privy to the same contractual terms with New Home and they all have a claim for breach of warranty although the extent of each of their damage may not yet be known. I do not see the basis for the creation of two classes of unsecured creditors.

[8] In any event, all counsel acknowledge that I have no jurisdiction to order that a separate claim of unsecured creditors be created under the proposal.

[9] The only issue before me is whether the IBNRs are entitled to vote and to what extent. Section 54 of the ***Bankruptcy and Insolvency Act*** allows "creditors" with "proven claims" to vote on a proposal. Section 2(1) of the ***Act*** defines "creditor" as a person having a claim "provable as a claim under the ***Act***". The law has long held that contingent claims may be provable claims in bankruptcy. This principle is in keeping with the policy of the ***Act*** to allow as many claims, actual or potential, against the bankrupt to be brought forward so that the bankrupt's slate can be wiped clean and all creditors, even contingent ones, can have the opportunity to try and prove their claim and share in the assets of the estate (***Re Wiebe*** (1995), 30 C.B.R. (3d) 109 (Ont. Bkptcy. Ct.); ***Hardy v. Fothergill*** (1888), 13 A.C. 351 (H.L.)).

[10] The test whether a claim is "provable in bankruptcy" is whether it is capable of being fairly estimated. If it is too

remote or speculative to be measured by actuarial computation or otherwise, then it is not capable of fair estimation and is not provable in bankruptcy. However, if claims can be actuarially measured, such as in the case before me, then they are capable of estimation and the trustee, or the court, should proceed to evaluate them.

[11] Section 54 of the ***Act*** refers to creditors with "proven" claims, but the effect of s. 135(1.1) of the ***Act*** is to deem contingent claims to be "proven" when they have been determined by the trustee to be provable claims and to have a certain value. If the trustee sets the value of these IBNR claims, then notwithstanding their contingent nature they will become "proven claims" for the purposes of voting on the proposal.

[12] I see no reason why the trustee should not rely on the actuarial evidence to set the value of these claims for voting purposes. Although I received some objections to admitting into evidence the KPMG Actuarial Report, these were of a general nature only. No specific observations were made as to any flaws in the report. The Report qualifies itself a number of times that it represents a rough prediction only but at this stage of the proceedings it is the only evidence before me and I have no reason to find it unreliable.

[13] The IBNRs, as creditors with provable claims in bankruptcy, should be entitled to participate in any decisions

about New Home's estate. Mr. McLean is authorized to file a single proof of claim in the amount of $20,411,842 on behalf of 362 separate creditors and the trustee is authorized to accept the proof of claim for voting purposes only. Mr. McLean is authorized to vote without proxies on behalf of those IBNRs who are not present at the meeting.

[14] The other relief sought in the notice of motion is adjourned generally.

"Satanove, . J."
The Honourable Madam Justice Satanove

Tab 13

See para. 10

In the Court of Appeal of Alberta

Citation: San Francisco Gifts Ltd. v. Oxford Properties Group Inc., 2004 ABCA 386

Date: 20041202
Docket: 0403-0325-AC
Registry: Edmonton

Between:

San Francisco Gifts Ltd., San Francisco Retail Gifts Incorporated (previously called San Francisco Gifts Incorporated), San Francisco Gift Stores Limited, San Francisco Gifts (Atlantic) Limited, San Francisco Stores Ltd., San Francisco Gifts & Novelties Inc., San Francisco Gifts & Novelty Merchandising Corporation (previously called San Francisco Gifts and Novelty Corporation), San Francisco (The Rock) Ltd. (previously called San Francisco Newfoundland Ltd.) and San Francisco Retail Gifts & Novelties Limited (previously called San Francisco Gifts & Novelties Limited)

Applicants

- and -

Oxford Properties Group Inc., Ivanhoe Cambridge 1 Inc., 20 Vic Management Ltd., Morguard Investments Ltd., Morguard Real Estate Investments Trust, Riocan Property Services, and 1113443 Ontario Inc.

Respondents

Reasons for Decision of the Honourable Madam Justice Carole Conrad

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Reasons for Decision of the
Honourable Madam Justice Conrad

I. Introduction

[1] The San Francisco group of companies ("San Francisco") seeks leave to appeal an order finding Barry Slawsky ("Slawsky") and Laurier Investments Corp. ("Laurier") do not share a "commonality of interest" with other unsecured creditors, and placing them in a separate class for purposes of voting on a plan of arrangement under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 ("*CCAA*").

II. Facts

[2] San Francisco is composed of the operating company, San Francisco Gifts Ltd., and several nominee companies. The operating company holds all of San Francisco's assets and is 100% owned by Laurier. Laurier is wholly owned by Slawsky, who is also the president and sole director of nearly all of the San Francisco group of companies. Slawsky and Laurier are San Francisco's only secured creditors. In addition, they have substantial unsecured debt with the company.

[3] On January 7, 2004, San Francisco was granted protection under the *CCAA*. The initial order was extended, and San Francisco remains in business. On June 22, 2004, San Francisco was permitted to file a Plan of Compromise or Arrangement ("Plan") and submit it to its creditors for consideration and voting. The Plan classified Slawsky and Laurier as "unaffected creditors," meaning that their claims survive the reorganization. Slawsky and Laurier would not share in the distribution of $500,000.00; however, they would value their security and vote as unsecured creditors.

[4] On July 14, 2004, a group of six objecting landlords asked the Court to create a separate class or classes for landlords and any similarly-affected parties, to assist the Court-appointed monitor in identifying and preserving creditor claims, and to remove any "related parties" from the unsecured creditors class (or, alternatively, deny them a vote).

III. Decision Below

[5] The motion was heard on September 1 and 2, 2004. In a reserved written judgment, the supervising chambers justice declined to create a separate class for landlords, but made provision for preserving certain landlords' claims relating to the right to distrain. The decision removed Slawsky and Laurier from the unsecured creditors class, placing them in a separate class for voting purposes, and awarded costs against San Francisco under Column 1. It is the removal of Slawsky and Laurier from the unsecured creditors class for which San Francisco seeks leave to appeal. If granted leave to appeal, San Francisco asks this Court to also review the costs award.

[6] The chambers justice focused on the lack of "commonality of interest" between Slawsky and Laurier and the rest of the unsecured creditors. Her concerns centred on the different treatment afforded Slawsky and Laurier. Although Slawsky and Laurier would not share in the $500,000.00 distribution, their debt would not be compromised. If the reorganization failed and San Francisco became bankrupt, Slawsky and Laurier would be unaffected, whereas the rest of the unsecured creditors would receive nothing. The chambers justice concluded at para. 49 of her reasons that in light of their divergent interests, "[i]t stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Barry Slawsky and, through him with Laurier."

IV. Test for Leave to Appeal

[7] Any person dissatisfied with an order under the *CCAA* is permitted an appeal of that order on obtaining leave: *CCAA*, s.13. The test for leave to appeal is set out in ***Re Liberty Oil & Gas Ltd.*** (2003), 44 C.B.R. (4th) 96, 2003 ABCA 158 at paras. 15 and 16:

> The test for granting leave, as articulated in this Court, involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties . . . .
>
> The four factors subsumed in an assessment whether the criterion is present are:
>
> (1) Whether the point on appeal is of significance to the practice;
> (2) Whether the point raised is of significance to the action itself;
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> (4) Whether the appeal will unduly hinder the progress of the action . . . .

V. Standard of Review

[8] In considering whether the appeal is *prima facie* meritorious, it is necessary to consider the standard of review the Court would apply if leave was granted. This Court has stated that the supervising chambers justice in a *CCAA* matter is tasked with an ongoing management process similar to that of a judge in the course of a trial: ***Re Liberty Oil & Gas Ltd.***, *supra* at para. 20. Consequently, the reviewing court will only interfere with the decision where the chambers justice "acted unreasonably, erred in principle or made a manifest error": ***UTI Energy Corp. v. Fracmaster Ltd.*** (1999), 244 A.R. 93 at para. 3 (C.A.).

VI. Decision

[9] The applicants' main complaints are that the chambers justice erred in her application of the common-law "commonality of interests" test and she misunderstood the facts. The *CCAA* does not

explicitly state what factors differentiate creditors so as to place them in separate classes for voting purposes. But in determining issues relating to class, it is important to recognize that the right to vote as a separate class and thereby defeat a proposed plan of arrangement is the statutory protection provided to the different classes of creditors. While fairness on many issues is assessed again at a later stage, it is the initial placing within a separate class that provides this non-discretionary right to creditors.

[10] To give effect to this protection, a "commonality of interests" test was developed. The foundation for the "commonality of interests" test is that the classes must be structured so as to "prevent a confiscation and injustice" and to enable the members to "consult together with a view to their common interest": ***Sovereign Life Assurance Co. v. Dodd***, [1892] 2 Q.B. 573 at 583 (C.A.). It follows that it is important to carefully examine classes with a view to protecting against injustice, and not simply rely on fairness being evaluated later.

[11] The means of preventing confiscation and injustice raises some very interesting issues when it comes to determining who should be in a separate class for voting purposes. Unlike the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3, the *CCAA* does not specifically provide for treatment of related parties. While unsecured creditors and shareholders have similar legal rights with respect to debts owing, a shareholder *qua* shareholder has other legal rights that may impact on, or make impossible, the ability of the class to hold a common interest. This is an important issue that has not yet been addressed by this Court. As interesting and important as that issue is, however, it is not the issue on this appeal and resolution of the issue must wait to another day.

[12] The chambers judge did not need to, and did not, make her decision on commonality of interest based merely on the fact that Slawsky and Laurier were shareholders. Rather, in arriving at her decision to place the shareholders in a separate class, the chambers judge relied on the different treatment afforded Slawsky and Laurier under the Plan. She stated (at para. 49):

> Here, there is no compromise by Slawsky or Laurier. Further, they would, but for a security position shortfall, be unaffected by a bankruptcy of the companies, whereas all of the other creditors in the class would receive nothing. Slawsky has created a Plan which gives him voting rights that he doubtless wants to employ if he senses the need to sway the vote. In return, he gives up nothing. It stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Slawsky and, through him, with Laurier. For that reason, Slawsky and Laurier must be placed in a separate class.

[13] I do not accept the applicants' argument that the chambers judge failed to understand that Slawsky and Laurier *had* given up something in that the Plan did not provide for their participation in the $500,000.00 available for distribution. This judge was alive to that element of the Plan. When she said that "he gives up nothing," she was referring to the fact that under the Plan the shareholders' debt remains outstanding and is not compromised, unlike the other unsecured

creditors' debt. In short, Slawsky and Laurier may be in a position to control the vote and cancel all unsecured creditors' debt but their own. Under these circumstances, there would be no meaningful consultation about the Plan.

[14] In my view, the chambers judge was absolutely correct in her assessment that it stretches the imagination to think that there would be meaningful consultation about the Plan between shareholders whose debts would not be cancelled and other unsecured creditors whose debts would be. Certainly, bearing in mind the standard of review, there is absolutely no merit to this appeal.

[15] Thus, while I acknowledge that questions of class are important, both to the practice and the parties, this application for leave must fail because it fails to establish that the appeal is *prima facie* meritorious.

[16] In the result, the chambers judge did not err in principle, she did not misunderstand the evidence, and her decision to remove Slawsky and Laurier from the class of unsecured creditors was correct. In my view, any other decision would have resulted in an injustice to the other unsecured creditors. At a minimum, bearing in mind the standard of review, there is no chance of success on the appeal.

[17] Leave to appeal is denied.

(Counsel speaks to costs)

[18] Costs are allowed to the Respondent in Column 1 and I allow costs for the filing of their Memorandum, notwithstanding the red stamp.

Application heard on November 24, 2004

Reasons filed at Edmonton, Alberta
this 2nd day of December, 2004

Conrad J.A.

Appearances:

R.T.G. Reeson, Q.C.
For the Applicants

J.H.H. Hockin
for the Respondents

M.J. McCabe, Q.C.
For the Court Appointed Monitor

Tab 14

See para. 41

Date of Release: April 20, 1993

No. A924791
Vancouver Registry

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. 1979, c. 59

IN THE MATTER OF WOODWARD'S LIMITED, WOODWARD STORES LIMITED AND ABERCROMBIE & FITCH CO. (CANADA) LTD.	)	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE TYSOE (IN CHAMBERS)

Counsel for Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd.: Michael A. Fitch, Susan M. Eyre, D. Geoffrey Cowper

Counsel for Hans Andriessen and certain other terminated employees: Paul J. Pearlman

Counsel for R. Longine and certain other terminated employees: James E. Howell

Counsel for Royal Trust Corporation of Canada: Vincent Morgan

Counsel for National Bank Leasing: Digby R. Leigh

Counsel for North American Trust Company: Douglas B. Hyndman

Counsel for Triple Five Corporation Limited: B.A.R. Smith, Q.C. (Alta.)

Counsel for Bucci Investment Corporation and Prospero International Realty Inc.:	William E.J. Skelly
Counsel for Cambridge Shopping Centres Limited:	Douglas I. Knowles Clayton W. Caverly
Counsel for Neptune Foods:	Sean Donovan
Counsel for Park Royal Shopping Centre Limited and others:	Robert G. Kuhn Nicolaas A. Blom
Counsel for Laing Properties:	Robert P. Sloman
Counsel for Oakridge Centre Holdings Inc. and others:	Gordon K. Mitchell L.M. Candido
Counsel for General Electric Capital Canada Inc.:	Alan H. Brown
Counsel for Zellers Inc.:	James P. Taylor, Q.C. Scott A. Turner Michael Harquail (Ont.)
Date and place of hearing:	April 13, 14 and 15, 1993 Vancouver, B.C.

INTRODUCTION

The Petitioners ("Woodward's") apply for an order approving the classes of creditors designated in their plan of arrangement under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 (the "***CCAA***") filed on April 7, 1993 (the "Reorganization Plan"). Woodward's proposes to hold meetings of these classes of creditors during the first part of May 1993 for the purpose of voting on the Reorganization Plan.

The classes of creditors designated by the Reorganization Plan are Secured Creditors, Noteholders, Landlords and General Creditors. Each of these terms is defined in the Reorganization Plan. There is no issue as to the appropriateness of classes of secured creditors, noteholders, landlords and general creditors. The question is whether or not there should be additional classes.

The definitions in the Reorganization Plan of the classes of creditors are as follows:

> "Secured Creditors" means the Secured Trustee as holder of the Secured Notes;
>
> "Noteholders" means the A & F Debentureholders, the Stores Debentureholders, the 9% Noteholders and the 10% Noteholders;
>
> "Landlord" means any landlord, head lessor, sublessor or owner of premises which has entered into any Lease with any member of the Woodward's Group and includes any mortgagee or successor in title of such premises who has taken possession of such premises or is collecting rent in respect of such premises as well as any party who has taken an assignment of rents or assignment of lease in respect of such premises, whether as security or otherwise; provided, however, that if more than one person would otherwise come within this definition of Landlord in respect of any particular Lease, the rights and claims of all such persons in respect of such Lease will be dealt with collectively under this Plan and each reference herein to such Landlord shall be construed as a collective reference to all such persons;
>
> "General Creditors" means all persons with unsecured claims for any Indebtedness against Woodward's Group as at the General Creditor Meeting Date, including the Pre-Filing Trade Creditors, Employee Creditors, the Landlords and the Equipment Financiers but, for the Landlords and the Equipment Financiers, only to the extent of their claims to be dealt with

> in the General Creditor class as provided herein, and specifically excluding Post-Filing Trade Creditors, the Noteholders and the holders of the Unaffected Obligations.

The additional classes that have been proposed are as follows:

(a) employees of Woodward's that have been terminated since the commencement of these proceedings on December 11, 1992 (these employees made a formal application for separate classification);

(b) Royal Trust Corporation of Canada which holds a debenture creating a fixed charge against certain equipment purchased by Woodward's with the financing provided by Royal Trust;

(c) equipment financiers (which could include Royal Trust);

(d) creditors of Woodward Stores Limited (the "Operating Company") that hold the guarantee or joint covenant of its holding company, Woodward's Limited (the "Holding Company");

(e) one of more classes of landlords whose leases are being repudiated.

There is the potential that two parties having agreements to lease with Woodward's will want to make submissions that they should be in a separate or different class. These parties were only served with the Petition in this proceeding recently and it was agreed that my ruling would not affect their ability to make submissions at a subsequent time. It was also agreed that General

Electric Capital Canada Inc. would not be bound by my ruling and could make submissions that it should be in a separate or different class or that it should be considered to be a holder of an Unaffected Obligation.

I will return to the positions of the various parties but I think it will be useful to first review the authorities setting forth the general principles applicable to the issue of creditor classification.

GENERAL PRINCIPLES

The starting point of the case authorities is the decision of the English Court of Appeal in ***Sovereign Life Assurance Company v. Dodd***, [1892] 2 Q.B. 573 where Lord Esher said the following at pp. 579-80 in relation to the meeting of creditors to consider a plan of arrangement under the Joint Stock Companies Arrangement Act:

> The Act says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes - classes which the Act of Parliament recognizes, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

Bowen L.J. made the following comments at p. 583:

> The word "class" is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class or classes to be called. It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined 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.

There has been some jurisprudence over the years regarding creditor classification but, like the jurisprudence on other issues under the CCAA, it has intensified over the past five to ten years. One of the earlier cases of the present wave of jurisprudence dealing with creditor classification is ***Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*** (1988), 72 C.B.R. 20 (A.Q.B.). In that case Forsyth J. rejected the argument that different secured creditors should be placed in separate classes because they held separate security over different assets or because the relative values of their security were different. The Court rejected the "identity of interest" approach which involves each class only containing creditors with identical interests. Instead, the Court followed the approach which I will call the "non-fragmentation" approach. This approach avoids the creation of a multiplicity of classes by including creditors with different legal rights in the same class as long as their legal rights are not so dissimilar that it is not possible for them to vote with a common interest. This is essentially the approach that was suggested by Bowen L.J. in the passage from the ***Sovereign Life***

quoted above (although his words have been incorrectly attributed to Lord Esher in at least one case authority and one article).

The approach taken in the ***Oakwood Petroleums*** case has been specifically adopted by the B.C. Court of Appeal in ***Northland Properties Limited v. Excelsior Life Insurance Company of Canada*** (1989), 73 C.B.R. 195. In the lower court decision in that case the Court considered the similarities and dissimilarities of various mortgagees holding mortgages against different properties and concluded that they should be in the same class. Dealing with the points of dissimilarity, Trainor J. said as follows at p. 192 of 73 C.B.R.:

> The points of dissimilarity are that they are separate properties and that there are deficiencies in value of security for the loan, which vary accordingly for particular priority mortgagees. Specifically with respect to Guardian and Excelsior, they are both in a deficiency position.
>
> Now, either of the reasons for points of dissimilarity, if effect was given to them, could result in fragmentation to the extent that a plan would be a realistic impossibility. The distinction which is sought is based on property values, not on contractual rights or legal interests.

After the Court of Appeal in ***Northland Properties*** quoted the above passage, it said the following (at p. 203):

> I agree with that, but I wish to add that in any complicated plan under this Act, there will often be some secured creditors who appear to be oversecured, some who do not know if they are fully secured or not, and some who appear not to be fully secured. This is a variable cause arising not by any difference

> in legal interests, but rather as a consequence of bad lending, or market values, or both.

As the B.C. Court of Appeal has specifically adopted the reasoning in ***Oakwood Petroleums***, the approach which I have called the "non-fragmentation" approach is the one to be followed in British Columbia. As will be seen shortly, the "non-fragmentation" approach has also been preferred over the "identity of interest" approach by the Ontario courts.

There have been two recent cases that are particularly relevant because they deal with employees, landlords and equipment lessors in circumstances that are similar to the situation at hand. The first of these cases is ***Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*** (1991), 8 C.B.R. (3d) 312 (O.C.J.) where one of the proposed classes consisted of all creditors other than two secured creditors, including holders of unsecured debentures, terminated employees, landlords whose leases had been repudiated and equipment lessors whose leases were to be repudiated (although the report does not specifically say it, I assume that the proposed class also included the general trade creditors). The Court rejected the argument of one of the landlords that there should be a separate class of creditors consisting of the landlords and the equipment lessors. Borins J. utilized the "non-fragmentation" approach as illustrated by the following passage on pp. 317-8:

> In my view, an important principle to consider in approaching ss. 4 and 5 of the C.C.A.A. is that followed in *Re Wellington Building Corp.*,

> 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (S.C.), in which it was emphasized that the object of ss. 4 and 5 is not confiscation but is to enable compromises to be made for the common benefit of the creditors as creditors, of for the common benefit of some class of creditors as such. To this I would add that recognition must be given to the legislative intent to facilitate corporate re-organization and that in the modern world of large and complicated business enterprises the excessive fragmentation of classes could be counter-productive to the fulfilment of this intent. In this regard, to approach the classification of creditors on the basis of identity of interest, as suggested by counsel for H & R Properties, would in some instances result in the multiplicity of classes, which would make any re-organization difficult, if not impossible, to achieve. In my view, in placing a broad and purposive interpretation upon the provisions of the C.C.A.A. the court should take care to resist approaches which would potentially fragment creditors and thereby jeopardize potentially viable plans of arrangement, such as the plan advanced in this application.

The other recent decision is ***Re Grafton-Fraser Inc. and Canadian Imperial Bank of Commerce*** (1992), 90 D.L.R. (4th) 285 (Ont. Gen. Div.). In that case Houlden J.A. approved the classification of creditors into secured creditors, landlords and unsecured creditors. It appears from the report that the plan contemplated that some leases would be repudiated and there would be rent reductions in respect of certain of the continuing premises. I am told that the final plan of Grafton-Fraser Inc. did not include the landlords with continuing leases at reduced rental rates in the same class as the landlords whose leases were repudiated, but the decision of Houlden J.A. appears to be

predicated on the fact that the two types of landlords would be in the same class. It had been argued that the landlords should be in the same class as the unsecured creditors. Houlden J.A. felt that it was appropriate to have the landlords in a separate class for two reasons; namely, there would be great difficulty in ascertaining the amounts of the claims of the landlords and the plan enjoined the landlords from exercising their contractual and statutory remedies.

Before I apply the general principles outlined above to the circumstances of this case, I wish to add some comments regarding the classification of creditors. The case authorities focus on the differences in the legal rights of the creditors in determining whether their interests are sufficiently similar or dissimilar to warrant creditors being placed in the same class or separate classes. I agree that it is the legal rights of the creditors that must be considered and that other external matters that could influence the interests of a creditor are not to be taken in account. However, it is my view that the legal rights should not be considered in isolation and that they must be considered within the context of the provisions of the reorganization plan. It would be appropriate to segregate two sets of creditors with similar legal interests into separate classes if the plan treats them differently. Conversely, it may be appropriate to include two sets of creditors with different legal rights in the same class if the plan treats them in a fashion that gives them a commonality of interest despite their different legal

rights. In addition, when the Court is assessing whether there is a sufficient commonality of interest to include two sets of creditors in the same class, it is necessary in my view to examine their legal rights within the context of the potential failure of the reorganization plan. The treatment of the two sets of creditors under the plan should be compared to the rights they would have in the event of the failure of the plan (i.e., bankruptcy or other liquidation).

TERMINATED EMPLOYEES

The first set of creditors that submitted that it should be in a separate class is the group of former employees of Woodward's who were terminated after December 11, 1992, the date of commencement of these ***CCAA*** proceedings. These former employees all have claims against Woodward's for damages as a result of Woodward's failure to give them reasonable notice of termination. The Reorganization Plan includes the terminated employees in the class of General Creditors which also includes the trade suppliers and other unsecured claims of the Operating Company. The Reorganization Plan proposes that the General Creditors receive 37% of the principal amounts of their proven claims.

The two counsel acting for former employees on this application submitted that their clients should comprise a separate class of creditors for several reasons. They say that the terminated employees are largely middle-aged, long service

employees with limited education who have little prospect of finding alternate employment. They point to the fact that the courts recognize the difference between a contract of employment and an ordinary commercial contract. They further make reference to the fact that the trade suppliers will be selling merchandise to the reorganized company and that they will have a potentially continuing relationship which may influence the manner in which they vote on the plan. Finally, they say that the trade suppliers have the ability to "write off" their losses and that they will receive different income tax treatment in respect of their losses than the terminated employees.

In arguing that the terminated employees should form their own class, counsel relied on the article ***Reorganizations under the Companies' Creditors Arrangement Act*** (1947) 25 Can. Bar Rev. 587 by Stanley E. Edwards. This article has been relied upon extensively by the courts in interpreting the ***CCAA***. However, the article has not been followed with respect to the classification of creditors. Mr. Edwards proposes the "identity of interest" approach which was not been adopted by the Alberta, British Columbia and Ontario courts. The preferred approach is the "non-fragmentation" approach.

The legal rights of the terminated employees are the same as the legal rights of the trade suppliers. They are both creditors with unsecured claims against the Operating Company (the secured and preferred amounts payable to employees under provincial

legislation and the ***Bankruptcy and Insolvency Act*** have already been paid to the terminated employees). In a bankruptcy or other liquidation they would both receive the same pro rata amount of their claims. They are to receive the same pro rata amount of their claims under the Reorganization Plan.

The fact that there is a recognized difference between contracts of employment and ordinary commercial contracts is not relevant because the contracts of employment of the terminated employees have come to an end. The terminated employees have claims for damages against Woodward's for wrongful dismissal. Once the amount of damages for an employee has been agreed upon or determined by the Court, the difference between the two types of contracts becomes historical and the employee has the same rights as any other unsecured creditor. The differences between the two types of contracts may result in the employees receiving higher amounts of damages but the differences do not warrant the terminated employees being entitled to a higher distribution than the other unsecured creditors.

I am satisfied that there is a sufficient commonality of interest between the terminated employees and the other members of the General Creditors class that they should be included in the same class.

EQUIPMENT FINANCIERS AND ROYAL TRUST CORPORATION OF CANADA

It is convenient to deal with the submissions of the equipment lessors and Royal Trust at the same time because if Royal Trust is not put in a class of its own, its alternate position was that it should be included in a class with the equipment lessors.

The term "Equipment Financiers" is defined in the Reorganization Plan. In brief, the term means any person who has provided financing for the acquisition or installation of office equipment or trade fixtures and who has retained a security interest by way of a lease or a security instrument. Woodward's has notified or will be notifying certain equipment financiers that it no longer requires their equipment. These equipment financiers will then have a claim against Woodward's for damages resulting from the repudiation of their contractual arrangements. It is these equipment financiers who wish to be in a separate class. The Reorganization Plan proposes that the terminated equipment financiers be treated as General Creditors and that they receive 37% of the amounts of their claims. The amount of each claim would presumably be the discounted value of future payments owing by Woodward's to the equipment financier less the present value of the equipment.

Most of the equipment financiers are parties that bought the equipment and are leasing it to Woodward's on a normal type of term lease. The equipment financiers who are lessors include National Bank Leasing, North American Trust Company and Royal Bank

Leasing. Royal Trust also falls within the definition of "Equipment Financier" but it is not a lessor. It financed the acquisition by Woodward's of certain equipment by way of a traditional financing arrangement. It loaned money to Woodward's on a term basis and it took security in the form of a debenture creating a fixed charge against the equipment that it financed.

In other contexts under the ***CCAA*** the treatment of equipment leases in relation to the treatment of security documents causes me considerable doubts. Should equipment leases be treated the same as security instruments in all or some cases? Does it make a difference whether the lease is classified as an operating lease or a capital lease? Should the extent of depreciation of the subject asset be taken into account? Fortunately these questions can be left for another time because they do not need to be resolved in order to deal with the classification issue.

Lessors and debentureholders do have different legal rights but the question to be answered is whether the different rights result in a lack of commonality of interest. In a bankruptcy a lessor is entitled to retake possession of the leased goods upon default and, if the lease is worded properly, the lessor is entitled to prove as an unsecured creditor for its damages. In the case of a debentureholder in a bankruptcy situation, the debentureholder has the right to cause the charged assets to be sold and it is entitled to prove as an unsecured creditor for the deficiency on its loan. In most cases the damages of the lessor

and the deficiency on the debentureholder's loan will be equivalent; namely, the difference between the present value of the monies that are owed and the value of the leased goods or the charged assets. Hence, the rights of an equipment lessor and the rights of a debentureholder with a fixed charge on financed equipment in a bankruptcy situation are roughly the same. The equipment lessors and Royal Trust are being treated the same under the Reorganization Plan. Therefore, there is a sufficient commonality of interest for Royal Trust to be included in the same class as the equipment lessors.

Some submissions were made with respect to the priority between Royal Trust and The R-M Trust Company which is the sole Secured Creditor under the Reorganization Plan. I do not accept the contention that Royal Trust has priority over The R-M Trust Company on any of Woodward's assets other than the ones that are covered by the fixed charge in favour of Royal Trust.

The question then becomes whether the equipment financiers (including Royal Trust) belong in a separate class or in the class of General Creditors. This is an example of why the legal rights of the parties must be examined within the context of the Reorganization Plan. In isolation the rights of the equipment financiers and the rights of unsecured creditors are very different. But the treatment of the two groups in the Reorganization Plan could affect their interests.

If the Reorganization Plan provided that Woodward's was to retain the financed equipment and the equipment financiers were to be paid the same proportion of their indebtedness as the unsecured creditors, the equipment financiers would be entitled to be included in a different class from the unsecured creditors. They would be losing their proprietary or security rights in the equipment and they would be receiving the same pro rata distribution as unsecured creditors who do not have same rights. However, that is not what the Reorganization Plan is proposing.

The Reorganization Plan does not affect any of the proprietary or security rights of the equipment financiers. Woodward's is allowing the equipment financiers to fully exercise those rights outside of the Reorganization Plan. All the Reorganization Plan is purporting to affect are the claims of the equipment financiers for damages or the deficiencies on loans. These claims are unsecured claims and there is no reason why they should be treated any differently than the claims of unsecured creditors. There is a sufficient commonality of interest between the unsecured creditors and the equipment financiers with respect to their unsecured claims for damages or the deficiencies on loans. It is appropriate to include the equipment financiers in the class of General Creditors with respect to these claims.

This classification of the equipment financiers is consistent with the decision in ***Sklar-Peppler***, *supra*, where the

Ontario Court of Justice approved the grouping of equipment lessors in the same class as the unsecured creditors.

HOLDERS OF GUARANTEES OR JOINT COVENANTS

The class of General Creditors is comprised of creditors of the Operating Company. However, at least two of these creditors hold a guarantee or joint covenant of the Holding Company. National Bank Leasing holds a guarantee from the Holding Company and the debenture held by Royal Trust is a joint debenture from the Operating Company and the Holding Company. For ease of reference I will refer to a creditor holding a guarantee or joint covenant of the Holding Company as the holder of a guarantee and such reference shall also include the holder of a joint covenant.

The Holding Company does not own any tangible assets. Other than the shares in the Operating Company, the only asset owned by the Holding Company is an inter-company account owed to it by the Operating Company. This inter-company account means that upon the bankruptcy or other liquidation of the Operating Company, the Holding Company would be an unsecured creditor entitled to share on a pro rata basis in distributions to the unsecured creditors of the Operating Company. If the Holding Company was also to be liquidated, the money received on account of the inter-company receivable would be distributed to the creditors of the Holding Company, including creditors of the Operating Company with guarantees from the Holding Company and other unsecured creditors if sufficient monies were available to fully satisfy the secured

and preferred creditors of the Holding Company. The result is that unsecured creditors of the Operating Company with guarantees from the Holding Company may receive more money than the other unsecured creditors of the Operating Company in the event of bankruptcies or other liquidations of the two companies.

On April 16, 1993 the Monitor appointed in these proceedings issued a report confirming that upon a liquidation of the two companies, the unsecured creditors of the Holding Company would receive a distribution. The Monitor estimates a liquidatation distribution for the unsecured creditors of the Holding Company to be in the range from 2% to 12%.

The distinction between the interests of the unsecured creditors of the Operating Company and the interests of the unsecured creditors of the Holding Company is recognized in the classification of the creditors in the Reorganization Plan. The unsecured creditors of the Holding Company are included in the class of Noteholders which is a different class from the General Creditors, the class that includes the unsecured creditors of the Operating Company. It is proposed in the Reorganization Plan that the Noteholders receive 32% of their indebtedness.

The Reorganization Plan ignores the fact that the holders of guarantees are unsecured creditors of both companies. It proposes that they receive the same 37% proportion of their indebtedness as the other General Creditors and their status as creditors of the Holding Company is not reflected.

In view of the fact that the holders of guarantees do have different legal rights from the other members of the class of General Creditors, it is necessary to decide whether the rights are so dissimilar that they cannot vote on the Reorganization Plan with a common interest. It was submitted by counsel for Woodward's that there is a common interest because the holders of guarantees will still receive more under the Reorganization Plan than they will be paid upon a liquidation of the two companies. I do not think that this is sufficient to create a commonality of interest with the other members in the class of General Creditors who have lesser legal rights. To the contrary, I believe that this is an example of what Bowen L.J. had in mind in the ***Sovereign Life*** case, *supra*, when he used the term "confiscation". By being a minority in the class of General Creditors, the holders of guarantees can have their guarantees confiscated by a vote of the requisite majority of the class who do not have the same rights. The holders of guarantees could be forced to accept the same proportionate amount as the other members of the class and to receive no value in respect of legal rights that they uniquely enjoy and that would have value in a liquidation of the two companies.

The passage from ***Sklar-Peppler*** quoted above made reference to the decision in ***Re Wellington Building Corp.***, *supra*. In that case the Court was asked to approve a scheme of arrangement under the ***CCAA*** that had one class of secured creditors which included bondholders, lienholders, third mortgagee and fourth

mortgagees. The Court refused to approve the scheme on the basis that there should have been more than one class of secured creditors. Kingstone J. said the following at p. 54 of 16 C.B.R.:

> ... it was necessary under the Act that they should vote in classes and that three-fourths of the value of each class should be obtained in support of the scheme before the Court could or should approve of it. Particularly is this the case where the holders of the senior securities' (in this case the bondholders') rights are seriously affected by the proposal as they are deprived of the arrears of interest on their bonds if the proposal is carried through. It was never the intention under the Act, I am convinced, to deprive creditors in the position of the 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.

In ***Re 229531 B.C. Ltd.*** (1989), 72 C.B.R. 310 (B.C.S.C.) the Court refused to approve a plan of arrangement under the ***CCAA*** for numerous reasons. One of the reasons was that a guarantee held by one creditor was to be released as a result of the reorganization plan and the creditor was to receive the same proportionate distribution as all of the other unsecured creditors. In other words, the guarantee was being confiscated by the vote of other creditors who did not enjoy the same rights as the creditor which held the guarantee.

If it was clear that no monies would be available to unsecured creditors upon a liquidation of the Holding Company, the

legal rights of the holders of the guarantees would have no practical value and there would then be no objection to their inclusion in the class of General Creditors. There is also a point where the prospects of the unsecured creditors of the Holding Company receiving any monies upon its liquidation would be so uncertain that the commonality of interest between the holders of the guarantees and the other members of the class of General Creditors would not be affected. However, I am not satisfied in this case that such prospects are so uncertain that the holders of guarantees should be forced to be in the same class as the other unsecured creditors of the Operating Company. In making this statement, I note that the unsecured creditors of the Holding Company are to receive 32% of their indebtedness under the Reorganization Plan.

I should stress that it is important in my view that there is only one difference between the rights of the holders of the guarantees and the rights of the other members of the class of General Creditors. It is clear that the one additional right enjoyed by the holders of the guarantees is not being given any value under the Reorganization Plan. The result could be different if the other members of the class of General Creditors had additional rights that were not enjoyed by the holders of the guarantees. There could be a trade-off between the rights that were not commonly shared and the groups could have a sufficient commonality of interest to be included in the same class. Here, there is no potential trade-off between the two groups and the one

additional right of the holders of the guarantees is being confiscated without compensation.

Counsel for Woodward's suggested that the issue of the guarantees be left to the fairness hearing (i.e., the hearing to consider the sanctioning of the Reorganization Plan). As I believe that the holders of guarantees have a sufficiently different legal right to warrant a separate classification, it follows that I would consider the Reorganization Plan to be unfair to them if they are included in the class of General Creditors. I should not order meetings for the creditors to vote on the Reorganization Plan when I know that those meetings would be fruitless because I would refuse to approve the outcome of the meetings.

LANDLORDS

Counsel for Triple Five Corporation Limited submitted that there should be two classes of landlords, one class consisting of landlords with anchor tenants whose leases are being repudiated and the other class consisting of the remaining landlords. Counsel for Bucci Investment Corporation and Prospero International Realty Inc. submitted that there should be three classes of landlords, one class consisting of landlords with anchor tenants whose leases are being repudiated, a second class consisting of landlords without anchor tenants whose leases are being repudiated and the third class consisting of the remaining landlords.

Counsel for Triple Five Corporation Limited put forward three reasons in support of his position. A fourth reason was also

put forward initially but it was withdrawn and reserved for the fairness hearing. The three reasons are as follows:

(a) a repudiation of a lease by an anchor tenant will cause the landlord to be in breach of other contractual obligations and the consequences of such a repudiation go beyond the liquidated damages that result from the repudiation of a lease by a tenant other than an anchor tenant;

(b) there is no precedent for the selective repudiation of leases under the ***CCAA*** and Woodward's has chosen not utilize the proposal provisions of the ***Bankruptcy and Insolvency Act*** that now has a procedure for the repudiation of leases;

(c) Zellers Inc. (and its parent, The Hudson's Bay Company) is a stranger to the relationship between Woodward's and its creditors and its involvement in Woodward's reorganization (by way of a merger with the reorganized company) requires a higher degree of fairness.

In my view, none of these reasons is a valid justification for the creation of a separate class of landlords:

(a) the additional consequences of a repudiation by an anchor tenant flow from external considerations and the different consequences to different landlords does not result from different legal rights existing between the landlords and Woodward's. As was held in ***Northland***

Properties, *supra*, separate creditor classification must be based on a difference in legal interests or rights;

(b) ***Sklar-Peppler***, *supra*, and ***Grafton-Fraser***, *supra*, are both examples of reorganizations involving repudiations of leases. The fact that the ***Bankruptcy and Insolvency Act*** now specifically provides for the repudiation of leases does not mean that a reorganization involving lease repudiation cannot be attempted under the ***CCAA*** and it certainly does not mean that there should be separate classes of landlords;

(c) the aspect of fairness is a matter to be considered on the application for the Court to sanction the Reorganization Plan. The application is commonly called the fairness hearing. There is nothing in the involvement of Zellers Inc. that requires the creation of separate classes for landlords.

Counsel for Bucci and Prospero did not put forward any independent grounds for the creation of separate landlord classes. His point was that if there was justification for the creation of a separate class for landlords with anchor tenants whose leases were being repudiated, there was equal justification for the creation of a separate class for the other landlords whose leases were being repudiated.

There was one point that bothered me about the grouping of all the landlords into a single class. In addition to including

landlords whose leases were being repudiated, the class includes landlords who are having their leases partially repudiated by the unilateral reduction in the amount of leased space and landlords who are having the rent under their leases unilaterally reduced. Both of these two groups of landlords would be having a continuing relationship with Woodward's. Unlike the trade suppliers, the continuing relationship between these landlords and Woodward's is based on legal rights. I was concerned that the continuing legal relationship between these landlords and Woodward's may give them a different interest from interests of the landlords whose leases are being wholly repudiated. For example, the continuing landlords may be more willing to vote in favour of the Reorganization Plan because they will be able to recoup some of their losses from the profits generated out of the continuing relationship with Woodward's. The answer to my concern is that the rent under all of the continuing leases is to be adjusted to market rent. The landlords whose leases are being repudiated will also be leasing their premises to new tenants at market rent. Accordingly, the landlords with continuing leases will not have any advantage over the other landlords and there will be sufficient commonality of interest to include all of the landlords in one class.

During submissions I queried whether the landlords should be included in the class of General Creditors. At first blush a landlord whose lease is being repudiated is in the same position as the other unsecured creditors of the Operating Company. The reason why it is appropriate for the Landlords to be in a different class

is that they receive different treatment under the Reorganization Plan. The General Creditors are to be paid 37% of their claims while the Landlords are to paid an amount equal to six months' rent. One reason for the different treatment is the fact that it is very difficult to properly quantify the claims of the Landlords and the efforts of the Landlords to mitigate their damages will not be known prior to the implementation of the Reorganization Plan. This rationale was accepted in ***Grafton-Fraser***, *supra*, where the Court approved a separate classification for the landlords. Another justification for the different treatment is the fact that the ***Bankruptcy and Insolvency Act*** provides that landlords whose leases are repudiated are entitled to compensation equal to six months' rent.

In the ***Grafton-Fraser*** case, *supra*, the Court approved a landlord class which, at least at the time of the decision, appeared to include both landlords with repudiated leases and landlords with continuing leases at reduced rental rates.

It is my view that there is sufficient commonality of interest among the landlords for all of them to be included in a single class. I am reinforced in my decision by the positions of the other landlords represented by counsel at the hearing. Mr. Kuhn, Mr. Knowles and Mr. Mitchell, who each represent landlords in each of the three proposed landlord classes, all supported the single class for the landlords and that position in itself demonstrates that the landlords do have a commonality of interest.

CONCLUSION

I approve the classes of creditors designated in the Reorganization Plan with the exception that the class of General Creditors should not include creditors of the Operating Company who hold guarantees or joint covenants from the Holding Company. I dismiss the application of the terminated employees for separate classification and I reject the other submissions for separate classifications.

April 20, 1993
Vancouver, B.C.

" D. Tysoe, J. "

Tab 15

See paras. 9, 11

Court of Queen's Bench of Alberta

Citation: Re: San Francisco Gifts Ltd. (*Companies' Creditors Arrangement Act*), 2004 ABQB 705

Date: 20040929
Docket: 0403 00170
Registry: Edmonton

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SAN FRANCISCO GIFTS LTD. ("SAN FRANCISCO"), SAN FRANCISCO RETAIL GIFTS INCORPORATED (PREVIOUSLY CALLED SAN FRANCISCO GIFTS INCORPORATED), SAN FRANCISCO GIFT STORES LIMITED, SAN FRANCISCO GIFTS (ATLANTIC) LIMITED, SAN FRANCISCO STORES LTD., SAN FRANCISCO GIFTS & NOVELTIES INC., SAN FRANCISCO GIFTS & NOVELTY MERCHANDISING CORPORATION (PREVIOUSLY CALLED SAN FRANCISCO GIFTS AND NOVELTY CORPORATION), SAN FRANCISCO (THE ROCK) LTD. (PREVIOUSLY CALLED SAN FRANCISCO NEWFOUNDLAND LTD.) and SAN FRANCISCO RETAIL GIFTS & NOVELTIES LIMITED (PREVIOUSLY CALLED SAN FRANCISCO GIFTS & NOVELTIES LIMITED) (COLLECTIVELY "THE COMPANIES")

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

INTRODUCTION

[1] The San Francisco group of companies (San Francisco) obtained *Companies' Creditors Arrangement Act*[1] (*CCAA*) protection on January 7, 2004 under a consolidated Initial Order. The Initial Order has been extended and the companies continue in business. They now propose a compromise of their debt that is spelled out in a plan of arrangement ("Plan") that has been

[1] R.S.A. 1985, c. C-36, as am.

circulated to their creditors. Like all *CCAA* plans of arrangement, this Plan proposes classes of creditors for voting purposes. Two-thirds in value and a majority in number of the creditors in each class must cast a positive vote for the Plan in order for it to pass muster. If approved, the Plan will then be presented to the Court for sanctioning at what is commonly referred to as a "fairness hearing".[2] These steps have been delayed by the present application.

[2] The six applicants are landlords (the "objecting landlords") of retail premises in Ontario, New Brunswick, Nova Scotia and Newfoundland that were leased to San Francisco. The leases were either abandoned by San Francisco before the *CCAA* proceedings began or were later terminated with court approval. The objecting landlords seek to reclassify the creditors of San Francisco for purposes of voting on the Plan. They rely on three grounds for their application. First, they argue that they should be placed in a separate class because they have distinct legal rights, their claims are difficult to value and they are preferred over other creditors in the class. Second, they believe that their reclassification is warranted as a result of inequitable treatment of certain creditors under the Plan. Third, they seek to ban closely related creditors, or "related persons", as that phrase is defined in s. 4 of the *Bankruptcy and Insolvency Act*[3] (*BIA*), from voting on the Plan at all. They submit that, at the very least, related persons should be placed in a separate class to prevent them from controlling the creditor vote.

BACKGROUND

[3] San Francisco operates a national chain of novelty goods stores. It currently has 450 employees working from 84 locations. The head office is in Edmonton, Alberta.

[4] The group of companies is comprised of the operating company San Francisco Gifts Ltd., and a number of nominee companies. The operating company, which is 100 percent owned by Laurier Investments Corp. ("Laurier"), holds all of the group's assets. In turn, Laurier is 100 percent owned by Barry Slawsky ("Slawsky"), the driving force behind the companies. He is the president and sole director of virtually all of the companies, and is one of the companies' two secured creditors, the other being Laurier. The nominee companies are hollow shells incorporated for the sole purpose of leasing premises.

[5] The Monitor reports that the reviews by its counsel of Slawsky and Laurier's security documents "do not indicate any deficiencies in the security position" and that the combined book value of their loans to the companies is $9,767,000.00. San Francisco's debt at the date of the

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[2] The considerations at this hearing are typically whether there has been strict compliance with statutory requirements, whether any unauthorized acts have occurred, and whether the plan is fair and reasonable: see ***Re Sammi Atlas Inc.*** (1998), 3 C.B.R. (4th) 171 (Ont. Ct. (Gen.Div.)).

[3] R.S.C. 1985, c. B-3, as am.

Initial Order was $5,300,000.00, not including any unsecured deficiency claims by the secured creditors. There are 1183 creditors in total.

[6] Like many consolidated *CCAA* plans of arrangement, this Plan contemplates the compromise of all of the participant companies' debts from one pool of assets. The Plan places all non-governmental unsecured creditors into one class and proposes a compromise payment of roughly $.10 on the dollar by dividing $500,000 between all unsecured creditors in this class on a *pro rata* basis, after payment of the first $200.00 of each proven claim. The Plan also provides that Slawsky and Laurier's claims will survive the reorganization. They are defined in the Plan as "unaffected creditors" who will not share in the payment to creditors. They may, however, value their security and vote as unsecured creditors for their deficiency claims.

[7] There is little common ground between the parties on this application, except for their ready recognition that a separate landlords' class will secure its members the power to veto the creditor vote.

ANALYSIS

Classification of Creditors Generally

[8] The *CCAA* does not direct how creditors should be classified for voting purposes. It does nothing more than define what a secured versus an unsecured creditor is[4] and specify that a plan of arrangement must be approved by the various classes of creditors affected by it.[5] However, a "commonality of interest" test and well-defined guidelines for classification have been set out in the case law.

[9] In ***Sovereign Life Assurance Co. v. Dodd***,[6] Lord Esher M.R. articulated the rationale for the commonality of interest test:

> …It seems plain that we must give such a meaning to the term "class" that will prevent the section being so worked as to prevent a confiscation and injustice, and that it must be confined 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.

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[4] *CCAA*, s. 2.

[5] *CCAA*, s. 6.

[6] ***Sovereign Life Assurance Co. v. Dodd***, [1892] 2 Q.B. 573 at 583 (C.A.).

[10] The objecting landlords focus their argument on the two themes in this passage: the need for meaningful consultation between class members, something the objecting landlords say will not occur because their rights are different from other creditors in the proposed class; and avoidance of injustice by "confiscation of rights", something the objecting landlords say is preordained if there is no reclassification.

[11] The commonality of interest test has evolved over time and now involves application of the following guidelines that were neatly summarized by Paperny J. (as she then was) in ***Resurgence Asset Management LLS v. Canadian Airlines Corp.*** ("***Canadian Airlines***")[7]:

1. Commonality of interest should be viewed based on the non-fragmentation test,[8] not on an identity of interest test .

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

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

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[7] ***Resurgence Asset Management LLS v. Canadian Airlines Corp.*** (1990), 19 C.B.R. (4th) 12 (Alta. Q.B.), leave to appeal denied (1990) 19 C.B.R. (4th) 33 (Alta. C.A.), cited in the Court of Appeal's subsequent decision in ***Canadian Airlines*** (2000), 261 A.R. 120, 2000 ABCA 149 at para. 27: see also ***Sklar-Peppler Furniture Corp v. Bank of Nova Scotia*** (1991), 86 D.L.R. (4th) 621, 8 C.B.R. (3d) 312 (Ont. Ct. Gen. Div.)).

[8] "Non-fragmentation" means that a multiplicity of classes should be avoided if possible. The notion was first expressed in the Canadian context in ***Norcen Energy Resources v. Oakwood Petroleums Ltd.*** (1988), 72 C.B.R. 20 (Alta. Q.B.), but does not appear to have gained wide acceptance until 1993 when ***Re Woodward's Ltd.*** (1993), 20 C.B.R. (3d) 74 at 81 (B.C.S.C.) was decided. There were five creditor groups in ***Re Woodward's***, including one group of landlords of abandoned premises and another of creditors holding cross-corporate guarantees or joint covenants, which sought separate classes. The court ruled that, given there was sufficient commonality of interest among the general body of creditors and the applicant landlords, a separate class was unwarranted. Tysoe J. rejected the landlords' proposition that their legal interests differed from that of the other creditors in that repudiation of an anchor tenant's lease would cause the landlord to be in breach of other tenant obligations. He did, however, order a separate class for the holders of cross-corporate guarantees, observing that their unique rights were "confiscated without compensation" under the plan. Interestingly, Tysoe J. rejected the suggestion that the issue be dealt with at the fairness hearing because he was convinced that the scheme was so unfair that he would refuse to sanction a successful outcome, rendering the creditors' vote pointless.

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

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

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

[12] To this pithy list, I would add the following considerations:

(i) Since the *CCAA* is to be given a liberal and flexible interpretation, classification hearings should be dealt with on a fact specific basis and the court should avoid rigid rules of general application.[9]

(ii) In determining commonality of interests, the court should also consider factors like the plan's treatment of creditors, the business situation of the creditors, and the practical effect on them of a failure of the plan.[10]

Landlord Classifications Generally

[13] The objecting landlords rely on the affidavit of Walter R. Stevenson, a Toronto lawyer who acts for them. I find it odd that counsel for a party would swear an affidavit in support of his client's motion. It is a risky proposition that is strongly discouraged in this Court. In any event, Mr. Stevenson deposes that he has thirteen years of experience representing clients in insolvency matters. He says that he has been involved in nine cases where national tenants abandoned leased premises and their landlords were placed in a separate class. Presumably, all of this information was intended to persuade me that a separate landlord class is now or should be the norm. It does not.

[14] Mr. Stevenson's list is not, nor does it purport to be, an exhaustive review of classifications in multi-location *CCAA* restructurings across Canada. Further, he provides no insight as to whether it was the debtor company or the court which decided that a separate class was appropriate in each of the cases to which he referred. Nor does not provide any information as to why a particular classification decision was made in the first place. There may be valid reasons for a debtor to segregate landlords. For example, in ***Grafton-Fraser Inc. v. Canadian***

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[9] ***Re Fairview Industries Ltd.*** (1991), 109 N.S.R. (2d) 32, 11 C.B.R. (3d) 71 (S.C.T.D.).

[10] ***Re Woodward's*** at p. 81.

Imperial Bank of Commerce,[11] the court refused to disturb a separate class proposed by the debtor company for 130 landlords. A landlord in that case was funding the Plan.

[15] ***Grafton-Fraser*** is cited as authority for the general proposition that landlords should be entitled to a separate class. In his brief reasons, Houlden J. indicated that he was allowing the separate class to remain on the basis that, as compared to other creditors, landlords would have difficulty valuing their claims and would be enjoined from exercising the contractual and statutory claims that they would ordinarily enjoy on a tenant's insolvency. ***Grafton-Fraser***, like all *CCAA* cases, was doubtless decided on its facts. It was considered, but not applied, in ***Re Woodward's***, a case that brought widespread attention to the non-fragmentation and contextual approach in classification.[12]

[16] Landlords are not entitled to a separate class simply because of who they are. There must be sufficient evidence that their claims are materially different from the claims of other creditors in the class to warrant that. To find otherwise would require that I ignore the contextual and non-fragmentation approach (which I observe does not appear to have firmly take hold until after ***Grafton-Fraser*** was decided), and give excessive power to one creditor group in relation to a plan of arrangement designed for the benefit of all of the creditors. This concern was expressed by Borins J. in ***Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia***[13] in dismissing a landlord's plea for a separate class so that it's intended negative vote would not be fruitless. A similar caution was voiced by Blair J. in ***Re Ambro Enterprises Inc.***[14]. He too found that a separate class for landlords was unwarranted in that case.

Distinct Legal Rights and Valuation Issues

[17] Depending on their particular circumstances, the objecting landlords assert that they have one or more of three distinct legal rights that will be eroded or confiscated if they are unsuccessful in their application: (1) the right to follow and seize assets removed from abandoned premises; (2) the right to claim damages against any person who aided the tenant in clandestinely removing goods from their reach; and (3) the right to terminate a lease for default under what is commonly called an "insolvency clause" in their leases. At the risk of stating the obvious, objecting landlords who had leases terminated with court approval after the Initial Order cannot advance these arguments.

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[11] ***Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce*** (1992), 90 D.L.R. (4th) 285, 11 C.B.R. (3d) 161 (Ont. Ct. (Gen. Div.)).

[12] Peter B. Birkness, "Re Woodward's Limited - The Contextual Commonality of Interest Approach to Classification of Creditors" (1993), 20 C.B.R. (3d) 91 at 92.

[13] ***Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*** (1991), 86 D.L.R. (4th) 621, 8 C.B.R. (3d) 312 (Ont. Ct. (Gen. Div.)).

[14] ***Re Ambro Enterprises Inc.*** (1993), 22 C.B.R. (3d) 80 (Ont. Ct. (Gen. Div.)).

1. Rights Arising from Clandestine Removal of Goods

[18] Before applying for *CCAA* protection, San Francisco removed assets and abandoned 14 of the 16 premises leased from the objecting landlords.

[19] Ontario and New Brunswick's legislation allows a landlord the right to follow and seize goods that were fraudulently and clandestinely removed to prevent the landlord from distraining for rental arrears. There is a thirty day time limit on this right to seize. The landlord is also granted a right of action against any person who knowingly aided in the removal or concealment of the goods.[15] These remedies are akin to those provided in the 1737 ***Distress for Rent Act*** of England,[16] commonly called ***The Statute of George***, 11 Geo. II, c. 19. Nova Scotia's legislation differs from that in Ontario and New Brunswick in that it does not provide for the third party right of action and the time period for following the goods and seizing is twenty-one rather than thirty days.[17] Newfoundland lacks any specific legislation granting these remedies, and it is questionable if ***The Statute of George***, although incorporated into the laws of Newfoundland before December 31, 1831, remains in effect there.[18]

[20] To succeed in an action under these statutory schemes (and perhaps under the common law in Newfoundland), there must be sufficient evidence to establish that: (1) rent payments are in arrears; (2) goods owned by the tenant were removed from the premises; (3) this conduct was clandestine or fraudulent; and (4) the goods were removed for the purpose of preventing the landlord from seizing them for arrears of rent.

[21] The issue arises whether the objecting landlords must prove their claims for classification purposes or simply show that they have an arguable case. Clearly, the court is not interested in ruling on hypothetical matters, but it would be unreasonable at this stage to require an applicant

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[15] *Commercial Tenancies Act*, R.S.O.1990, c. L-7, ss. 48-50 and *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, ss. 27, 29.

[16] *Distress for Rent Act 1737*, 11 Geo. 2, c. 19, s. 1, which provides: "In case of any tenant or tenants, lessee or lessees ... upon the demise or withholding whereof, any rent is or shall be reserved due or payable, shall fraudulently or clandestinely, convey away, or carry off or from such premises, his or her or their goods or chattels, to prevent the landlord or lessor ... from distraining the same for arrears of rent, it shall or may be lawful for every landlord or lessee ... to take or seize such goods and chattels wherever the same shall be found as distress for the said arrears of rent. "

[17] *An Act Respecting Tenancies and Distress for Rent*, R.S.N.S. 1989, c. 464, ss. 13 and 14.

[18] ***Buyer's Furniture Ltd. v. Barney's Sales & Transport Ltd.*** (1982),137 D.L.R. (3d) 320 (Nfld. S.C.T.D.), affirmed (1983) 3 D.L.R. (4th) 704 (Nfld. C.A.).

in a reclassification hearing to actually prove their claim. Proof will be required at a later date to establish entitlement to membership in a new class, if one is ordered. What must be presented at this point is sufficient evidence to show that there is an arguable case that would justify a separate class.

[22] The objecting landlords rely on two leases, which they say are typical of the leases entered into between them and San Francisco (or its nominee corporations), to demonstrate that there were arrears owing at the date of abandonment. The alleged arrears are comprised of accelerated rent which, under the terms of the leases, became due on termination and are contractually deemed arrears. Without deciding on the correctness of the objecting landlords' assertion, I find that there is sufficient evidence to establish at least an arguable case that there are arrears of rent.

[23] Insofar as evidence of clandestine removal is concerned, two landlords depose that, without their knowledge and without notice to them, San Francisco vacated and removed all of its assets from their premises. Although it would have been preferable to have more detail of the circumstances of the alleged removal of assets, this evidence again is sufficient to establish an arguable case. The merits of the objecting landlords' position will be fully aired and determined in quantifying their claims.

[24] I have concluded that the objecting landlords have an arguable case. Their rights to pursue distraint and sue a person for aiding in clandestine removal of goods are unique ones. However, the uniqueness of a right is, in and of itself, insufficient to warrant a separate class. The right must be adjudged worthy of a separate class after considering the various factors outlined above. In essence, it must preclude consultation between the creditors.

[25] The Initial Order specifically preserved all creditors' rights to take or continue an action against San Francisco if their claims were subject to statutory time limitations.[19] The objecting landlords elected not to pursue their statutorily time limited remedy of following and seizing goods within the time permitted. As a result, it is unreasonable to allow them to now assert that entitlement as the justification for a separate class. Moreover, in the context of a bankruptcy, the remedy is generally academic since there are no goods available for distraint. For these reasons, the inability to follow and seize goods cannot support the ordering of a separate class.

[26] The Plan requires that all creditors give up claims against the company, its officers, employees, agents, affiliates, associates and directors. This requirement is subject to the qualification that an action based on allegations of misrepresentations made by a director to creditors or of wrongful or oppressive conduct by a director is preserved (emphasis added).[20]

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[19] The amendment on January 12, 2004 does not affect the issues at bar.

[20] Article 6.1 of the Plan provides as follows: "On the Effective Date, and except as provided below, each of the Companies, the Monitor, and the past and present directors, officers, employees, agents, affiliates and associates of each of the foregoing parties (the "Released

While candidly acknowledging that their best chance of financial recovery on a successful action would be against Slawsky, the objecting landlords contend that preserving their right of action only against him would be insufficient protection given that they do not know at the moment whether he alone was the person who orchestrated or aided in the removal of San Francisco's goods. In view of Slawsky's apparent level of control over the companies, it might be reasonable to conclude that he was involved in the decision to abandon the premises. However, that is speculative at this point and others may well have been involved.

[27] Although the Initial Order did not stay actions against San Francisco's employees or agents, the landlords' failure as yet to pursue the employees or agents does not end the matter. This aspect of a removal action is quite different from the statutorily time limited ability of a landlord to follow and seize their tenant's goods, which the objecting landlords chose not to exercise. Only general limitations legislation and the practical effects of the Releases contained in the Plan affect this aspect of the claim.

[28] I find that the Plan does not adequately address the objecting landlords' unique legal entitlement to claim damages against persons who aided their tenant in clandestinely removing goods from the premises. In making this finding, I considered the following to be significant factors:

1. Unlike the ability to follow and seize goods, which has been rendered academic, this right of action is potentially meaningful.

Parties") shall be released and discharged by all Creditors, including holders of Unsecured Creditor Claims, and Goods and Services Tax Claims from any and all demands, claims, including claims of any past and present officers, directors or employees for contribution and indemnity, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, charges and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any person may be entitled to assert, including, without limitation, any and all claims in respect of any environmental condition or damage affecting any of the property or assets of the Companies, 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, dealing or other occurrence existing or taking place on or prior to the Effective Date relating to, arising out of or in connection with any Claims, the business and affairs of the Companies, whenever and however conducted, this Plan and the *CCAA* Proceedings, and any Claim that has been barred or extinguished by the Claims Procedure Order shall be irrevocably released and discharged, provided that this release shall not affect the rights of any Person to pursue any recoveries for a Claim against a director or the Companies that: (a) relates to contractual rights of one or more creditors against a director; or
(b) are based on allegations of misrepresentations made by a director to creditors or of wrongful or oppressive conduct by a director."

2. The Plan does not offer compensation for deprivation of this right of action, resulting in a "confiscation" of the objecting landlords' right as described in ***Sovereign Life***.

3. Unlike claims that would be extinguished on a bankruptcy of the companies, this right of action would survive since it is against third parties.

[29] The *CCAA* is designed to be fluid and flexible, and the Court is given wide discretion to facilitate that flexibility. Alternatives to establishing a separate voting class should be explored. I can envision at least three other options: (1) direct an amendment to the Plan to compensate the objecting landlords for the loss of their potential rights of action against persons other than Slawsky; (2) direct an amendment to the Plan to expand the survival of actions provision (clause 6.1 (b)) to include potential defendants other than Slawsky; or (3) deal with the matter at the fairness hearing.

[30] Ordering a separate class would clearly recognize and protect the objecting landlords' potential causes of action against third parties other than Slawsky. Further, it would overcome potential hurdles in consultation among the unsecured creditors. However, a separate class would give the objecting landlords a veto power over the Plan. This flags the principle that courts should be careful to resist classification approaches that might jeopardize viable plans of arrangement.

[31] Directing that the Plan be amended to compensate the objecting landlords for the loss of their potential rights of action is not a viable option. It would require that the Court blindly enter into San Francisco's strategic arena. Such a direction would interfere with the right of the companies to make their own Plan and would purport to cloak the Court with knowledge of the companies' resources, strategies and plans, knowledge which it simply does not posses. Interference of this sort should be avoided.

[32] Directing an amendment to the Plan to expand the survival of actions provision to include potential defendants other than Slawsky certainly would be less intrusive than compensating the objecting landlords for the loss of their potential right of action. It would preserve their right to pursue the removal action against persons other than Slawsky and would enhance consultation with other creditors in the class. On the other hand, it would impose an obligation on the companies that they may not have contemplated or may have been unwilling to voluntarily assume.

[33] As to dealing with the matter at a fairness hearing, I note that the *CCAA* does not require that debtors present a 'guaranteed winner' of a plan to their creditors. Debtors can make any proposal to their creditors and take whatever chances they might consider appropriate. However, to succeed, they must act in good faith and present a plan of arrangement at the end of the day which is fair and reasonable. If they fail to do so, the process is a waste of time and valuable

resources. It accomplishes nothing but an erosion of assets that otherwise would be available to creditors on liquidation. This is precisely what Tysoe J. sought to avoid when he ordered a separate class for guarantee holders in ***Re Woodward's***, on being convinced that the plan in that case was unfair to them.[21]

[34] The opposite result occurred in ***Canadian Airlines***, where Madam Justice Paperny deferred the classification issue to the fairness hearing. ***Canadian Airlines*** presented quite a different scenario to that in ***Re Woodward's*** or the one before me. The concern in ***Canadian Airlines*** was with Air Canada voting in the same class as other unsecured creditors when it had appointed the board which directed the *CCAA* proceedings, was funding the Plan, and fears existed about its acquisition of deficiency claims to secure a positive vote. The court was not concerned about a confiscation of legal rights but was attempting to safeguard against "ballot stuffing".[22]

[35] In the particular circumstances of the present case, I find it preferable to protect the objecting landlords' remedy by directing that there be an amendment to the Plan to preserve any cause of action they might have against any party who aided San Francisco in clandestinely removing its assets from their premises. This measure balances the need to avoid giving unwarranted power to one creditor group and the need to protect a unique legal entitlement. It avoids the potential of valuable resources being expended on creditors' meetings when the potential exists that at the end of the day I would find the Plan to be unfair on the basis of this aspect of the objecting landlords' argument. Finally, it avoids significant interference with the debtor's financial strategy in formulating its Plan.

2. Loss of Default/Insolvency Clause Remedy

[36] Some, if not all, of the leases allow the landlord to terminate the lease in the event of the tenant's insolvency. The objecting landlords argue that this is another unique right which is not compensated for in the Plan.

[37] The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to the proceedings in the first place.[23] The objecting landlords complain that their rights are permanently lost because of the Release contained in the Plan. They do not

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[21] At para. 11.

[22] ***Re Olympia & York Developments Ltd.***, [1994] O.J. No.1335 at para. 24 (QL) (Ont. Ct. (Gen. Div.)).

[23] See for example: ***Norcen Energy Resources Ltd.***, where one of the debtor's joint venture partners was enjoined from relying on an insolvency clause to replace the operator under a petroleum operating agreement.

acknowledge that the stay is essential to the longer-term feasibility of the *CCAA* restructuring and something which courts have granted with increasing regularity to give effect to the remedial nature of the *CCAA*.[24] Even ignoring this pragmatic consideration, the objecting landlords' argument fails. The contractual right that is affected is neither unique, nor of any practical use. Thirteen other creditors, mainly equipment lessors and utility providers, have similar contractual default provisions. Further, all of the leases have already been terminated.

3. Difficulty in Valuing Claim

[38] The objecting landlords rely on ***Grafton-Fraser*** for the proposition that landlords' claims are difficult to value and therefore a separate class is warranted. Unfortunately, the brief reasons given by Houlden J. do not provide any insight as to how the company in that case proposed to value the landlords' claims. No doubt, Houlden J. had the specific facts before him clearly in focus as he made his decision. I reject the contention that ***Grafton-Fraser*** is a decision of sweeping application, being mindful that rigid rules of general application are to be avoided in *CCAA* matters.

[39] The Claims Procedure Order, issued on June 22, 2004 in this matter, establishes a mechanism for valuing landlords' abandoned premises claims that reflects the methodology established by the Supreme Court of Canada in ***Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.***[25] The valuation mechanism, set out in para. 12 of the Order,[26] is straightforward. A

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[24] As noted by Spence J. in ***Re Playdium Entertainment Corp.*** (2001), 31 C.B.R. (4th) 309 at para. 32 (Ont. Sup. Ct. Just.): "If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the *CCAA* order could not be asserted by the Famous Players after the stay period. If such an order could not be made the *CCAA* regime would prospectively be of no value even though a compromise of creditor claims might be worked out in the stay period." See also ***Luscar Ltd. v. Smoky River Coal Ltd.*** (1999), 237 A.R. 326 (Alta. C.A.).

[25] ***Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.,*** [1971] S.C.R. 562.

[26] 12(a) With respect to Proofs of Claim to be filed with the Monitor by a Landlord of retail premises currently or formerly occupied by the Companies ("Landlord"), a Landlord is to value and calculate its claim ("Landlord's Claim") as being the aggregate of:

(i) Arrears of rent, if any, owing under a lease as at January 7, 2004;

(ii) In instances where a lease has been repudiated by the Companies (whether or not the repudiation occurred before or after January 7, 2004), the value of rent payable under the lease from the date of repudiation to the date of the Proof of Claim (if any) less any revenue received from any reletting of the premises (in whole or in part) as at the date of the Proof of Claim;

(iii) In instances where a lease has been repudiated by the Companies

claimant simply follows the formula. There is a clear cut-off date for mitigation efforts and a readily calculable present value. The landlords' claims will not be difficult to value.

Inequitable Treatment of Creditors

1. Preferential Treatment of Some Landlords

[40] The objecting landlords make the curious complaint that the Plan prefers them to other unsecured creditors in that it contemplates the duty to mitigate, for valuation purposes, ending at the claims bar date.

[41] Presumably, the objecting landlords could re-let the premises the following day and still base their claim on the value of unpaid rent for the unexpired portion of the term of their lease. While they might receive a benefit, it is trite that there must always be a cut-off date for mitigation when future losses are the subject of a *CCAA* creditor claim. San Francisco chose the claims bar date for ease of analyzing claims for voting purposes. Its choice makes practical sense and is not facially offensive. As noted in ***Re Alternative Fuel Systems Inc.***,[27] courts have approved a variety of solutions to quantifying landlords' claims. That approach is in keeping with the distinct purpose of the *CCAA*. Further, the treatment of landlords' claims under a plan of arrangement is an issue for negotiation and, ultimately, court approval.

[42] The objecting landlords also say that they are preferred in that the Plan is a consolidated one that proposes a compromise regardless of whether a landlord's claim against a hollow nominee company would have been worthless outside of the *CCAA*. This issue will be of interest to other creditors as they consider their vote and position on the fairness hearing. However, it does not warrant creation of a separate class. If anything, it might warrant San Francisco

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> (whether or not the repudiation occurred before or after January 7, 2004), the present value (using an interest factor of 3.65%) of rents payable under the lease as at the date of the Proof of Claim through to the end of the unexpired term of the lease (if any) less any revenue to be received during that time period from any reletting of the premises (in whole or in part) which has occurred prior to the date of the Proof of Claim.
>
> (b) For the purposes of a Landlord's Claim, where a lease contains an option in favour of the Companies authorizing the Companies to treat that lease as terminated and at an end prior to the otherwise stated termination date of that lease, the Companies shall be deemed to have exercised that option and the Landlord's Claim with respect to that lease shall be calculated having regard to the early termination date.

[27] ***Re Alternative Fuel Systems Inc.*** (2004), 236 D.L.R. (4th) 155 at paras. 64-69, 2004 ABCA 31.

revisiting the Plan, which some of the beneficiaries appear to think is too generous in the circumstances.

2. Preferential Treatment of Slawsky and Laurier

[43] The objecting landlords take issue with Slawsky and Laurier being classified as "unaffected creditors" whose claims survive the reorganization despite their ability to value their security for voting purposes and to vote as unsecured creditors for their deficiency claims. Slawsky and Laurier's view is that the Plan does not prefer them because they do not share in the payment available to the general pool of unsecured creditors under the Plan and they are, by deferring payment of their secured claims, effectively funding the Plan.

[44] The Plan's treatment of Slawsky and Laurier does not serve as a reason to segregate the landlords. Whether it is a reason to place Slawsky and Laurier into a separate class is discussed under the next heading.

Related Parties

[45] The objecting landlords take umbrage with Slawsky, his son Aaron, Laurier, and other corporate entities in which Slawsky has an interest, voting on the Plan. They want to import into the *CCAA* proceedings the *BIA* prohibition against "related persons" voting in favour of a proposal, urging that the same policy considerations apply against allowing an insider to control the vote.[28]

[46] The Alberta Court of Appeal in ***Re Alternative Fuel Systems Inc.*** declined to import *BIA* landlord claim calculations into a *CCAA* proceeding. The court found that the section of the *CCAA* at issue did not mandate importation of *BIA* provisions and, more significantly, the court found that to do so would not pay sufficient attention to the distinct objectives of the *CCAA* (remedial) and *BIA* (largely liquidation). In conducting its contextual analysis, the court acknowledged the need to maintain flexibility in *CCAA* matters, discouraging importation of any statutory provision that might impede creative use of the *CCAA* without a demonstrated need or statutory direction. There is no such direction or need in this case.

[47] The objecting landlords find support for their position in ***Re Northland Properties Ltd.***[29] Trainor J. in that case refused to allow a subsidiary to vote on its parent's *CCAA* plan. While care

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[28] The *BIA*, s. 4(3)(c) definition of "related person" includes a controlling shareholder of a corporation. Section 54(3) provides that a creditor related to the debtor may vote against but not for the acceptance of a proposal.

[29] ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (N.S.) 166 at 170 (B.C.S.C.). See also: ***Re The Wellington Bldg. Corp. Ltd.***, [1934] O.R. 653 (H.C.J.) and ***Re Dairy Corporation of Canada Limited***, [1934] O.R. 436 (C.A.), referred to in ***Re Northland Properties***.

should be exercised to avoid a corporation "stuffing the ballot boxes in its own favour",[30] a blanket ban on insider voting is not always necessary or desirable. Safeguards against potential abuses can be built into a plan and the voting mechanism. For example, the Monitor could procure sworn declarations from insiders as to their direct and indirect shareholdings in order to help track voting. That information, together with proofs of claim, proxies, and ballots, which relate to the insiders' claims could then be presented at the fairness hearing. This type of safeguard was taken in ***Canadian Airlines***. Paperny J. observed in that case that "absent bad faith, who creditors are is irrelevant".[31]

[48] Safeguards such as this are applicable only if the court is satisfied that there is sufficient commonality of interest between the insiders and the other creditors to place them in the same class. That was the case in ***Canadian Airlines***. There, all of the creditors in the class were unsecured creditors. They were treated in the same way under the plan, and would have been treated the same way on a bankruptcy. The plan called for the insider, Air Canada, to compromise its claim, just like all of the other creditors.

[49] Here, there is no compromise by Slawsky or Laurier. Further, they would, but for a security position shortfall, be unaffected by a bankruptcy of the companies, whereas all of the other creditors in the class would receive nothing. Slawsky has created a Plan which gives him voting rights that he doubtless wants to employ if he senses the need to sway the vote. In return, he gives up nothing. It stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Slawsky and, through him, with Laurier. For that reason, Slawsky and Laurier must be placed in a separate class.

CONCLUSIONS

[50] The right of the objecting landlords to pursue distraint is unique as is their right to sue a person for aiding in clandestine removal of goods from the leased premises. For the reasons stated, loss of the objecting landlords' right to follow and seize goods cannot support the ordering of a separate class. However, I find that the Plan does not adequately address their right to claim damages against persons who aided a tenant in clandestinely removing goods from the premises. Rather than create a separate voting class for the objecting landlords, I direct that the Plan be amended to preserve any cause of action the objecting landlords and others in their position might have against any party who aided San Francisco in clandestinely removing its assets from their premises.

[51] The right or ability of the objecting landlords to terminate the leases in question in the event of their tenants' insolvency is neither unique nor of any practical effect at this point. It is not a sufficient ground for creation of a separate voting class. Nor have I accepted the argument of the

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[30] ***Re Olympia & York Developments Ltd.*** at para.24, per Farley J.

[31] At para. 37.

objecting landlords that a separate class should be established because their claims will be difficult to value. The Claims Procedure Order provides a mechanism for valuing their claims.

[52] I have determined that, to the extent there is preferential treatment of the landlords or of Slawsky and Laurier under the Plan, such preferential treatment does not justify segregating the objecting landlords. However, as Slawsky and Laurier do not share a commonality of interest with other unsecured creditors, they must constitute a separate class for voting purposes.

[53] Although success on this application has been somewhat divided, the objecting landlords have enjoyed greater success. There are no provisions in the *CCAA* dealing with costs, however, the Court has the discretion to award costs under the *Rules of Court* and its inherent jurisdiction.[32] The nature of the relief granted to the objecting landlords is akin to declaratory relief and accordingly, costs under Column 1 of Schedule C to the *Rules of Court* are appropriate. The costs are payable forthwith.

Heard on the 1st day of September, 2004.
Additional submissions received on the 21st and 24th days of September, 2004.

Dated at Edmonton, Alberta this 28th day of September, 2004.

J.E. Topolniski
J.C.Q.B.A.

[32] ***Re Jackpine Forest Products Ltd.***, 2004 BSSC 20.

Appearances:

Richard T. G. Reeson, Q.C.
Howard J. Sniderman
Witten LLP
for the Companies

Jeremy H. Hockin
Parlee McLaws LLP
for Oxford Properties Group Inc., Ivanhoe Cambridge 1 Inc., 20 Vic Management Ltd., Morguard Investments Ltd. Morguard Investments Ltd, Morguard Real Estate Investments Trust, RioCan Property Services, 1113443 Ontario Inc. (the “Objecting Landlords”)

Michael J. McCabe , Q.C.
Reynolds, Mirth, Richards & Farmer LLP
for the Monitor

Tab 16

CITATION: Banro Corporation (Re), 2018 ONSC 2064
COURT FILE NO.: CV-17-589016-00CL
DATE: 20180329

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED and KAMITUGA (BARBADOS) LIMITED

Applicants

BEFORE: HAINEY J.

COUNSEL: *Jane O. Dietrich, Ryan C. Jacobs*, and *Sophie Moher*, for the Applicants

Wael Rostom, for the Monitor

Robert Staley, Sean Zweig and *Preet Bell*, for VR Global Partners, L.P.

Junior Sirivar, for Baiyin International Investment Ltd./Baiyin Nonferrous Group Company, Limited

Brendan O'Neill and *Ryan Baulke*, for Gramercy Funds Management LLC

HEARD: March 27, 2018

ENDORSEMENT

[1] The Applicants move for an order pursuant to s. 6 of the CCAA for sanction and approval of their Amended Consolidated Plan of Compromise and Reorganization dated March 9, 2018 ("Plan").

[2] These CCAA proceedings were commenced on December 22, 2017. Despite conducting a court-approved sale and investment solicitation process, no successful bid was identified. As a result, the Applicants sought creditor approval of the Plan in accordance with my order dated February 1, 2018.

[3] At the Creditors' Meeting held on March 9, 2018 both classes of affected creditors voted to approve the Plan with 96.15% of the Eligible Voting Creditors in the Affected Secured Class and 96.3% of the Eligible Voting Creditors in the Affected Banro Unsecured Class voting in favour of the Plan.

[4] VR Global Partners, L.P. ("VR") was the only creditor to vote against the approval of the Plan. VR is the holder of approximately $19 million of secured notes (the total principal amount of secured notes outstanding is $197.5 million). VR's objection is that the Plan is not fair and reasonable because Baiyin Nonferrous Group Company ("Baiyin") and Gramercy Funds Management LLC ("Gramercy"), who are by far the Applicants largest creditors, are to receive Class A common shares in Newco ("Class A Shares") and all other holders of secured notes are to receive Class B common shares with voting restrictions in Newco ("Class B Shares").

[5] VR through its counsel, Mr. Staley, submits that it is not fair and reasonable for the Plan to provide different consideration for the compromise of identical debt. According to VR, the Class A and Class B Shares have distinct economic and legal rights because of the differences in voting rights, and "they are likely to have different economic values as a result."

[6] VR further submits that for the Plan to be fair and reasonable, creditor treatment must be equitable. According to VR, it is inequitable for creditors with the same debt and security to receive different consideration.

[7] Despite Mr. Staley's able argument, I do not accept VR's position for the following reasons.

The two classes of shares have equivalent economic rights

[8] The Class A Shares and the Class B Shares have equivalent economic rights because the difference between the consideration that VR is receiving for its compromised debt and what Baiyin and Gramercy are receiving is minimal. This is because of the following:

(a) Baiyin and Gramercy, as the most significant creditors of the Applicants, are anticipated to collectively hold over 74% of Newco's equity. Because Baiyin and Gramercy will have effective control of Newco, the voting restriction on the Class B Shares is intended to reduce unnecessary delay, cost and expense going forward by reducing the need to call and hold shareholder meetings for all shareholders;

(b) The Class B Shares will have the same economic rights as the Class A Shares in respect of all dividends, distributions and other payments made by Newco;

(c) The following provisions have been put in place to minimize any impact that the voting restrictions of the Class B Shares may have to ensure the same economic treatment in the event of any future transaction involving Newco:

    (i) All shareholders will participate in any Exit Transaction and/or buyout by Gramercy or Baiyin;

    (ii) The holders of the Class B Shares will be entitled to vote as a separate class on any amendments to Newco's articles that are materially adverse to holders of the Class B shares; and

    (iii) The Class B Shares will become voting shares upon the earlier of (i) 42 months after implementation of the Plan; or (ii) the occurrence of an Exit Transaction (i.e.

sale of Newco's equity, a sale of all or substantially all of Newco's assets or a public offering of Newco's equity).

Applicable legal principles

[9] The established legal principles that apply to a determination of whether a plan of arrangement in CCAA proceedings is fair and reasonable include the following:

(a) Equitable treatment is not necessarily equal treatment so that the fact that VR's consideration is slightly different than the consideration received by Baiyin and Gramercy does not mean the Plan is not equitable. Farley J. made this clear in *Sammi Atlas Inc., Re,* 1998 CarswellOnt 1145 at para. 4 as follows:

> ...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). (emphasis added)

(b) The question of whether a plan of arrangement is fair and reasonable must be determined in the context of the plan as a whole (see *Keddy Motor Inn Ltd., Re*, 1992 CarswellNS 46 at para. 37). In my view, the Plan as a whole is fair and reasonable.

(c) An important measure of whether a plan of arrangement is fair and reasonable is the extent of the approval by the creditors. In this case the Plan was overwhelmingly approved by both classes of affected creditors. In fact, 23 other holders of secured notes identical to VR's notes who are unrelated to Baiyin or Grammercy voted to approve the Plan. Newbould J. stressed the importance of this in *4519922 Canada Inc., Re*, 2015 ONSC 4648 at para. 29 as follows:

> One important measure of whether a plan is fair and reasonable is the parties' approval of a plan, and the degree to which approval has been given.

(d) There is a very heavy burden on a party to demonstrate that a plan of arrangement is not fair and reasonable. In this case VR has failed to meet that burden as the difference between the Class A Shares and Class B Shares is minimal. Blair J. (as he then was) described the burden on a party challenging a plan on the grounds that it is not fair and reasonable as follows at para. 39 in *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 182:

> In *Re Keddy Motors Inns Ltd., supra*, the Nova Scotia Court of Appeal spoke of "a very heavy burden" on parties seeking to show that a Plan is not fair and reasonable, involving "matters of substance", when the Plan has been approved by the requisite majority of creditors (see pp. 257-258). Freeman J.A. stated at p. 258:

> The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of a court. 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.

(e) Where certain creditors, such as Baiyin and Gramercy, have contributed to the success of a Plan, they may be entitled to different treatment than other creditors. In this case Baiyin and Gramercy:

(i) have provided $20 million of DIP financing that is not being repaid but being converted to exit financing on the implementation of the Plan;

(ii) have provided material consensual waivers of obligations owing under the Gold Streams and Forward Agreements; and

(iii) are necessary for the restructuring to proceed.

In my view for these reasons they are entitled to different treatment than VR. Support for my conclusion can be found in the decision of Tingley J.C.S. in *Uniforêt inc., Re*, 2003 CarswellQue 3404 at para. 21 as follows:

> For a plan of arrangement to succeed, an insolvent company must secure the approval of all classes of its creditors, even those who have subordinated their claims to all other creditors, as is the case with the debentureholders (Class 6). It does not necessarily follow that a plan generous to some creditors must therefore be unfair to others. A plan can be more generous to some creditors and still fair to all creditors. A creditor like Jolina that has stepped into the breach on several occasions to keep Uniforêt afloat in the 4 years preceding the filing of the First Plan warrants special treatment.

The same can be said about Baiyin and Gramercy who have "stepped into the breach on several occasions" to keep the Applicants afloat.

(f) Finally, the applicable jurisprudence makes it clear that the court should not interfere with the business judgment of the parties. This is exactly what VR is asking the court to do. Justice Blair made this clear in *Olympia & York* at para. 37 as follows:

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

[10] For all of these reasons VR's objection to the Plan is dismissed.

The Sanction Order should be granted

[11] I have concluded that it is appropriate for me to grant the Sanction Order in the form requested for the following reasons:

(a) The "double majority" test under s. 6(1) of the CCAA has been met because of the overwhelming support of the creditors achieved at the Creditors' Meeting.

(b) The test outlined by Paperny J. in *Re Canadian Airlines Corp.*, 2000 ABQB 442, has also been met because:

(1) There has been strict compliance with all of the statutory requirements;

(2) There have been no unauthorized steps taken by the Applicants. This is confirmed in the Monitor's Fourth Report; and

(3) The Plan is fair and reasonable because it represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available.

(c) The classification of creditors was approved and the Plan was approved by the requisite majority of creditors (96% in number and 91% in dollar value of creditors who voted in favour of the Plan).

(d) The Plan represents the best available alternative for the Applicants under the circumstances.

(e) The Plan is in the public interest as it will allow the Applicants to operate as a going concern and provide ongoing work for 1,450 employees.

The Releases are fair and reasonable

(f) I have also concluded that the releases provided for in the Plan are fair and reasonable. In arriving at this conclusion I have taken into consideration the following:

(1) The releases were critical components of the decision-making process for the Directors', Officers' and Requisite Consenting Parties' participation in the CCAA Proceedings and support for the Plan;

(2) The Applicants would not have brought forward the Plan and the Requisite Consenting Parties would not have supported the Plan absent the inclusion of the Releases;

(3) The support of the Requisite Consenting Parties in terms of (a) voting in support of the Plan; (b) consensually agreeing to amend the Gold Streams and the Forwards; and (c) providing Interim Financing that will be converted to exit financing on Plan Implementation is essential to the Plan's viability. Without such support, the Plan would not succeed and the Applicants would likely have had no option but to proceeding with a liquidation which would not have provided the same benefits to the Applicants' stakeholders;

(4) The Released Parties made significant contributions to the recapitalization of the Banro Group, both prior to and throughout the CCAA Proceedings. The efforts of the Special Committee and the other Directors and Officers of the Banro Group along with the Requisite Consenting Parties resulted in the negotiation of the Support Agreement, the SISP, the DIP Term Sheet and the Plan, all of which formed the foundation for the Recapitalization through these CCAA Proceedings;

(5) The actions of the Released Parties, including the Directors and Officers as well as the Requisite Consenting Parties were and are critical to the recoveries of all Affected Creditors and stakeholders largely, including the Applicants' employees by negotiating for their continued employment in Canada and the Democratic Republic of the Congo upon implementation of the Plan; and

(6) The Releases apply to the extent permitted by law. The release in favour of the Directors and Officers is compliant with section 5.1(2) of the CCAA, which mandates certain exceptions to the compromise of claims against directors set out under section 5.1(1) of the CCAA.

The declarations regarding the Lepard Action

(g) I am also satisfied that the declarations requested in the Sanction Order in respect of the claims and causes of action raised in the Lepard Action are appropriate because the claims and causes of action are all Affected Equity Claims and are also barred as against the officers and directors because of non-compliance with the Claims Procedure Order.

Sealing Order

(h) It is appropriate that there be a sealing order with respect to the Confidential Affidavit in accordance with para. 35 of the Sanction Order.

Conclusion

[12] In conclusion, the Sanction Order is granted. I thank all counsel for their helpful submissions.

HAINEY J.

Date: March 29, 2018

Tab 17

Court of Queen's Bench of Alberta

Citation: SemCanada Crude Company (Re), 2009 ABQB 490

Date:20090824
Docket: 0801 08510
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 a Plan of Compromise or Arrangement of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 319278 Nova Scotia Company and 1380331 Alberta ULC

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

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Introduction

[1] The SemCanada Group applied for various relief related to the holding of meetings of creditors to consider three plans to restructure and distribute assets of the CCAA applicants, including applications for orders authorizing the establishment of a single class of creditors for each plan for the purpose of considering and voting on the plans. I granted the applications, and these are my reasons.

Relevant Facts

[2] On July 22, 2008, SemCanada Crude Company ("SemCanada Crude") and SemCAMS ULC ("SemCAMS") were granted initial Orders pursuant to s. 11(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended (the "CCAA").

[3] On July 30, 2008, the CCAA proceedings of SemCAMS and SemCanada Crude and the bankruptcy proceedings of SemCanada Energy Company (“SemCanada Energy”) A.E. Sharp Ltd. (“AES”) and CEG Energy Options, Inc. (“CEG”) which had been commenced on July 24, 2008 were procedurally consolidated for the purpose of administrative convenience.

[4] In addition, CCAA protection was granted to two affiliated companies, 3191278 Nova Scotia Company (“319") and 1380331 Alberta ULC (“138"). SemCanada Energy, AES, CEG, 319 and 138 are collectively referred to as the “SemCanada Energy Companies”. The CCAA applicants are collectively referred to as the “SemCanada Group”.

[5] On July 22, 2008, SemGroup L.P. and its direct and indirect subsidiaries in the United States (the “U.S. Debtors”) filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

[6] According to the second report of the Monitor, the financial problems of the SemGroup arose from a failed trading strategy and the volatility of petroleum products prices, leading to material margin calls related to large futures and options positions on the NYMEX and OTC markets, resulting in a severe liquidity crisis. SemGroup’s credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the CCAA.

[7] The SemCanada Group are indirect, wholly-owned subsidiaries of SemGroup LP. The SemCanada Group is comprised of three separate businesses:

(a) SemCanada Crude, a crude oil marketing and blending operation;
(b) the SemCanada Energy Companies, whose business was gas marketing, including the purchase and sale of gas to certain of its four subsidiaries as well as to SemCAMS; and
(c) SemCAMS, whose business consists of ownership interests in large gas processing facilities located in Alberta, as well as agreements to operate these facilities.

[8] SemCrude, L.P. as U.S. borrower and a predecessor company of SemCAMS as Canadian borrower, certain U.S. SemGroup corporations and Bank of America as administrative agent for a syndicate of lenders (the “Secured Lenders”) entered into a credit agreement in 2005 (the “Credit Agreement”). The Credit Agreement provides four different credit facilities. There are no advances outstanding with respect to the Canadian term loan facility, but in excess of U.S. $2.9 billion is owing under the U.S. term loan facility, the working capital loan facility and the revolver loan.

[9] Five of the SemCanada Group, including SemCanada Crude, SemCanada Energy and SemCAMS, have provided a guarantee of all obligations under the Credit Agreement to the Secured Lenders, who rank as senior secured lenders, and under a US $600 million bond

indenture issued by SemGroup. The guarantee is secured by a security and pledge agreement (the "Security Agreement") signed by the five members of the SemCanada Group.

[10] The SemCanada Energy Companies were liquidated or have ceased operations and no longer have significant ongoing operations. As a result of liquidation proceedings and the collection of outstanding accounts receivable, the SemCanada Energy Companies hold approximately $113 million in cash. An application to distribute that cash to the Secured Lenders was adjourned *sine die* on January 19, 2009: Re SemCanada Crude Company (*Companies' Creditors Arrangement Act*), 2009 ABQB 90.

[11] Originally, SemCAMS and SemCanada Crude proposed to restructure their businesses as stand-alone operations without further affiliation with the U.S. Debtors and accordingly sought bids in a solicitation process undertaken in early 2009. Unfortunately, no acceptable bids were received. It also became apparent that, as SemCanada Crude's business was closely integrated with certain North Dakota transportation rights and assets owned by the U.S. Debtors, restructuring SemCanada Crude's operations on a stand alone basis would be problematic. The SemCanada Group turned to the alternative of joining in the restructuring of the entire SemGroup through concurrent and integrated plans of arrangement in both Canada and the United States.

Summary of the U.S. and Canadian Plans

[12] The U.S. and Canadian plans are complex and need not be described in their entirety in these reasons. For the purpose of these reasons, the relevant aspects of the plans are as follows:

1. The disclosure statement relating to a joint plan of affiliated U.S. Debtors was approved for distribution to creditors by the U.S. Bankruptcy Court on July 21, 2009. Under the Chapter 11 process, meetings of creditors are not necessary. Voting takes place through a notice and balloting mechanism that has been approved by the U.S. Court and September 3, 2009 has been set as the voting deadline for acceptance or rejection of the U.S. plan.

2. The total distributable value of the SemGroup for the purpose of the plans is expected to be US $2.3 billion, consisting of US $965 million in cash, US $300 million in second lien term loan interests and US $1.035 billion in new common stock and warrants of the U.S. Debtors.

3. The SemCanada Group will contribute approximately US $161 million in available cash to the U.S. plan and US $54 million is expected to be received from SemCanada Crude relating to crude oil settlements that will occur after the effective date of the plans, being cash received from prepayments that are outstanding on the implementation date which will be replaced with letters of credit or other post-plan financing.

4. Approximately US $50 million will be retained by the corporate group for working capital and general corporate purposes, including for the post plan cash needs of SemCAMS and SemCanada Crude.

5. Certain U.S. causes of action will be contributed to a "litigation trust" and will be distributed through the U.S. Plan, including to the Secured Lenders on their deficiency claims. No value has been placed on the litigation trust by the U.S. Debtors. The Monitor reports that it is unable to make an informed assessment of the value of the litigation trust assets as the trust is a complicated legal mechanism that will likely require the expenditure of significant time and professional fees before there will be any recovery.

6. The U.S. plan contains a condition precedent that, on the effective date of the plan, the restructured corporate group will enter into a US $500 million exit financing facility, which will apply to all post-restructuring affiliates, including SemCAMS and SemCanada Crude, and which will allow the corporate group to re-enter the crude marketing business in the United States and to continue operations in Canada.

7. It is expected that the Secured Lenders will receive cash, second lien term loan interests and equity in priority to unsecured creditors on their secured guarantee claims of US $2.9 billion, which will leave them with a deficiency of approximately US $1.07 billion on the secured loans. The Secured Lenders are entitled under the U.S. Plan to a share in the litigation trust on their deficiency claim. If certain other classes of creditors do not vote to approve the U.S. plan, the Secured Lenders may also receive equity of a value up to 4.53% of their deficiency, subject to other contingencies. The Monitor reports that the Secured Lenders are thus estimated to recover approximately 57.1% of their estimated claims of US $2.1 billion on secured working capital claims and 73.3% of their estimated claims of US $811 million on secured revolver/term claims. The Monitor estimates that the Secured Lenders will recover no value on their deficiency claims, assuming no reallocation of equity from other categories of debtors and no value for the litigation trust.

8. The holders of the US $600 million bonds (the "Noteholders") are entitled to receive common shares and warrants in the restructured corporate group, plus an interest in the litigation trust and certain trustee fees, for an estimated recovery of 8.34% on their claims of US $610 million under the U.S. plan, assuming all classes of Noteholders approve the plan and no value is given to the litigation trust. Depending on certain contingencies, the range of recovery is 0.44$ to 11.02% of their claim. Noteholders are treated more advantageously under the plans than general unsecured creditors in recognition that the Senior Notes are jointly and severally

guaranteed by 23 U.S. debtors and the Canadian debtors, while in most instances only one SemGroup debtor is liable with respect to each ordinary unsecured creditor. In addition, the Noteholders have waived their right to receive distributions under the Canadian plans.

9. Under the U.S. Plan, general unsecured creditors will receive common shares, warrants and an interest in the litigation trust. Depending on the level of approval, recovery levels will range from 0.08% to 8.03% on claims of US $811 million. The Monitor reports that it expects recovery to general unsecured creditors under the U.S. Plan to be 2.09% of their claim.

10. Pursuant to section 503(b)(9) of the U.S. Bankruptcy Code, entities that provided goods to the U.S. Debtors in the ordinary course of business that were received within 20 days of the filing of Chapter 11 proceedings are entitled to a priority claim that ranks above the claims of the Secured Lenders.

11. There are 3 Canadian plans. As the Secured Lenders will be entitled to some recovery in respect of their deficiency claim and the Noteholders will be entitled to some recovery on their unsecured claim under the U.S. Plan, the Secured Lenders and the Noteholders are deemed to have waived their rights to any additional recovery under the Canadian plans for the most part. However, the votes of the Secured Lenders and the Noteholders entitled to vote on the U.S. Plan are deemed to be votes for the purpose of the Canadian plans, both with respect to numbers of parties and value of claims, and are to be included in the single class of “Affected Creditors” entitled to vote on the Canadian plans. Originally, the Canadian plans provided that the value attributable to the Secured Lenders’ votes would be based on the full amount of their guarantee claim, approximately US $2.9 billion, and not only on their deficiency claim of approximately US $1.07 billion. Thus, the aggregate value of the Secured Lenders’ voting claims would be:

    a) US $2.939 billion for the SemCAMS plan;

    b) US $2.939 billion less C $145 million for the SemCanada Crude plan, recognizing that the Secured Lenders would be entitled to receive C $145 million in respect of a negotiated Lenders’ Secured Claim under the SemCanada Crude plan; and

    c) US $2.939 billion less C $108 million for the SemCanada Energy plan, recognizing that the Secured Lenders will

receive that amount in respect of a negotiated Lenders' Secured Claim under the SemCanada Energy plan.

At the conclusion of the classification hearing, the CCAA applicants proposed a revision to the proposed orders which stipulates that, if the approval of a plan by the creditors would be determined by the portion of the votes cast by the Secured Lenders that represents an amount of indebtedness that is greater than their estimated aggregate deficiency after taking into consideration the payments they are to receive under the U.S. plan and the Canadian plans, the Court shall determine whether the voting claim of the Secured Lenders should be limited to their estimated deficiency claim.

12. Only "Ordinary Creditors" receive any distribution under the Canadian Plans. Ordinary Creditors are defined as creditors holding "Affected Claims" other than the Secured Lenders, Noteholders, CCAA applicants and U.S. Debtors. Each plan provides that the Affected Creditors of the CCAA applicant will vote at the Creditors' Meeting as a single class.

13. The SemCAMS plan will be funded by a cash advance from SemCanada Crude and establishes two pools of cash. One pool will fund the full amount of secured claims which have not been paid prior to the implementation date of the plan up to the realizable value of the property secured, and the other pool will fund distributions to ordinary unsecured creditors. Ordinary unsecured creditors will receive cash subject to a maximum total payment of 4% of their proven claims. The Monitor estimates that the distribution will equal 4% of claims unless claims in excess of the current highest estimate are established.

14. The SemCanada Crude plan also establishes two pools of cash, one for secured claims and one for ordinary unsecured creditors. Again, the distribution to ordinary unsecured creditors is estimated to be 4% of claims unless claims in excess of the current highest estimate against SemCanada Crude are established.

15. Any cash remaining in SemCanada Crude after deducting amounts necessary to fund the above-noted payments to secured and unsecured ordinary creditors of SemCAMS and SemCanada Crude, unaffected claims and administrative costs, less a reserve for disputed claims, will be paid to the Secured Lenders through the U.S. plan as part of the payment on secured debt.

16. The SemCanada Energy distribution plan is funded from the cash received from the liquidation of the assets of the companies. It also establishes two pools of cash, one of which will be used to pay secured ordinary creditors and a one of which will be used to pay cash distributions to ordinary unsecured creditors. The Monitor estimates that the distribution to ordinary unsecured creditors will be in

the range of 2.16% to 2.27% of their claims, unless claims in excess of the current maximum estimate are established. Any amounts outstanding after payment of these claims, unaffected claims and administration costs will be paid to the Secured Lenders. The proposed lower amount of recovery is stated to be in recognition of the fact that the SemCanada Energy Companies have been liquidated and have no going concern value.

17. As this summary indicates, the U.S. Plan and the Canadian plans are closely integrated and economically interdependent. Each of the plans requires that the other plans be approved by the requisite number of creditors and implemented on the same date in order to become effective. The receipt of at least $160 million from the SemCanada Group is a condition precedent to the implementation of the U.S. Plan.

18. The Monitor reports that the SemCanada Group has indicated that there is no viable option to the proposed plans and that a formal liquidation under bankruptcy legislation would provide a lower recovery to creditors. The Monitor notes that the rationale for the treatment of the Secured Lenders and the ordinary unsecured creditors under the plans is that the Secured Lenders have valid and enforceable secured claims, and that, in the event of the liquidation of the Canadian companies, the Secured Lenders would be entitled to all proceeds, resulting in no recovery to ordinary creditors. Therefore, reports the Monitor, the CCAA plans are considered to be better than the alternative of a liquidation. The Secured Lenders derive some benefit from the plans through the preservation of the going concern value of SemCAMS and SemCanada Crude and by having a prompt distribution of funds held by the SemCanada Energy Companies.

19. The Monitor notes that the distribution to the SemGroup unsecured creditors under the U.S. plan is viewed as better than a liquidation, and that, therefore, given the effect of the U.S. Bankruptcy Code's "cram-down" provisions, it is likely that the U.S. plan will be confirmed. The Monitor comments that the proposed distribution to ordinary unsecured creditors under the CCAA plans is considered to be fair as it is comparable to and potentially slightly more favourable than the distributions being made to the U.S. ordinary unsecured creditors.

Positions of Various Parties

[13] The SemCanada Group applied for orders

a) accepting the filing of, in the case of SemCAMS and SemCanada Crude, proposed plans of arrangement and compromise, and in the case of SemCanada Energy, a proposed plan of distribution;

b) authorizing the calling and holding of meetings of the Canadian creditors of these three CCAA applicants;

c) authorizing the establishment of a single class of creditors for each plan for the purpose of considering and voting on the plans;

d) approving procedures with respect to the calling and conduct of such meetings; and

e) other non-contentious enabling relief.

[14] Certain unsecured creditors of the applicants objected to the proposed classification of creditors, submitting that the Secured Lenders should not be allowed a vote in the same class as the unsecured creditors either with respect to the secured portion of their overall claim or any deficiency in their claims that would remain unpaid, and that the Noteholders should not be allowed a vote in the same class as the rest of the unsecured creditors.

[15] As noted previously, the CCAA applicants proposed a revision to the proposed orders at the conclusion of the classification hearing which would allow the Court to consider whether the voting claim of the Secured Lenders should be limited to their estimated deficiency claim. The objecting creditors continued to object to the proposed classification, even if eligible votes were limited to the deficiency claim of the Secured Lenders.

Analysis

[16] Section 6 of the CCAA provides that, where a majority in number representing two-thirds in value of "the creditors or class of creditors, as the case may be" vote in favour of a plan of arrangement or compromise at a meeting or meetings, the plan of arrangement may be sanctioned by the Court. There is little by way of specific statutory guidance on the issue of classification of claims, leaving the development of this issue in the CCAA process to case law. Prior decisions have recognized that the starting point in determining classification is the statute itself and the primary purpose of the statute is to facilitate the reorganization of insolvent companies: Paperny, J. in *Re Canadian Airlines Corp.*, (2000) 20 C.B.R. (4th) 46 (Alta. Q.B.), leave to appeal refused (2000), 20 C.B.R. (4th) 46, (Alta. C.A.), affirmed [2001] 4. W.W.R. (Alta. C.A.), leave to appeal to SCC refused [2001] S.C.C.A. No. 60 at para. 14. As first noted by Forsyth, J. in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20, 64 Alta. L. R. (2d) 139, [1989] 2 W.W.R. 566 (Q.B.) at page 28, and often repeated in classification decisions since, "this factor must be given due consideration at every stage of the process, including the classification of creditors..."

[17] Classification is a key issue in CCAA proceedings, as a proposed plan must achieve the requisite level of creditor support in order to proceed to the stage of a sanction hearing. The CCAA debtor seeks to frame a class or classes in order to ensure that the plan receives the maximum level of support. Creditors have an interest in classifications that would allow them

enhanced bargaining power in the negotiation of the plan, and creditors aggrieved by the process may seek to ensure that classification will give them an effective veto (see *Rescue: The Companies' Creditors Arrangement Act*, Janis P. Sarra, 2007 ed. Thomson Carswell at page 234). Case law has developed from the comments of the British Columbia Court in *Re Woodwards* (1993), 84 B.C.L.R. (5d) 206 (B.C.S.C.) warning against the danger of fragmenting the voting process unnecessarily, through the identification of principles applicable to the concept of "commonality of interest" articulated in *Re Canadian Airlines* and elaborated further in Alberta in *Re San Francisco Gifts Ltd.* (2004), 2004 CarswellAlta 1241, [2004] A.J. No. 1062 (Alta. Q.B.), leave to appeal refused (2004), 5 C.B.R. (5th) 300 (Alta. C.A.).

[18] The parties in this case agree that "commonality of interest" is the key consideration in determining whether the proposed classification is appropriate, but disagree on whether the plans as proposed with their single class of voters meet that requirement. It is clear that classification is a fact-driven inquiry, and that the principles set out in the case law, while useful in considering whether commonality of interest has been achieved by the proposed classification, should not be applied rigidly: *Re Canadian Airlines* at para. 18; *Re San Francisco Gifts* at para. 12; *Re Stelco Inc*., (2005), 15 C.B.R. (5th) 307 (Ont. C.A.) at para. 22.

[19] Although there are no fixed rules, the principles set out by Paperny, J. in para. 31 of *Re Canadian Airlines* provide a useful structure for discussion of whether to the proposed classification is appropriate:

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

[20] Under the now-rejected "identity of interest" test, all members of the class had to have identical interests. Under the non-fragmentation test, interests need not be identical. The interests of the creditors in the class need only be sufficiently similar to allow them to vote with a common interest: *Re Woodwards* at para. 8.

[21] The objecting creditors submit that the creation of two classes rather than one cannot be considered to be fragmentation. The issue, however, is not the number of classes, but the effect that fragmentation of classes may have on the ability to achieve a viable reorganization. As noted by Farley, J. in para. 13 of his reasons relating to the classification of creditors in *Stelco*, as endorsed by the Ontario Court of Appeal:

> ...absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid fragmentation - and in this respect multiplicity of classes does not mean that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

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

[22] The classification of creditors is viewed with respect to the legal rights they hold in relation to the debtor company in the context of the proposed plan, as opposed to their rights as creditors in relation to each other: *Re Woodwards* at para. 27, 29; *Re Stelco* at para. 30. In the proposed single classification, the rights of the creditors in the class against the debtor companies are unsecured (other than the proposed votes attributable to the secured portion of the debt of the Secured Lenders, which will be discussed separately).

[23] With respect to the Secured Lenders' deficiency claim, there is a clear precedent for permitting a secured creditor to vote a substantial deficiency claim as part of the unsecured class: *Re Campeau Corp*. (1991) 10 C.B.R. (3d) 100 (Ont. Gen. Div.; *Re Canadian Airlines*, supra.

[24] The classification issues in the *Campeau* restructuring were similar to the present issues. In *Re Campeau*, a secured creditor, Olympia & York, was included in the class of unsecured creditors for the deficiency in its secured claim, which represented approximately 88% of the value of the unsecured class. The Court rejected the submission that the legal interests of Olympia & York were different from other unsecured creditors in the class. Montgomery, J. noted at para. 16 that Olympic & York's involvement in the negotiation of the plan was necessary and appropriate given that the size of its claims would allow it a veto no matter how the classes were constituted and that its co-operation was necessary for the success of both the U.S. and Canadian plans.

[25] In the same way, the size and scope of the Secured Lenders claim makes their participation in the negotiation and endorsement of the proposed plans essential. That participation does not disqualify them from a vote in the process, nor necessitate their isolation in a special class. While under the integrated plans, the Secured Lenders will receive a different kind of distribution on their unsecured deficiency claim (a share of the litigation trust), that is an issue of fairness for the sanction hearing and does not warrant the establishment of a separate class.

[26] The interests of the Noteholders are unsecured. While it is true that under the integrated plans, the Noteholders would be entitled to a higher share of the distribution of assets than ordinary unsecured creditors, the rationale for such difference in treatment relates to the multiplicity of debtor companies that are indebted to the Noteholders, as compared to the position of the ordinary unsecured creditors. That difference, while it may be subject to submissions at the sanction hearing, is an issue of fairness, and not a difference material enough to warrant a separate class for the Noteholders in this case. A separate class for the Noteholders would only be necessary if, after considering all the relevant factors, it appeared that this difference would preclude reasonable consultation among the creditors of the class: *Re San Francisco Gifts* at para. 24.

[27] The question arises whether the fact that the Secured Lenders and the Noteholders have waived their rights to recover under the Canadian plans should result in either the requirement of separate classes or the forfeiture of their right to vote on the Canadian plans at all.

[28] This is a unique case: a cross-border restructuring with separate but integrated and interdependent plans that are designed to comply with the restructuring legislation of two jurisdictions. As the applicants point out, the co-ordinated structure of the plans is designed to ensure that the Secured Lenders and the Noteholders receive sufficient recoveries under the U.S. plan to justify the sacrifices in recovery that result from their waiver of distributions under the Canadian plans. In considering the context of the proposed classification, it would be unrealistic and artificial to consider the Canadian plans in isolation, without regard to the commercial outcome to the creditors resulting from the implementation of the plans in both jurisdictions. Thus, the fact that the distributions to Secured Lenders and Noteholders will take place through the operation of the U.S. plan, and that the effective working of the plans require them to waive their rights to receive distributions under the Canadian plans does not deprive them of the right to an effective voice in the consideration of the Canadian plans through a meaningful vote.

[29] It is not sufficient to say that the Secured Lenders and the Noteholders have a vote in the U.S. plans. The “cram down” power which exists under Chapter 11 of the U.S. Bankruptcy Code includes a “best interests test” that requires that if a class of holders of impaired claims rejects the plan, they can be “crammed down” and their claims will be satisfied if they receive property of a value that is not less than the value that the class would receive or retain if the debtor were liquidated under Chapter 7 of the U.S. Bankruptcy Code. Thus, the votes available to the Secured Lenders and the Noteholders with respect to their claims under the U.S. Plan do not give them the right available to creditors under Canadian restructuring law to vote on whether a proposed plan should proceed to the next step of a sanction hearing There is no reason to deprive the Secured Lenders and the Noteholders of that right as creditors of the Canadian debtors, even if the distributions they would be entitled to flow through the U.S. plan. The question becomes, then, whether that right should be exercised in a class with other unsecured creditors as proposed or in a separate class.

[30] It is noteworthy that the proposed single classification does not have the effect of confiscating the legal rights of any of the unsecured creditors, or adversely affecting any existing security position. It is in fact arguable that seeking to exclude the Secured Lenders and the Noteholders from the class prejudices these similarly-placed creditors by denying them a meaningful voice in the approval or rejection of the plans in Canada.

[31] A number of cases suggest that the Court should also consider the rights of the parties in liquidation in determining whether a proposed classification is appropriate: *Re Woodwards* at para. 14; *Re San Francisco Gifts* at para. 12.

[32] Under a liquidation scenario, the Secured Lenders would be entitled to nearly all of the proceeds of the liquidated corporate group, other than the relatively few secured claims that have

priority. This suggests that the Secured Lenders are entitled to a meaningful vote with respect to both the U.S. plan and the Canadian plans.

> 3. *The commonality of interests is to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate organizations if possible.*
>
> 4. *In placing a broad and purposive interpretation on the CCAA, the Court should be careful to resist classification approaches that would potentially jeopardize viable plans.*

[33] The Ontario Court of Appeal in *Re Stelco* cautioned that, in addition to considering commonality of interest issues, the court in a classification application should be alert to concerns about the confiscation of legal rights and should avoid "a tyranny of the minority", citing the comments of Borins, J. in *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 (4th) 621 (Ont. Gen. Div.), where he warned against creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power": *Stelco* at para 28.

[34] Excluding of the Secured Lenders and the Noteholders from the proposed single class would allow the objecting creditors to influence the voting process to a degree not warranted by their status. It is true that if the Secured Lenders and the Noteholders are not excluded from the class, even if only the votes related to the Secured Lenders' deficiency claim are tabulated, the positive vote will likely be enough to allow the proposed plans to proceed to a sanction hearing. It is also true that the Secured Lenders and the Noteholders may have been part of the negotiations that led to the proposed plans. Neither of those factors standing alone is sufficient to warrant a separate class unless rights are being confiscated or the classification creates an injustice.

[35] The structure of the classification as proposed creates in effect what was imposed by the Court in *Re Canadian Airlines*, a method of allowing the "voice" of ordinary unsecured creditors to be heard without the necessity of a separate classification, thus permitting rather than ruling out the possibility that the plans might proceed to a sanction hearing. Given that the votes of the Secured Lenders and the Noteholders on the U.S. plan will be deemed to be votes of those creditors on the Canadian plans, there will be perforce a separate tabulation of those votes from the votes of the remaining unsecured creditors. In accordance with the revision to the plans made at the end of the classification hearing, there will be a separate tabulation of the votes of the Secured Lenders relating to the secured portion of their claims and the votes relating to the unsecured deficiency.

[36] The situation in this classification dispute is essentially the same as that which faced Paperny, J. in *Re Canadian Airlines*. Fragmenting the classification prior to the vote raises the possibility that the plans may not reach the stage of a sanction hearing where fairness issues can be fully canvassed. This would be contrary to the purpose of the CCAA. This is particularly an issue recognizing that the U.S. plan and the Canadian plans must all be approved in order for any

one of them to be implemented. Conrad, J.A. in denying leave to appeal in Re *San Francisco Gifts* 2004 ABCA 386 at para. 9 noted that the right to vote in a separate class and thereby defeat a proposed plan of arrangement is the statutory protection provided to the different classes of creditors, and thus must be determined reasonably at the classification stage. However, she also noted that "it is important to carefully examine classes with a view of protecting against injustice": para. 10. In this case, the goals of preventing confiscation of rights and protecting against injustice favour the proposed single classification.

[37] This is the "pragmatic"factor referred to in Re *Campea* at para. 21.The CCAA judge must keep in mind the interests of all stakeholders in reviewing the proposed classification, as in any step in the process. If a classification prevents the danger of a veto of a plan that promises some better return to creditors than the alternative of a liquidating insolvency, it should not be interfered with absent good reason. The classification hearing is not the only avenue of relief for aggrieved creditors. If a plan received the minimum required level of approval by vote of creditors, it must still be approved at a hearing where issues of fairness must be addressed.

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

[38] As noted in *Re Canadian Airlines* at para. 35, fragmenting a class because of an alleged conflict of interest not based on legal rights is an error. The issue of the motivation of a party to vote for or against a plan is an issue for the fairness hearing. There is no doubt that the various affected creditors in the proposed single class may have differing financial or strategic interests. To recognize such differences at the classification stage, unless the proposed classification confiscates rights, results in an injustice or creates a situation where meaningful consultation is impossible, would lead to the type of fragmentation that may jeopardize the CCAA process and be counter-productive to the legislative intent to facilitate viable reorganizations.

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

[39] The issue of meaningful consultation was addressed by both the supervising justice and the Court of Appeal in *Re San Francisco Gifts*. In that case, Topolniski, J. noted that two corporate insiders that the proposed plan had included in the classification of affected creditors held claims that were uncompromised by the plan, that they gave up nothing, and that it "stretches the imagination to think other creditors in the class could have meaningful consultation [with them] about the Plan": para. 49. Her decision to place these parties in a separate class was confirmed by the Court of Appeal, which commented that Topolniski, J. was "absolutely correct" to find no ability to consult "between shareholders whose debts would not be cancelled and other unsecured creditors whose debts would be": para. 14.

[40] That is not the situation here. The deficiency claims of the Secured Lenders and the unsecured claims of the Noteholders are being compromised in the U.S. plan, and there is nothing to block consultations among affected creditors on the basis of dissimilarity of legal

interests. While there are differences in the proposed distributions on the unsecured claims, they are not so major that they would preclude consultation.

[41] The objecting creditors point to statements made by counsel for the Secured Lenders during the classification application about the alternatives to approval of the plans, which they submit indicates the impossibility of consultation. These comments were made in the context of advocacy on behalf of the proposed classification, and I do not take them as a clear statement by the Secured Lenders that they would refuse to consult with the other creditors.

Secured Portion of Secured Lenders' Claim

[42] The CCAA applicants and the Secured Lenders submit that it would be unfair and inappropriate to limit the votes of the Secured Lenders in the Canadian plans to the amount of the deficiency in their secured claim, rather than the entire amount owing under the guarantee. They argue that, by endorsing the plans, the Secured Lenders have in effect elected to treat their entire claim under the guarantee as unsecured with respect to the Canadian plans, except for relatively small negotiated secured claims under the SemCanada Crude plan and the SemCanada Energy plan. They also submit that the fact that under bankruptcy law, a creditor of a bankrupt debtor is entitled to prove for the full amount of its debt in the estates of both the debtor and a bankrupt guarantor of the debt justifies granting the Secured Lenders the right to vote the full amount of the guarantee claim, even if part of the claim is to be recovered through the U.S. plan, as long as they do not actually recover more than 100 cents on the dollar.

[43] It became apparent during the course of the classification hearing that it may not matter whether the plans are approved by the requisite number of creditors and value of their claims if the Secured Lenders are only entitled to vote the deficiency portion of their claims or the full amount of their claims. It was this that led to the revision in the language of the voting provisions of the plans. I defer a decision on the question of whether or not the Secured Lenders are entitled to vote the entire amount of their guarantee claims until after the vote has been conducted and the votes separately tabulated as directed. As noted by the Court of Appeal in *Re Canadian Airlines,* (2000), 19 C.B.R. (4th) 33 at para. 39, such a deferral of a voting issue is not an error of law and is in fact consistent with the purpose of the CCAA.

Recent Amendments

[44] The following amendment to the CCAA that has been proclaimed in effect from September 18, 2009 sets out certain factors that may be considered in approving a classification for voting purposes:

> 22.2 (2)**Factors -** For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account:

> (a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed. (R.S.C. 2005, c. 47, s. 131, amended R.S.C. 2007, Bill C -12, c.36, s.71)

[45] These factors do not change in any material way the factors that have been identified in the case law and discussed in these reasons nor would they have a material effect on the consideration of the proposed classification in this case.

Creditors with Claims in Process

[46] Two creditors advised that, because their claims of secured status had not yet been resolved with the applicants and the Monitor, they were not in a position to evaluate whether or not to object to the proposed classification. The plans were revised to ensure that the votes of creditors whose status as secured creditors remains unresolved until after the meetings of creditors be recorded with votes of creditors with disputed claims and reported to the Court by the Monitor if these votes affect the approval or non-approval of the plan in question.

Conclusion

[47] In summary, I have concluded that there is no good reason to exclude the Secured Lenders and the Noteholders from the single classification of voters in the proposed plans, nor to create a separate class for their votes. There are no material distinctions between the claims of these two creditors and the claims of the remaining unsecured creditors that are not more properly the subject of the sanction hearing, apart from the deferred issue of whether the Secured Lenders are entitled to vote their entire guarantee claim. No rights of the remaining unsecured creditors are being confiscated by the proposed classification, and no injustice arises, particularly given the separate tabulation of votes which enables the voice of the remaining unsecured creditors to be heard and measured at the sanction hearing. There are no conflicts of interest so over-riding as to make consultation impossible. While there are differences of interests and treatment among the affected creditors in the class, these are issues that will be addressed at the sanction hearing. Approval of the proposed classification in the context of the integrated plans is in accordance with the spirit and purpose of the CCAA.

Heard on the 5th day of August, 2009.
Dated at the City of Calgary, Alberta this 24th day of August, 2009.

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

Appearances:

A. Robert Anderson, Q.C., Rupert Chartrand, Michael De Lellis, Cynthia L. Spry and Douglas Schweitzer
Osler, Hoskin & Harcourt LLP
for the Applicants

David R. Byers
Stikeman Elliott LLP
for The Bank of America

Patrick T. McCarthy and Josef A. Krüger
Borden Ladner Gervais LLP
for the Monitor

Douglas S. Nishimura
Burnet Duckworth & Palmer LLP
for ARC Resources Ltd., City of Medicine Hat, Black Rider Resources Inc. Wolf Coulee Resources Inc., Orleans Energy Ltd., Crew Energy Inc., Trilogy Energy LP

Brendan O'Neill and Jason Wadden
Goodmans LLP
for Fortis Capital Corp.

Sean Fitzgerald
Miles Davison LLP
for Tri-Ocean Engineering Ltd.

Dean Hutchison
McCarthy Tetrault LLP
for Crescent Point Energy Trust, Enbridge Pipelines Inc.

Caireen Hanert

Hennan Blaikie LLP
for Bellamount Exploration Ltd., Enersul Limited Partnership

Bryce McLean
Field Law LLP
for DPH Focus Corporation

Aubrey Kauffman
Fasken Martineau Dumoulin LLP
for BNP Paribas

Tab 18

CITATION: Target Canada Co. (Re), 2016 ONSC 3651
COURT FILE NO.: CV-1 5- 10832-00CL
DATE: 2016-06-02

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

E N D O R S E M E N T

DELIVERED BY THE HONOURABLE JUSTICE MORAWETZ
on June 2, 2016, at TORONTO, Ontario

COUNSEL: *Jeremy Dacks, John MacDonald* and *Shawn Irving*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

William Sasso, Sharon Strosberg and *Jacqueline Horvat*, Representative Counsel for the Pharmacy Franchisee Association of Canada

Susan Philpott, Employee Representative Counsel for employees of the Applicants

Alan Mark, Melaney Wagner, Graham Smith and *Francy Kussner*, for the Monitor, Alvarez & Marsal Inc.

Jane Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC

Andrew Hodhod, for Bell Canada

Harvey Chaiton, for the Directors and Officers

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

Endorsement Page 1

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Legend

[sic] indicates preceding word has been reproduced verbatim and is not a transcription error.

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Transcript Ordered .....
Transcript Completed .....
Ordering Party Notified .....

THURSDAY, JUNE 2, 2016

R E A S O N S F O R J U D G M E N T

MORAWETZ, J. (Orally):

Target Canada Co. ("TCC"), the other applicants listed above and certain related partnerships, (collectively, the "Target Canada Entities"), obtained relief under the *Companies' Creditors Arrangement Act*, (the "CCAA) by an Initial Order dated January 15, 2015, (the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor in this proceeding (the "Monitor"). The reasons which gave rise to the Initial Order are reported as *Target Canada Co.*, Re, 2015 ONSC 303. Those reasons set out the factual background giving rise to the CCAA filing. The Initial Order granted a stay of proceedings until February 13, 2015, which was later extended eight times, most recently to June 6, 2016.

Today the Applicants bring this motion for Court sanction of their Second Amended and Restated Joint Plan of Compromise and Arrangement dated May 19, 2016 (the "Amended Plan") and to obtain an order extending the Stay Period until September 23, 2016 to allow for the implementation of the Amended Plan and the continuation of the Claims Process for the

benefit of all stakeholders.

The facts with respect to this motion are set out in the Sanction Affidavit of Mark J. Wong. Additional facts, including the background to, and mechanics of, the Amended Plan are described in the Meeting Order Affidavit of Mark J. Wong. In addition, factual information is also contained in the 28th Report of the Monitor.

Counsel for the Applicants submits that the Amended Plan is the product of extensive negotiations and consultations with key stakeholders, including Landlord Guarantee Creditors, Landlord Non-Guarantee Creditors, Target Corporation and the Consultative Committee, all with the assistance of the Monitor.

Noteworthy, each of the Monitor, the Landlords and the Consultative Committee of creditors support the Amended Plan.

The Amended Plan has been designed to isolate and address Claims against Propco and Property LP, on one hand, and TCC and the remaining Target Canada Entities on a consolidated basis, on the other. The Amended Plan provides for the consolidation for Plan purposes of the Target Canada Entities other than Propco and Property LP. The Monitor has commented on the impact of the substantive consolidation of the estates of

the Target Canada Entities for the purposes of this proceeding. Such commentary contained in Monitor's 27th report.

I note that there is no opposition to the proposed consolidation, which has been brought to the attention of the affected creditors and I am satisfied that the effect of such consolidation is not prejudicial to the position of any creditor or creditor group.

The primary features of the Amended Plan are summarized in Meeting Order Affidavit, the Sanction Affidavit and the Monitor's Report. Some of the more significant features include:

a. Affected Creditors voted on the Amended Plan as a single class.

b. Affected Creditors with Proven Claims that are less than or equal to $25,000 (the "Convenience Class Creditors") will be paid in full. Affected Creditors with Proven Claims in excess of $25,000 had the option to elect to be treated for all purposes as Convenience Class Creditors.

c. Landlord Guarantee Creditors will be paid the full amount of their Proven Claims on the Initial Distribution Date.

d. Landlord Non-Guarantee Creditors will be paid, in addition to their Pro Rata Share of their Proven Claims, a Landlord Non-Guaranteed Creditor Equalization Amount.

e. Other Affected Creditors with Proven Claims

will receive their Pro Rata Share of the remaining TCC Cash Pool.

f. All CCAA Charges will be discharged, except the Directors' Charge and the Administrative Charge.

g. The Target Canada Entities will transfer their remaining IP assets to Target Coporation's designees and the Pharmacy Shares to the Pharmacy Purchaser.

h. The Employee Trust will be terminated in accordance with the Amended Plan and any surplus funds returned to Target Corporation.

On November, 27, 2015 the Target Canada Entities brought a motion to file their original Plan of Compromise and Arrangement, ("the Original Plan"), and an Order authorizing the Target Canada Entities to call and hold a creditors' meeting to vote on it. I dismissed the motion on January 13, 2016, for reasons released on January 15, 2016 (the "January 15 Endorsement"). The reasons are reported as *Target Canada Co. (Re)*, 2016 ONSC 316. Among other things, the Applicants' motion was dismissed as the Original Plan violated paragraph 19A of the Initial Order by seeking to compromise the Landlord Guarantee Claims without the consent of such affected Landlords.

After the January 15 Endorsement was issued, the Target Canada Entities continued their negotiations with the Landlords to develop

framework for a consensual resolution that would preserve Target Corporation's agreement to maintain the subordination contained in the Original Plan, while the same time addressing certain Landlords' concerns and complying with the January 15th Endorsement.

On March 4, 2016 the Target Canada Entities announced that agreements had been entered into with all of the Landlord Guarantee Creditors and all of the Landlord Non-Guarantee Creditors.

The terms of these Agreements were disclosed and explained to Affected Creditors and to this Court prior to Creditors' Meeting.

The Landlord Guarantee Creditor Settlement Agreement and the Landlord Non-Guarantee Creditor Consent and Support Agreements are conditional upon (a) the Amended Plan's approval by the Affected Creditors; (b) sanction by this Court; and (c) Plan Implementation.

On April 13, 2016 an order was issued permitting the Applicants to put the Amended Plan before the Affected Creditors for approval at the Creditors' Meeting.

On April 14, 2016 the Monitor published the Meeting Materials on its website. The Meeting Materials were sent to Affected Creditors on April 19, 2016. In addition, notices were

published in major national and US newspapers at the end of April.

The Creditors' Meeting was held on May 25, 2016. The required quorum was present and the meeting was properly constituted.

According to the Monitor's tabulation, 100% in number representing 100% in value of the Affected Creditors holding Proven Claims that were present in person or by proxy and voting at the Meeting, voted (or were deemed to vote) to approve the Resolution in favour of the Amended Plan. According to the Monitor's tabulation, 1246 Affected Creditors representing approximately $554 million in value voted (or were deemed to vote pursuant to the Meeting Order) at the Creditors' Meeting.

Based on the most up-to-date information from the Monitor, the Target Canada Entities expect that, subject to certain exceptions, Affected Creditors will be paid in a range from 71% to 80% of their Proven Claims.

The issue on this motion is:

a. Should this Court approve the Amended Plan as fair and reasonable?

Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite

double-majority of creditors has approved the plan.

The general requirements for court approval of the 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 there has been anything done or purported to have been done, which is not authorized by the CCAA; and

c. the plan must be fair and reasonable.

See Re *Skylink Aviation Inc.*, 2013 ONSC 2519.

Having reviewed the record and hearing the submissions, I am satisfied that the foregoing test for approval has been met. In arriving at this conclusion, I have taken into account the following:

(a) In granting the Initial Order, it was determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that the Applicants were insolvent;

(b) Affected Creditors were classified for the purposes of voting and receiving distributions under the Amended Plan and they voted on the Amended Plan as a single class; and

(c) The Monitor published the required notices and provided copies of the Meeting Materials to Affected Creditors;

(d) Affected Creditors were provided with

Target Canada's letter to creditors containing an overview of the terms of the Amended Plan, as well as a letter from the Consultative Committee of creditors communicating the Consultative Committee's support of the Amended Plan and recommendation that Affected Creditors vote in favour of the Amended Plan;

(e) the Creditors' Meeting was properly constituted;

(f) 100% in number representing 100% in value voted in favour of the Plan. Such unanimous approval of the Amended Plan far exceeds the required statutory majority under section 6(1).

Sections 6(2), 6(5) and 6(6) of the CCAA provide that the Court may not sanction the plan unless the plan contains specified provisions concerning crown claims, employee claims and pension claims. I am satisfied that all of these requirements have been met.

The claims of Affected Creditors are not being paid in full. In compliance with section 6(8) of the CCAA, the Amended Plan does not provide for any recovery for equity holders. In addition, Target Corporation, the indirect shareholder of TCC and the largest single creditor of TCC, has agreed to subordinate the majority of its Intercompany Claims.

I also note that the Monitor is of the view that the Amended Plan complies with the requirements

of the CCAA, including the requirements under section 6 of the CCAA.

Having reviewed the record, I am satisfied that the statutory prerequisites to sanction the Amended Plan have been satisfied. I am also satisfied that no unauthorized steps have been taken in placing the Amended Plan before the Court to be sanctioned.

In assessing whether a proposed plan is fair and reasonable, the Court will consider the following:

a. whether the claims have been properly classified and whether the requisite majority of creditors approved the plan;
b. what creditors would receive on bankruptcy or liquidation as compared to the plan;
c. alternatives available to the plan;
d. oppression of the rights of creditors;
e. unfairness to shareholders; and
f. the public interest.

(See *to Sino-Forest Corp.*, 2012 ONSC 750 ("Sino-Forest").

I am satisfied that each of these factors supports approval of the Amended Plan.

In arriving at this conclusion, I have taken into account the following:

a. Classification and Creditor Approval: The

Amended Plan was unanimously approved.

b. Recovery on Bankruptcy: The Monitor has expressed the view that recoveries under the Amended Plan are well in excess of those that would have been received on a bankruptcy of the Target Canada Entities. Recoveries against TCC in a bankruptcy would be 30%, as compared to the expected range of 71 to 80% under the Amended Plan.

c. Alternatives to the Amended Plan: The Amended Plan is the only alternative to bankruptcy.

d. No Oppression of Creditors: I am satisfied that the pre-insolvency rights and priorities of Affected Creditors are respected under the Amended Plan.

e. No Unfairness to Shareholders: Given that Affected Creditors are not being paid in full, there is no unfairness to shareholders in receiving no recovery.

f. Public interest: The Amended Plan resolves the Proven Claims against Target Canada Entities in a manner that is efficient and timely, and which avoids costly litigation.

Article 7.1 of the Amended Plan provides for full and final releases in favour of:

a. The Target Canada Released Parties;

b. The Third-Party Released Parties (which includes the Monitor and its affiliates, their directors, officers, employees, legal counsel, agents and advisors, as well as the Pharmacists'

Representative Counsel and members of the Consultative Committee and their advisors;
c. It also provides a released in favour of the Plan Sponsor Released Parties, (Target Corporation and its subsidiaries other than the Target Canada Entities and the NE1, the HBC Entities and their respective directors, officers, employees, legal counsel agents and advisors), except in respect of the Landlord Guarantee Claims.

Finally, there is also release of the Employee Trust Released Parties.

It is accepted that Canadian courts have jurisdiction to sanction plans that containing releases in favour of third parties. In *Metcalfe and Mansfield Alternative Investments* (2008), 92 O.R. (3d) 513 (C.A.) the Court of Appeal held that the CCAA Court has the jurisdiction to approve a plan of compromise or arrangement that includes third-party releases, stating that a release negotiated in favour of a third-party as part of the "compromise" or "arrangement" that reasonably relates to the proposed restructuring falls within the objectives and flexible framework of the CCAA.

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.

In considering whether to approve releases in favour of third parties, the factors to be considered by the court include:

a. Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

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;

e. Whether the release benefitted the debtors as well as the creditors generally;

f. Whether the creditors voting on the plan had knowledge of the nature and the effect of the releases or;

g. Whether the releases were fair and reasonable and not overly broad.

(See *Metcalfe, Cline Mining Corp.*, 2015 ONSC 662; and *Re Kitchener Frame Limited* 2012 ONSC 234.)

In determining whether to approve a third-party release, the Court will take into account the particular circumstances of the case and the objectives of the CCAA. No single factor set out above will be determinative.

(See *Skylink and Cline Mining*.)

Courts have approved releases that benefit affiliates of the debtor corporation where the *Metcalfe* criteria is satisfied. In Sino-Forest, the subsidiaries of the debtor company were entitled to the benefit from the release under the plan as they were contributing their assets to satisfy the obligations of the debtor company for the benefit of affected creditors. It is not uncommon for CCAA courts to approve third-party releases in favour of person, such as directors or officers or other third parties, who could assert contribution and indemnity claims against the debtor company.

(See *Skylink and Cline Mining*.)

In my view, each of the Released Parties has contributed in tangible and material ways to the orderly wind down the Target Canada Entities' businesses. I accept that without the Releases, it is unlikely that all of the Released Parties would have been prepared to support the Amended Plan. The Releases are a significant part of the various compromises that were required to achieve the Amended Plan. They are a necessary element of the global, consensual resolution of this CCAA proceeding.

In particular, the economic contributions by

Target Corporation, as Plan Sponsor, have demonstrably increased the available recoveries for Affected Creditors, as attested by the Monitor. Target Corporation's material direct and indirect contributions as Plan Sponsor include:

a. subordinating a number of Intercompany Claims against TCC;

b. partially subordinating various other Intercompany Claims;

c. a cash contribution of approximately $25.45 million towards the aggregate Landlord Guaranteed Enhancement;

d. a net cash contribution of approximately $4.1 million to fund the Landlord Non-Guaranteed Creditor Equalization;

e. a cash contribution of $700,000 towards costs of certain Landlord Guaranteed Creditors;

f. funding the Employee Trust in the amount of $95 million.

I am satisfied that the Releases are appropriately narrow and rationally connected to the overall purposes of the Amended Plan. The Plan Sponsor Released Parties are not released from the Landlord Guarantee Claims, which are separately resolved in the Landlord Guarantee Creditors Settlement Agreement. Nor will Target Corporation be released under the Amended Plan from any indemnity or guarantee in favour of any Director, Officer or employee.

I am also satisfied that the Releases apply to the extent permitted by law and expressly do not apply to liability for criminal, fraudulent or other willful misconduct, or to other claims that are not permitted to be compromised or released under the CCAA.

Full disclosure of the Releases was made to the Affected Creditors in the Meeting Order Affidavit, in the Amended Plan and in the Letter to Creditors. The terms of the Release were also disclosed to creditors in the Original Plan. No party has objected to the scope of the Releases as contained in the Amended Plan.

Having considered the Record and the applicable law, I am satisfied that the Amended Plan represents an equitable balancing of the interests of all Stakeholders in accordance with the provisions and obligations of the CCAA and I find that the Amended Plan is both fair and reasonable to all Stakeholders. The Amended Plan is sanctioned and approved.

The Applicants have also requested an extension of the stay period to September 23, 2016. It is clear that the CCAA proceedings have to be extended so as to permit Plan Implementation to occur and to provide sufficient time to complete post implementation details. I am satisfied the parties are working in good faith and with due diligence in this matter and that there are

sufficient resources available to fund the Applicants during the proposed extension period. The extension of the stay period is approved. In order to accommodate my schedule, the stay period is extended to September 26, 2016, being three days longer than the requested period. The Applicants also request an extension of the Notice of Objection Bar Date to the Plan Implementation Date. This request is reasonable in the circumstances and it is ordered that the Notice of Objection Bar Date expire on the Plan Implementation Date.

The motion is therefore granted and the Sanction Order has been signed by me.

In closing, I would like to thank all parties and their representatives for the manner in which this proceeding has been conducted. All parties and their counsel, by working in a constructive and cooperative manner, have made a contribution to the Amended Plan. It is very rare to have a CCAA plan of this magnitude supported by 100 percent of the affected creditors who voted at the creditors' meetings. This Sanctioned Amended Plan represents the best outcome from this unfortunate commercial venture.

Form 2

Certificate of Transcript *(Subsection 5(2))*

Evidence Act

I, Tracy Eybel certify that this document is a true and accurate transcript of the recording of Target Canada et al, in the Superior Court of Justice, held at TORONTO taken from Recording 4899_8-2_20160602_085852__10 which has been certified in Form 1.

August 27, 2016

(Date) Authorized Court Transcriptionist

The Typist
Certified Verbatim Transcription
519-721-1879

Tab 19

CITATION: Re: Canwest Global Communications Corp. 2010 ONSC 4209
COURT FILE NO.: CV-09-8396-00CL
DATE: 20100728

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF SECTION 11 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 CANWEST GLOBAL COMMUNICATIONS AND THE OTHER APPLICANTS

BEFORE: Pepall J.

COUNSEL: *Lyndon Barnes, Jeremy Dacks and Shawn Irving* for the CMI Entities
David Byers and Marie Konyukhova for the Monitor
Robin B. Schwill and Vince Mercier for Shaw Communications Inc.
Derek Bell for the Canwest Shareholders Group (the "Existing Shareholders")
Mario Forte for the Special Committee of the Board of Directors
Robert Chadwick and Logan Willis for the Ad Hoc Committee of Noteholders
Amanda Darrach for Canwest Retirees
Peter Osborne for Management Directors
Steven Weisz for CIBC Asset-Based Lending Inc.

ORAL REASONS FOR DECISION

[1] This is the culmination of the *Companies' Creditors Arrangement Act*[1] restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring

[1] R.S.C. 1985, c. C-36 as amended.

was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

[2] The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

[3] The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US $440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US $2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional $38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

[4] In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

(a) the Noteholders; and

(b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

[5] The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLP Plan Entities. In its 16th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries on a going concern liquidation and based on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLP Plan Entities share pro rata in two-thirds of the Ordinary Creditors' pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share pro rata in one-third of the Ordinary Creditors' pool.

[6] It is contemplated that the Plan will be implemented by no later than September 30, 2010.

[7] The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and other equity-based awards outstanding thereunder will be terminated and cancelled and the participants therein shall not be entitled to any distributions under the Plan.

[8] On a distribution date to be determined by the Monitor following the Plan implementation date, all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

[9] Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

[10] In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of $11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

[11] Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

[12] Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

[13] The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

[14] Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

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

(b) all material 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

(c) the Plan must be fair and reasonable.

See *Re: Canadian Airlines Corp.*[2]

(a) Statutory Requirements

[15] I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding $5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

[16] Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan

[2] 2000 A.B.Q.B. 442 at para. 60, leave to appeal denied 2000 A.B.C.A 238, aff'd 2001 A.B.C.A 9, leave to appeal to S.C.C. refused July 12, 2001.

Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (l) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

[17] In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Re Canadian Airlines*[3].

[18] The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

[19] The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Re Canadian Airlines*:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an

[3] Ibid,at para. 64 citing *Olympia and York Developments Ltd. v. Royal Trust Co*. [1993] O.J. No. 545 (Gen. Div.) and *Re: Cadillac Fairview Inc*. [1995] O.J. No. 274 (Gen. Div.).

> insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[4]

[20] My discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

[21] In assessing whether a proposed plan is fair and reasonable, considerations include the following:

(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.

[22] I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing

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[4] Ibid, at para. 3.

accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Re Armbro Enterprises Inc.*[5] Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

> "I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed re-organization."[6]

[23] Similarly, in *Re: Uniforêt Inc.*[7] a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

[24] I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the

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[5] (1993), 22 C.B.R. (3rd) 80 (Ont. Gen. Div.).

[6] *Ibid*, at para. 6.

[7] (2003), 43 C.B.R. (4th) 254 (QEUE. S.C.).

guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

[25] Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

[26] The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

[27] I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

[28] The Plan does include broad releases including some third party releases. In *Metcalfe v. Mansfield Alternative Investments II Corp.*[8], the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. 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.

[29] In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

[30] In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have

[8] (2008), 92 O.R. (3rd) 513 (C.A.).

already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

[31] Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Entities, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

[32] In my view, the Plan is fair and reasonable and I am granting the sanction order requested. [9]

[33] The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Re Air Canada*[10] and *Re Calpine Canada Energy Ltd.*[11] I am satisfied that the agreement is fair and reasonable and should be approved.

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[9] The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.

[10] (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

[11] (2007), 35 C.B.R. (5th) 1.

[34] It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1)(c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors. The CCAA is such an Act: *Beatrice Foods v. Merrill Lynch Capital Partners Inc.*[12] and *Re Laidlaw Inc*[13]. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

> (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> (e) create new classes of shares;
>
> (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

[35] Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

[36] In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements;

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[12] (1996), 43 CBR (4th) 10.

[13] (2003), 39 CBR (4th) 239.

(b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *Re: A & M Cookie Co. Canada*[14] and *Mei Computer Technology Group Inc.*[15]

[37] I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

[38] A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

[39] In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

Pepall J.

Released: July 28, 2010

[14] [2009] O.J. No. 2427 (S.C.J.) at para. 8/

[15] [2005] Q.J. No. 2293 at para. 9.

Tab 20

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 7050
COURT FILE NO.: CV-12-9667-00CL
DATE: 20121212

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 SINO-FOREST CORPORATION, Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for Sino-Forest Corporation**

Derrick Tay, Jennifer Stam, and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Kenneth Rosenberg, Kirk Baert, Max Starnino, and A. Dimitri Lascaris, for the Class Action Plaintiffs

Won J. Kim, James C. Orr, Michael C. Spencer, and Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc.

Peter Griffin, Peter Osborne and Shara Roy, for Ernst & Young Inc.

Peter Greene and Ken Dekkar, for BDO Limited

Edward A. Sellers and Larry Lowenstein, for the Board of Directors of Sino-Forest Corporation

John Pirie and David Gadsden, for Poyry (Beijing)

James Doris, for the Plaintiff in the New York Class Action

David Bish, for the Underwriters

Simon Bieber and Erin Pleet, for David Horsley

James Grout, for the Ontario Securities Commission

Emily Cole and Joseph Marin, for Allen Chan

Susan E. Freedman and Brandon Barnes, for Kai Kit Poon

Paul Emerson, for ACE/Chubb

Sam Sasso, for Travelers

HEARD: DECEMBER 7, 2012

ENDORSED: DECEMBER 10, 2012

REASONS: DECEMBER 12, 2012

ENDORSEMENT

[1] On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

[2] The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning (the "Sanction Order") a plan of compromise and reorganization dated December 3, 2012 as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA").

[3] With the exception of one party, SFC's position is either supported or is not opposed.

[4] Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds requested an adjournment for a period of one month. I denied the Funds' adjournment request in a separate endorsement released on December 10, 2012 (*Re Sino-Forest Corporation*, 2012 ONSC 7041). Alternatively, the Funds requested that the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants".

[5] The defined terms have been taken from the motion record.

[6] SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision")

(2012 ONSC 4377, 92 C.B.R. (5th) 99), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816).

[7] Counsel submits that the classification of creditors for the purpose of voting on the Plan was proper and consistent with the CCAA, existing law and prior orders of this court, including the Equity Claims Decision and the Plan Filing and Meeting Order.

[8] The Plan has the support of the following parties:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

[9] The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee", also referred to as the "Class Action Plaintiffs") has agreed not to oppose the Plan. The Monitor has considered possible alternatives to the Plan, including liquidation and bankruptcy, and has concluded that the Plan is the preferable option.

[10] The Plan was approved by an overwhelming majority of Affected Creditors voting in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

[11] Options and alternatives to the Plan have been explored throughout these proceedings. SFC carried out a court-supervised sales process (the "Sales Process"), pursuant to the sales process order (the "Sales Process Order"), to seek out potential qualified strategic and financial purchasers of SFC's global assets. After a canvassing of the market, SFC determined that there were no qualified purchasers offering to acquire its assets for qualified consideration ("Qualified Consideration"), which was set at 85% of the value of the outstanding amount owing under the notes (the "Notes").

[12] SFC's counsel submits that the Plan achieves the objective stated at the commencement of the CCAA proceedings (namely, to provide a "clean break" between the business operations of the global SFC enterprise as a whole ("Sino-Forest") and the problems facing SFC, with the aspiration of saving and preserving the value of SFC's underlying business for the benefit of SFC's creditors).

Facts

[13] SFC is an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China ("PRC"). SFC's registered office is located in Toronto and its principal business office is located in Hong Kong.

[14] SFC is a holding company with six direct subsidiaries (the "Subsidiaries") and an indirect majority interest in Greenheart Group Limited (Bermuda), a publicly-traded company. Including SFC and the Subsidiaries, there are 137 entities that make up Sino-Forest: 67 companies incorporated in PRC, 58 companies incorporated in British Virgin Islands, 7 companies incorporated in Hong Kong, 2 companies incorporated in Canada and 3 companies incorporated elsewhere.

[15] On June 2, 2011, Muddy Waters LLC ("Muddy Waters"), a short-seller of SFC's securities, released a report alleging that SFC was a "near total fraud" and a "Ponzi scheme". SFC subsequently became embroiled in multiple class actions across Canada and the United States and was subjected to investigations and regulatory proceedings by the Ontario Securities Commission ("OSC"), Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police.

[16] SFC was unable to file its 2011 third quarter financial statements, resulting in a default under its note indentures.

[17] Following extensive arm's length negotiations between SFC and the Ad Hoc Noteholders, the parties agreed on a framework for a consensual resolution of SFC's defaults under its note indentures and the restructuring of its business. The parties ultimately entered into a restructuring support agreement (the "Support Agreement") on March 30, 2012, which was initially executed by holders of 40% of the aggregate principal amount of SFC's Notes. Additional consenting noteholders subsequently executed joinder agreements, resulting in noteholders representing a total of more than 72% of aggregate principal amount of the Notes agreeing to support the restructuring.

[18] The restructuring contemplated by the Support Agreement was commercially designed to separate Sino-Forest's business operations from the problems facing the parent holding company outside of PRC, with the intention of saving and preserving the value of SFC's underlying business. Two possible transactions were contemplated:

(a) First, a court-supervised Sales Process to determine if any person or group of persons would purchase SFC's business operations for an amount in excess of the 85% Qualified Consideration;

(b) Second, if the Sales Process was not successful, a transfer of six immediate holding companies (that own SFC's operating business) to an acquisition vehicle to be owned by Affected Creditors in compromise of their claims against SFC. Further, the creation of a litigation trust (including funding) (the "Litigation Trust") to enable SFC's litigation claims against any person not otherwise released within the CCAA proceedings,

preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

[19] SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012, and unless further extended, will expire on February 1, 2013.

[20] On March 30, 2012, the Sales Process Order was granted. While a number of Letters of Intent were received in respect of this process, none were qualified Letters of Intent, because none of them offered to acquire SFC's assets for the Qualified Consideration. As such, on July 10, 2012, SFC announced the termination of the Sales Process and its intention to proceed with the Restructuring Transaction.

[21] On May 14, 2012, this court granted an order (the "Claims Procedure Order") which approved the Claims Process that was developed by SFC in consultation with the Monitor.

[22] As of the date of filing, SFC had approximately $1.8 billion of principal amount of debt owing under the Notes, plus accrued and unpaid interest. As of May 15, 2012, Noteholders holding in aggregate approximately 72% of the principal amount of the Notes, and representing more than 66.67% of the principal amount of each of the four series of Notes, agreed to support the Plan.

[23] After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

[24] *The Labourers v. Sino-Forest Corporation Class Action* (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds LLP. It has the following two components: first, there is a shareholder claim (the "Shareholder Class Action Claims") brought on behalf of current and former shareholders of SFC seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; second, there is a $1.8 billion noteholder claim (the "Noteholder Class Action Claims") brought on behalf of former holders of SFC's Notes. The noteholder component seeks damages for loss of value in the Notes.

[25] The Quebec Class Action is similar in nature to the Ontario Class Action, and both plaintiffs filed proof of claim in this proceeding. The plaintiffs in the Saskatchewan Class Action did not file a proof of claim in this proceeding, whereas the plaintiffs in the New York Class Action did file a proof of claim in this proceeding. A few shareholders filed proofs of claim separately, but no proof of claim was filed by the Funds.

[26] In this proceeding, the Ad Hoc Securities Purchasers Committee - represented by Siskinds LLP, Koskie Minsky, and Paliare Roland Rosenberg Rothstein LLP - has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others.

[27] Since 2000, SFC has had the following two auditors ("Auditors"): E&Y from 2000 to 2004 and 2007 to 2012 and BDO from 2005 to 2006.

[28] The Auditors have asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the Shareholder Class Action Claims, with each of the Auditors having asserted claims in excess of $6.5 billion. The Auditors have also asserted indemnification claims in respect the Noteholder Class Action Claims.

[29] The Underwriters have similarly filed claims against SFC seeking contribution and indemnity for the Shareholder Class Action Claims and Noteholder Class Action Claims.

[30] The Ontario Securities Commission ("OSC") has also investigated matters relating to SFC. The OSC has advised that they are not seeking any monetary sanctions against SFC and are not seeking monetary sanctions in excess of $100 million against SFC's directors and officers (this amount was later reduced to $84 million).

[31] SFC has very few trade creditors by virtue of its status as a holding company whose business is substantially carried out through its Subsidiaries in PRC and Hong Kong.

[32] On June 26, 2012, SFC brought a motion for an order declaring that all claims made against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims to be "equity claims" (as defined in section 2 of the CCAA). These claims encapsulate the commenced Shareholder Class Action Claims asserted against SFC. The Equity Claims Decision did not purport to deal with the Noteholder Class Action Claims.

[33] In reasons released on July 27, 2012, I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly equity claims." The Auditors and Underwriters appealed the decision and on November 23, 2012, the Court of Appeal for Ontario dismissed the appeal.

[34] On August 31, 2012, an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

[35] According to SFC's counsel, the Plan endeavours to achieve the following purposes:

(a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all affected claims;

(b) to effect the distribution of the consideration provided in the Plan in respect of proven claims;

(c) to transfer ownership of the Sino-Forest business to Newco and then to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries so as to enable the Sino-Forest business to continue on a viable, going concern basis for the benefit of the Affected Creditors; and

(d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the litigation trustee.

[36] Pursuant to the Plan, the shares of Newco ("Newco Shares") will be distributed to the Affected Creditors. Newco will immediately transfer the acquired assets to Newco II.

[37] SFC's counsel submits that the Plan represents the best available outcome in the circumstances and those with an economic interest in SFC, when considered as a whole, will derive greater benefit from the implementation of the Plan and the continuation of the business as a going concern than would result from bankruptcy or liquidation of SFC. Counsel further submits that the Plan fairly and equitably considers the interests of the Third Party Defendants, who seek indemnity and contribution from SFC and its Subsidiaries on a contingent basis, in the event that they are found to be liable to SFC's stakeholders. Counsel further notes that the three most significant Third Party Defendants (E&Y, BDO and the Underwriters) support the Plan.

[38] SFC filed a version of the Plan in August 2012. Subsequent amendments were made over the following months, leading to further revised versions in October and November 2012, and a final version dated December 3, 2012 which was voted on and approved at the meeting. Further amendments were made to obtain the support of E&Y and the Underwriters. BDO availed itself of those terms on December 5, 2012.

[39] The current form of the Plan does not settle the Class Action Claims. However, the Plan does contain terms that would be engaged if certain conditions are met, including if the class action settlement with E&Y receives court approval.

[40] Affected Creditors with proven claims are entitled to receive distributions under the Plan of (i) Newco Shares, (ii) Newco notes in the aggregate principal amount of U.S. $300 million that are secured and guaranteed by the subsidiary guarantors (the "Newco Notes"), and (iii) Litigation Trust Interests.

[41] Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their *pro rata* share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

[42] With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate

amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of $150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the $150 million Indemnified Noteholder Class Action Limit.

[43] The Plan includes releases for, among others, (a) the subsidiary; (b) the Underwriters' liability for Noteholder Class Action Claims in excess of the Indemnified Noteholder Class Action Limit; (c) E&Y in the event that all of the preconditions to the E&Y settlement with the Ontario Class Action plaintiffs are met; and (d) certain current and former directors and officers of SFC (collectively, the "Named Directors and Officers"). It was emphasized that non-released D&O Claims (being claims for fraud or criminal conduct), conspiracy claims and section 5.1 (2) D&O Claims are not being released pursuant to the Plan.

[44] The Plan also contemplates that recovery in respect of claims of the Named Directors and Officers of SFC in respect of any section 5.1 (2) D&O Claims and any conspiracy claims shall be directed and limited to insurance proceeds available from SFC's maintained insurance policies.

[45] The meeting was carried out in accordance with the provisions of the Plan Filing and Meeting Order and that the meeting materials were sent to stakeholders in the manner required by the Plan Filing and Meeting Order. The Plan supplement was authorized and distributed in accordance with the Plan Filing and Meeting Order.

[46] The meeting was ultimately held on December 3, 2012 and the results of the meeting were as follows:

(a) the number of voting claims that voted on the Plan and their value for and against the Plan;

(b) The results of the Meeting were as follows:

a. the number of Voting Claims that voted on the Plan and their value for and against the Plan:

	Number of Votes	%	Value of Votes	%
Total Claims Voting For	250	98.81%	$ 1,465,766,204	99.97%
Total Claims Voting Against	3	1.19%	$ 414,087	0.03%
Total Claims Voting	253	100.00%	$ 1,466,180,291	100.00%

b. the number of votes for and against the Plan in connection with Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims up to the Indemnified Noteholder Limit:

	Vote For	Vote Against	Total Votes
Class Action Indemnity Claims	4	1	5

c. the number of Defence Costs Claims votes for and against the Plan and their value:

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	12	92.31%	$	8,375,016	96.10%
Total Claims Voting Against	1	7.69%	$	340,000	3.90%
Total Claims Voting	13	100.00%	$	8,715,016	100.00%

d. the overall impact on the approval of the Plan if the count were to include Total Unresolved Claims (including Defence Costs Claims) and, in order to demonstrate the "worst case scenario" if the entire $150 million of the Indemnified Noteholder Class Action Limit had been voted a “no” vote (even though 4 of 5 votes were "yes" votes and the remaining "no" vote was from BDO, who has now agreed to support the Plan):

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	263	98.50%	$	1,474,149,082	90.72%
Total Claims Voting Against	4	1.50%	$	150,754,087	9.28%
Total Claims Voting	267	100.00%	$	1,624,903,169	100.00%

[47] E&Y has now entered into a settlement (“E&Y Settlement”) with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

[48] As noted in the endorsement dated December 10, 2012, which denied the Funds’ adjournment request, the E&Y Settlement does not form part of the Sanction Order and no relief is being sought on this motion with respect to the E&Y Settlement. Rather, section 11.1 of the Plan contains provisions that provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met. That release will only be granted if all conditions are met, including further court approval.

[49] Further, SFC’s counsel acknowledges that any issues relating to the E&Y Settlement, including fairness, continuing discovery rights in the Ontario Class Action or Quebec Class Action, or opt out rights, are to dealt with at a further court-approval hearing.

Law and Argument

[50] Section 6(1) of the CCAA provides that courts may sanction a plan of compromise if the plan has achieved the support of a majority in number representing two-thirds in value of the creditors.

[51] To establish the court’s approval of a plan of compromise, the debtor company must establish the following:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

(b) nothing has been done or purported to be done that is not authorized by the CCAA; and

(c) the plan is fair and reasonable.

(See *Re Canadian Airlines Corporation*, 2000 ABQB 442, leave to appeal denied, 2000 ABCA 238, aff'd 2001 ABCA 9, leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 and Re Nelson Financial Group Limited, 2011 ONSC 2750, 79 C.B.R. (5th) 307).

[52] SFC submits that there has been strict compliance with all statutory requirements.

[53] On the initial application, I found that SFC was a "debtor company" to which the CCAA applies. SFC is a corporation continued under the *Canada Business Corporations Act* ("CBCA") and is a "company" as defined in the CCAA. SFC was "reasonably expected to run out of liquidity within a reasonable proximity of time" prior to the Initial Order and, as such, was and continues to be insolvent. SFC has total claims and liabilities against it substantially in excess of the $5 million statutory threshold.

[54] The Notice of Creditors' Meeting was sent in accordance with the Meeting Order and the revised Noteholder Mailing Process Order and, further, the Plan supplement and the voting procedures were posted on the Monitor's website and emailed to each of the ordinary Affected Creditors. It was also delivered by email to the Trustees and DTC, as well as to Globic who disseminated the information to the Registered Noteholders. The final version of the Plan was emailed to the Affected Creditors, posted on the Monitor's website, and made available for review at the meeting.

[55] SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

[56] Counsel submits that the classification of creditors as a single class in the present case complies with the commonality of interests test. See *Re Canadian Airlines Corporation*.

[57] Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc*. (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Re Canadian Airlines Corporation*, and *Re Nortel Networks Corporation* (2009) O.J. No. 2166 (Ont. S.C.). Further, courts should resist classification approaches that potentially jeopardize viable plans.

[58] In this case, the Affected Creditors voted in one class, consistent with the commonality of interests among Affected Creditors, considering their legal interests as creditors. The classification was consistent with the Equity Claims Decision.

[59] I am satisfied that the meeting was properly constituted and the voting was properly carried out. As described above, 99% in number, and more than 99% in value, voting at the meeting favoured the Plan.

[60] SFC's counsel also submits that SFC has not taken any steps unauthorized by the CCAA or by court orders. SFC has regularly filed affidavits and the Monitor has provided regular reports and has consistently opined that SFC is acting in good faith and with due diligence. The court has so ruled on this issue on every stay extension order that has been granted.

[61] In *Nelson Financial*, I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Re Canwest Global Communications Corporation*, 2010 ONSC 4209, 70 C.B.R. (5th) 1:

1. The claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditor; the approval of the plan by the requisite majority of creditors is most important;

2. It is helpful if the Monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy;

3. If other options or alternatives have been explored and rejected as workable, this will be significant;

4. Consideration of the oppression rights of certain creditors; and

5. Unfairness to shareholders.

6. The court will consider the public interest.

[62] The Monitor has considered the liquidation and bankruptcy alternatives and has determined that it does not believe that liquidation or bankruptcy would be a preferable alternative to the Plan. There have been no other viable alternatives presented that would be acceptable to SFC and to the Affected Creditors. The treatment of shareholder claims and related indemnity claims are, in my view, fair and consistent with CCAA and the Equity Claims Decision.

[63] In addition, 99% of Affected Creditors voted in favour of the Plan and the Ad Hoc Securities Purchasers Committee have agreed not to oppose the Plan. I agree with SFC's submission to the effect that these are exercises of those parties' business judgment and ought not to be displaced.

[64] I am satisfied that the Plan provides a fair and reasonable balance among SFC's stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.

[65] The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

[66] In addition to the consideration that is payable to Affected Creditors, Early Consent Noteholders will receive their *pro rata* share of an additional 7.5% of the Newco Shares ("Early Consent Consideration"). Plans do not need to provide the same recovery to all creditors to be considered fair and reasonable and there are several plans which have been sanctioned by the courts featuring differential treatment for one creditor or one class of creditors. See, for example, *Canwest Global* and *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.). A common theme permeating such cases has been that differential treatment does not necessarily result in a finding that the Plan is unfair, as long as there is a sufficient rational explanation.

[67] In this case, SFC's counsel points out that the Early Consent Consideration has been a feature of the restructuring since its inception. It was made available to any and all noteholders and noteholders who wished to become Early Consent Noteholders were invited and permitted to do so until the early consent deadline of May 15, 2012. I previously determined that SFC made available to the noteholders all information needed to decide whether they should sign a joinder agreement and receive the Early Consent Consideration, and that there was no prejudice to the noteholders in being put to that election early in this proceeding.

[68] As noted by SFC's counsel, there was a rational purpose for the Early Consent Consideration. The Early Consent Noteholders supported the restructuring through the CCAA proceedings which, in turn, provided increased confidence in the Plan and facilitated the negotiations and approval of the Plan. I am satisfied that this feature of the Plan is fair and reasonable.

[69] With respect to the Indemnified Noteholder Class Action Limit, I have considered SFC's written submissions and accept that the $150 million agreed-upon amount reflects risks faced by both sides. The selection of a $150 million cap reflects the business judgment of the parties making assessments of the risk associated with the noteholder component of the Ontario Class Action and, in my view, is within the "general range of acceptability on a commercially reasonable basis". See *Re Ravelston Corporation*, (2005) 14 C.B.R. (5^{th}) 207 (Ont. S.C). Further, as noted by SFC's counsel, while the New York Class Action Plaintiffs filed a proof of claim, they have not appeared in this proceeding and have not stated any opposition to the Plan, which has included this concept since its inception.

[70] Turning now to the issue of releases of the Subsidiaries, counsel to SFC submits that the unchallenged record demonstrates that there can be no effective restructuring of SFC's business and separation from its Canadian parent if the claims asserted against the Subsidiaries arising out of or connected to claims against SFC remain outstanding. The Monitor has examined all of the releases in the Plan and has stated that it believes that they are fair and reasonable in the circumstances.

[71] The Court of Appeal in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corporation*, 2008 ONCA 587, 45 C.B.R. (5th) 163 stated that the "court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring".

[72] In this case, counsel submits that the release of Subsidiaries is necessary and essential to the restructuring of SFC. The primary purpose of the CCAA proceedings was to extricate the business of Sino-Forest, through the operation of SFC's Subsidiaries (which were protected by the Stay of Proceedings), from the cloud of uncertainty surrounding SFC. Accordingly, counsel submits that there is a clear and rational connection between the release of the Subsidiaries in the Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

[73] Counsel points out that the Subsidiaries who are to have claims against them released are contributing in a tangible and realistic way to the Plan. The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.

[74] In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial*, *Re Nortel Networks*, 2010 ONSC 1708, and *Re Kitchener Frame Limited*, 2012 ONSC 234, 86 C.B.R. (5th) 274. Further, it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan.

[75] With respect to the Named Directors and Officers release, counsel submits that this release is necessary to effect a greater recovery for SFC's creditors, rather than having those directors and officers assert indemnity claims against SFC. Without these releases, the quantum of the unresolved claims reserve would have to be materially increased and, to the extent that any such indemnity claim was found to be a proven claim, there would have been a corresponding dilution of consideration paid to Affected Creditors.

[76] It was also pointed out that the release of the Named Directors and Officers is not unlimited; among other things, claims for fraud or criminal conduct, conspiracy claims, and section 5.1 (2) D&O Claims are excluded.

[77] I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

[78] Finally, in my view, it is necessary to provide brief comment on the alternative argument of the Funds, namely, the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants". The Plan was presented to the meeting with Article 11 in place. This was the Plan that was subject to the vote and this is the Plan that is the subject of this motion. The alternative proposed by the Funds was not considered at the meeting and, in my view, it is not appropriate to consider such an alternative on this motion.

Disposition

[79] Having considered the foregoing, I am satisfied that SFC has established that:

(i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and

(iii) the Plan is fair and reasonable.

[80] Accordingly, the motion is granted and the Plan is sanctioned. An order has been signed substantially in the form of the draft Sanction Order.

MORAWETZ J.

Date: December 12, 2012

Tab 21

See para. 5

Algoma Steel Corp. v. Royal Bank of Canada and Montreal Trust Co. as trustee of debentures issued by Algoma Steel Corp. under a trust indenture, and Royal Bank of Canada, Canadian Imperial Bank of Commerce, Hongkong Bank of Canada and the Toronto-Dominion Bank in their capacity as holders of debentures issued pursuant to the trust indenture *

[Indexed as: Algoma Steel Corp. v. Royal Bank of Canada]

8 O.R. (3d) 449
[1992] O.J. No. 889
Action No. C11707

Court of Appeal for Ontario,
Krever, McKinlay and Labrosse JJ.A.
April 30, 1992

* Application for leave to appeal to the Supreme Court of Canada was refused with costs October 29, 1992 (La Forest, Sopinka and Gonthier JJ.).

Debtor and creditor -- Companies' Creditors Arrangement Act -- Unsecured creditor seeking leave to sue debtor for contribution and indemnity for liability for product liability claim -- Debtor having product liability insurance -- Creditor suing debtor to obtain proceeds of insurance under s. 132 of Insurance Act -- If creditors not prejudiced, court may amend plan of arrangement to allow claim to proceed -- Insurance Act, R.S.O. 1990, c. I.8, s. 132 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Companies' Creditors Arrangement Act -- Court having jurisdiction to amend plan of arrangement in exceptional circumstances -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

K-H was a defendant in an action brought by an infant who had suffered serious personal injuries when a wheel manufactured by K-H broke away from a truck. K-H sought contribution and indemnity from A, the manufacturer of the steel used in the wheel. By making this claim, K-H could seek, pursuant to s. 132 of the Insurance Act, the proceeds of A's product liability insurance policy issued by R Insurance Co. A, however, was subject to an order under the Companies' Creditors Arrangement Act (CCAA) that required the court's leave for proceedings to be brought against A. Further, under that Act, a plan of arrangement provided that upon payment by A to a trustee of a certain sum all claims of the specified unsecured creditors would be released, discharged and cancelled. K-H was a specified unsecured creditor with a claim valued by A at the sum of one dollar. K-H applied to the court under s. 12(2)(iii) of the CCAA for the determination of the amount of its claim. K-H also applied for relief under the plan of arrangement for the amount of any liability A may have to it in excess of the policy limits. The judge at first instance confirmed the valuation of the claim and held that he had no authority to permit K-H to proceed against A. K-H applied for and was granted leave to appeal. The essential issue in the appeal was whether under the CCAA the existence of a plan of arrangement prevented the court from permitting K-H to sue A even to the limited extent of the insurance proceeds.

Held, leave to appeal should be granted and the appeal should be allowed.

However weak the evidence available on the application, the case against A was not without foundation nor frivolous. The fact that s. 12(2)(iii) provides that the amount of the creditor's claim, if not admitted by the company "shall be determined by the court on summary application by the company or by the creditor", does not compel the court to determine the valuation summarily. In an appropriate case, the determination could be made after a trial. In the absence of such a trial, it could not be said that the valuation of K-H's claim at one dollar was correct.

To grant the other relief sought by K-H would require an

amendment by the court of the plan of arrangement. Generally speaking, the plan of arrangement is consensual and the result of agreement. If the plan is fair and reasonable, it is not to be interfered with by the court unless (a) the Act authorizes the court to affect the plan and (b) there are compelling reasons justifying the court's action. Where no prejudice would result and the needs of justice would be met, the court may act if the CCAA authorizes intervention. Here, s. 11(c) may enable the court to amend, depending on the circumstances and the language of the plan itself. The court's jurisdiction is to be exercised sparingly and in exceptional circumstances only. In this case, for example, it would be unacceptable if the amendment exposed assets other than the insurance proceeds. If only the insurance proceeds were made potentially available, no interest was affected adversely. R Insurance Co. was not prejudiced because under s. 132(1) of the Insurance Act , its liability was subject to the same equities as the insurer would have had if the judgment against the debtor had been satisfied. The position of D, which was facilitating the plan of arrangement as part of a comprehensive restructuring scheme, could be protected by the court providing, in the order, that the assets of A (other than the insurance proceeds), and the assets of any other corporation that may become responsible in any way for any liabilities of A by virtue of the operation of the plan of arrangement or the more comprehensive scheme of restructuring, shall not be available to satisfy any judgment obtained as a result of any proceedings by K-H against A.

Statutes referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11(c), 12(2)(iii)
Insurance Act, R.S.O. 1990, c. I.8, s. 132, 132(1)

APPEAL from an order dismissing a motion to amend a plan of arrangement under the Companies' Creditors Arrangement Act.

D.J.T. Mungovan and Debbie A. Campbell, for Kelsey-Hayes Canada Ltd. and Kelsey-Hayes Co.

M.E. Royce and M.E. Barrack, for Algoma Steel Corp.

W.L.N. Somerville, Q.C., and B.H. Bresner, for Royal Insurance Co. of Canada.

R.N. Robertson, Q.C., and W. Alfred Apps, for Dofasco Inc.

THE COURT:-- This is a motion for leave to appeal and, if leave is granted, an appeal, under the provisions of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (CCAA), from the order of Farley J. dismissing a motion for the valuation of the claim of Kelsey-Hayes Canada Limited (Kelsey-Hayes) and for leave to bring proceedings against the Algoma Steel Corporation Limited (Algoma), the subject of a plan of arrangement under the CCAA.

Kelsey-Hayes is involved in product liability litigation in Missouri as a result of serious personal injuries suffered by a child when a wheel broke away from a Dodge truck and struck him. The wheel was manufactured by Kelsey-Hayes against whom a Missouri jury awarded a verdict in excess of four million dollars (U.S.). That verdict was set aside by the trial judge on the basis that Chrysler Corporation, the truck's manufacturer, had been improperly dismissed from the action at an earlier stage. The setting aside of the verdict was appealed to the Missouri Court of Appeals, but judgment on the appeal has been reserved. Kelsey-Hayes, the defendant in the Missouri litigation, alleges that the steel used for the manufacture of the errant wheel was a defective product of Algoma and seeks to claim contribution or indemnity from Algoma in order to be able to pursue, under s. 132 of the Insurance Act, R.S.O. 1990, c. I.8, the proceeds of a product liability insurance policy by which Algoma is insured by the Royal Insurance Company of Canada (Royal). It also seeks relief under the plan of arrangement in respect of the amount of any liability Algoma may have to it in excess of the policy limits.

In the CCAA proceedings an order was made by Montgomery J. in the terms of s. 11(c) of the CCAA that no action or other

proceeding may be proceeded with or commenced against Algoma except with the leave of the court. It is common ground that Kelsey-Hayes, by reason of its claim against Algoma, is a known designated unsecured creditor of Algoma, as defined in the plan of arrangement. The plan of arrangement, which has been voted on by all classes of affected creditors, and sanctioned, subject to the outcome of this appeal, by an order of Farley J. dated April 26, 1992, provides that upon payment by Algoma to a trustee of a certain sum in payment of the claims of the specified unsecured creditors, "all Claims of Specified Unsecured Creditors will be released, discharged and cancelled".

After Kelsey-Hayes notified Algoma of the litigation in Missouri, of its allegation of defective steel against Algoma, and of its claim in the amount of the Missouri verdict, Algoma responded by valuing the claim at the sum of one dollar. Kelsey-Hayes thereupon applied to the court, under the provisions of s. 12(2)(iii) of the CCAA , for the determination of the amount of its claim. Before the application was heard, Kelsey-Hayes enlarged the relief sought to include that described above and Royal was brought into the proceedings. Mr. Justice Farley held that he had no authority to permit Kelsey-Hayes to proceed against Algoma and went on to confirm the valuation of the claim at one dollar. The essential issue in this appeal is whether, under the CCAA, the fact that the plan of arrangement now exists prevents the court from permitting Algoma from being proceeded against by Kelsey-Hayes even to the limited extent of the insurance proceeds.

We are of the view that, however weak the evidence available on the application may have been with respect to the origin of the steel used in the manufacture of the wheel, and thus the case against Algoma, it cannot be said that the case is without any foundation or is frivolous. The fact that s. 12(2)(iii) provides that the amount of a creditor's claim, if not admitted by the company, "shall be determined by the court on summary application by the company or by the creditor", does not compel the court to determine the valuation summarily. The provision simply authorizes the proceedings to be brought summarily, that is, by way of originating notice of motion or application

rather than by the lengthier, and more complicated, procedure of an action. In an appropriate case, therefore, there is no reason why the determination cannot be made after a trial either of an issue or an action, in the course of which production and discovery would be available. In the absence of such a trial, it cannot be said, in our view, that the valuation of the claim of Kelsey-Hayes against Algoma in the sum of one dollar is correct.

The more difficult question is whether the court has jurisdiction to authorize proceedings now that the plan of arrangement is in place. It is submitted that it does not because of the need for commercial certainty and because to do so would be to amend the plan of arrangement (which extinguishes the claims of all designated unsecured creditors of which Kelsey-Hayes is certainly one). The plan of arrangement is a matter of contract, it is argued, and the court's jurisdiction is limited to sanctioning or refusing to sanction the arrangement arrived at contractually. There is much merit in this argument but, in our view, it is not a complete answer.

Kelsey-Hayes does not deny that if the language of the plan of arrangement quoted above, extinguishing the claims of designated unsecured creditors, is unambiguous, as we believe it is, to grant the relief which it seeks would require an amendment by the court of the plan of arrangement. We accept the submission that, generally speaking, the plan of arrangement is consensual and the result of agreement and that if it is fair and reasonable (an issue for the court to decide) it is not to be interfered with by the court unless (a) the Act authorizes the court to affect the plan and (b) there are compelling reasons justifying the court's action. Generally speaking again, the court ought not to interfere where to do so would prejudice the interests of the company or the creditors. But where no prejudice would result and the needs of justice are to be met, the court may act if the CCAA, properly interpreted, authorizes intervention. In this connection, it may be relevant that, although it is hardly conclusive, Algoma's management information circular to creditors, shareholders and employees, which accompanied the proposed plan

of arrangement, advised those persons, under the heading "Court Approval of the Plan" as follows:

> The authority of the Court is very broad under both the CCAA and the OBCA -- Algoma has been advised by counsel that the Court will consider, among other things, the fairness and reasonableness of the Plan. The Court may approve the Plan as proposed or as amended in any manner that the Court may direct and subject to compliance with such terms and conditions, if any, as the Court thinks fit.

(Emphasis added)

We agree that the circular's statement that the court may direct an amendment of the plan does not, as a matter of law, make it so. The CCAA must be the authority for the jurisdiction and the critical issue is whether there is any provision in the Act that fairly gives rise to a power in the court to amend. In our view there is such a provision and that provision, s. 11(c), depending on the language of the plan itself, may by necessary inference, in an appropriate case, enable the court to make an order, the technical effect of which is that the plan is amended. The relevant portion of the section reads as follows:

> . . . whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> . . . . .
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

(Emphasis added)

As we have already pointed out, an order in the terms of this provision was made early in the proceedings by Montgomery J.

The effect of the enactment and the order is to empower the court to grant leave to take proceedings against Algoma in appropriate circumstances. It was submitted that this power, having regard to the commercial realities reflected by the CCAA, is one that may be exercised only before the creditors have voted to accept the plan of arrangement. No authority could be cited to support such a circumscription of the court's jurisdiction, unqualifiedly conferred by the statute. Nor, as a matter of principle, is there any reason to suggest that the scheme created by the CCAA contemplates a role for the court as a mere rubber stamp or one that is simply administrative rather than judicial. On the other hand, we have no doubt that, given the primacy accorded by the Act to agreement among the affected actors, the jurisdiction of the court is to be exercised sparingly and in exceptional circumstances only, if the result of the exercise is to amend the plan, even in merely a technical way. In this case, for example, it would be an unacceptable exercise of jurisdiction if the effect of granting leave to Kelsey-Hayes to proceed against Algoma would be to render vulnerable to possible execution any assets other than insurance proceeds, if any, that may be available under the policy by which Royal insured Algoma against product liability. If the leave granted could be so limited, and that is the difficulty that must be addressed, the plan of arrangement which, in its terms, extinguishes the claims of designated unsecured creditors, would undergo amendment in an insignificant and technical way only, as far as the other creditors are concerned.

The concern of prejudice must now be considered and the question asked whether any interests would be affected detrimentally if Kelsey-Hayes were permitted to claim against Algoma to the extent only of recourse to the insurance proceeds. If to give leave had the effect of giving potential access to assets over and above the policy limits, there would indeed be prejudice to several interests and, moreover, the plan of arrangement would be significantly amended. On the premise that only the insurance proceeds were to be made potentially available to satisfy any judgment that Kelsey-Hayes may be awarded in its claim over against Algoma, it cannot be said that any interest is affected adversely except possibly

that of Royal and that of Dofasco Inc. (Dofasco). It is to that issue that we now turn.

The potential liability of Royal to Kelsey-Hayes as insurer of Algoma arises out of the provisions of s. 132(1) of the Insurance Act, which read as follows:

> 132.(1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

Royal is potentially answerable to Kelsey-Hayes, a third party with respect to Algoma's policy of insurance only by virtue of this statutory provision but, in any third-party claim against it, its liability is "subject to the same equities as the insurer would have if the judgment had been satisfied". Prejudice, in a legal sense, as far as Royal is concerned is non-existent.

The question of prejudice to Dofasco is more difficult. Its interest arises in this way. As part of the comprehensive restructuring scheme of which the plan of arrangement is the central part, Algoma's assets are to be transferred to a new corporate entity, referred to in argument as New Algoma, in which Algoma's shareholders and creditors (whose claims are being compromised and otherwise discharged) are to receive shares. The funds to make this possible are to be supplied by Dofasco in the sum of 30 million dollars. In return, Dofasco is to obtain Algoma's tax loss in the sum of $150 million. The result of these transactions as contemplated by the comprehensive scheme is that Algoma is to become devoid of assets and creditors, in short, that Algoma is to be made a "clean corporation", or a mere shell with a tax loss carry-forward. Dofasco filed no material and, on the appeal filed

no factum, showing any prejudice which it might suffer if leave to proceed is granted. Instead, in oral argument, it submitted that any such order would impair the integrity of the plan of arrangement and reduce the certainty that was necessary for the plan's success. In our view, no impairment will occur if an order is made subject to sufficient safeguards to limit any possible recovery to the insurance proceeds. We think a safeguard can be provided. The difficulty is in the language of s. 132 of the Insurance Act which requires, as a condition precedent to a direct action against the insurer, that an execution against the insured be returned unsatisfied.

This very requirement makes the purpose of the section clear. It is to provide direct access to an insurer, by a person incurring the liability referred to in the section, in a situation where the insured is judgment-proof, thus circumventing the normal operation of insurance contracts, which is solely to indemnify the insured against loss. To interpret the section in such a way as to apply only in the narrow situation where the insured is judgment-proof (and therefore almost certainly insolvent), but not in situations where either the insured or its creditors have taken proceedings pursuant to federal insolvency statutes, would be to frustrate its objectives in a large percentage of situations where it would otherwise apply.

If the plaintiff in this case were successful in the Missouri action against Kelsey-Hayes and Kelsey-Hayes were successful in a permitted claim over for indemnity or contribution from Algoma, there could be no question that, notionally, the condition precedent of an unsatisfied judgment would be met because, prior to the plan Algoma was insolvent and the commencement of proceedings under the CCAA rendered it judgment-proof. To secure the certainty of the integrity of the plan, which Dofasco argues it needs in order to discharge its role in the scheme, we make clear our intention that only any insurance proceeds that may become available to Algoma are to be the subject of any recovery against Algoma that Kelsey-Hayes may prove that it is entitled to. That is to be accomplished by providing in our order that neither the assets of Algoma (other than the insurance proceeds) nor the assets of any other

corporation which may become responsible in any way for any liabilities of Algoma by virtue of the operation of the plan of arrangement or the more comprehensive scheme of restructuring, or any condition precedent thereto, shall be available to satisfy any judgment obtained as a result of any proceedings by Kelsey-Hayes against Algoma.

The justice of permitting an amendment to the plan as inconsequential as the one we permit in these exceptional circumstances is illustrated by the hypothetical case put in argument. Suppose a visitor had become quadriplegic as a result of an injury on the premises of Algoma under circumstances in which Algoma as occupier might be liable and suppose Algoma's potential liability was insured against by an appropriate insurance policy. To restrict the injured person, a known designated unsecured creditor under the terms of the plan of arrangement, to his or her compromised claim valued, without a trial, in a summary proceeding, would, in our view, be unacceptable. The actual situation before the court is analogous.

For these reasons, we grant leave to appeal, allow the appeal, set aside the order of Farley J. dated April 9, 1992, and grant leave to Kelsey-Hayes to proceed as it may be advised in the terms set out above.

Order accordingly.

Tab 22

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.

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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.
>
> . . . . .
>
> 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.
>
> . . . . . [page540]
>
> 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

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(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.)

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

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(14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
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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 23

See paras. 46, 69-70

SUPREME COURT OF CANADA

CITATION: 9354-9186 Québec inc. *v.* Callidus Capital Corp., 2020 SCC 10

APPEALS HEARD AND JUDGMENT RENDERED: January 23, 2020
REASONS FOR JUDGMENT: May 8, 2020
DOCKET: 38594

BETWEEN:

9354-9186 Québec inc. and 9354-9178 Québec inc.
Appellants

and

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Respondents

- and -

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals
Interveners

AND BETWEEN:

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Appellants

and

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier

Respondents

- and -

Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc.,
Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 117)	Wagner C.J. and Moldaver J. (Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

9354-9186 Québec inc. and
9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc.,
IMF Bentham Limited (now known as Omni Bridgeway Limited),
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation,

International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc., Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Indexed as: 9354-9186 Québec inc. *v.* Callidus Capital Corp.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.
Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion

to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As

a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable

treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (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. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or

bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual

circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the

objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive. Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish

the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

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APPEALS from a judgment of the Quebec Court of Appeal (Dutil, Schrager and Dumas JJ.A.), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), setting aside a decision of Michaud J., 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Appeals allowed.

Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* and *Hannah Toledano*, for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.

Neil A. Peden, for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited).

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Jocelyn Perreault, *Noah Zucker* and *François Alexandre Toupin*, for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier.

Joseph Reynaud and *Nathalie Nouvet*, for the intervener Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of

deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1]

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. *The Initial Competing Plans of Arrangement*

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000;

creditors with larger claims were to receive, on average, 31 percent of their respective claims.

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting

unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the

Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. *Quebec Superior Court (2018 QCCS 1040) (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when

> its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.
>
> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3)

if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. *Quebec Court of Appeal (2019 QCCA 171) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial

discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*

(2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred

to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999

ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in

[3] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167–68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

Indalex, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

[47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue!*

The Companies' Creditors Arrangement Act, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), 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 (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a

diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp- 566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion

unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 305 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its

voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at N§149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan

(*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at N§45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

> **Related creditors**
>
> **(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that,

under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at N§33, *Red Cross*; *Re 1078385*

Ontario Inc. (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the

CCAA will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

> **General power of court**
>
> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring

jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the

BIA (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so[4]. The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

[79] Indeed, as the Monitor observes, "Once a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the

New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. *Bluberi's LFA Should Be Approved as Interim Financing*

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques*

San Francisco Inc. v. Richter & Associés Inc., 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

> **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.

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form

or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

> **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.

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate

[5] A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

> **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.
>
> (*CCAA*, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs,

in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. National Bank of Canada*, 2006 QCCA 557 [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding

furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising

judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian*

> *Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).
>
> (Houlden, Morawetz and Sarra, at N§33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in C*rystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> (*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It

follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped

his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment

on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise

will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . .
>
> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the

mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was

unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Tab 24

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United States Bankruptcy Court, District of Columbia.

IN RE CHENG & COMPANY L.L.C., Debtor.

Case No. 15–00014
|
Signed December 18, 2015

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MEMORANDUM DECISION RE ESTIMATION OF THE CLAIM OF MR 619 FOR PURPOSES OF VOTING ON THE DEBTOR'S PLAN OF REORGANIZATION

S. Martin Teel, Jr., United States Bankruptcy Judge

***1** This is the court's decision estimating the claim of MR 619 H Street Capital LLC ("MR 619") for purposes of voting on the most recent plan of reorganization filed by the debtor, Cheng & Company, L.L.C. ("Debtor").

I

MR 619 filed a proof of claim in this case asserting a secured claim in the amount of $1,378,245.22 for "Money Loaned under Note and Deed of Trust." The Debtor has objected to that claim. The Debtor's objection asserts that the Debtor is entitled to rescind the deed of trust securing MR 619's claim and to recover damages suffered by the Debtor as a result of the breach of certain obligations, which damages are a complete offset to the amounts owed to MR 619. The parties have agreed to the lifting of the automatic stay of 11 U.S.C. § 362(a) so that the Superior Court may proceed in litigation pending there to determine the merits of the Debtor's claims against MR 619 and other entities not before this court.

MR 619 requested pursuant to Bankruptcy Rule 3018(a) that its claim be temporarily allowed for the purpose of voting on the *Debtor's First Amended Plan of Reorganization, as Modified (July 20, 2015)* (Dkt. No. 68) ("Plan"). The court issued a scheduling order (Dkt. No. 83) for a hearing to be held for the purpose of estimating MR 619's claim. Prior to the issuance of that scheduling order, the Debtor sought to amend its objection to MR 619's claim to include all of the grounds asserted in the Second Amended Complaint[1] that it had been permitted to file in the Superior Court. The court granted that request, noting that the estimation hearing "ought to be one to reach an estimation of MR 619's claim based on the likely outcome in the Superior Court and that outcome's impact on MR 619's claim." *Order re Motion by Debtor to Amend its Objection to the Claim of MR 619 H Street Capital LLC* (Dkt. No. 98). The estimation hearing was held on December 9, 10, 11, and 15, 2015. Having heard evidence and the argument of counsel, and pursuant to the following findings of fact and conclusions of law, the court temporarily allows the claim of MR 619 in the full amount asserted.

II

Pursuant to Bankruptcy Rule 3018(a), a bankruptcy judge after notice and hearing "may temporarily allow the claim or interest [of a creditor] in an amount which the court deems proper for the purpose of accepting or rejecting a plan." Fed. R. Bankr.P. 3018(a). The policy behind temporarily allowing claims is to prevent possible abuse by plan proponents who might ensure acceptance of a plan by filing last minute objections to the claims of dissenting creditors. *See Stone Hedge Properties v. Phoenix Capital Corp. (In re Stone Hedge Properties),* 191 B.R. 59, 63 (Bankr.M.D.Pa.1995); *see also* 9 *Collier on Bankruptcy* ¶ 3018.01[5] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). "Neither the [Bankruptcy] Code nor the [Bankruptcy] Rules prescribe any method for estimating a claim [for voting purposes], and it is therefore committed to the reasonable discretion of the court, ... which should employ whatever method is best suited to the circumstances of the case." *In re Ralph Lauren Womenswear, Inc.,* 197 B.R. 771, 775 (Bankr.S.D.N.Y.1996) (citation omitted). The *Ralph Lauren* Court continued:

> ***2** This being but an estimation hearing, my findings of fact will not have any preclusive effect upon the ultimate disposition of [creditor's] claim. This is due to the fundamental difference between the adjudication of a claim and its temporary allowance for plan purposes.
>
> A trier of fact determines which version [of the facts] is most probable and proceeds from there to determine an award in a fixed amount. An estimator of claims must

> take into account the likelihood that each party's version might or might not be accepted by a trier of fact. The estimated value of a claim is then the amount of the claim diminished by [the] probability that it may be sustainable only in part or not at all.

In re Windsor Plumbing Supply Co., Inc., 170 B.R. 503, 521 (Bankr.E.D.N.Y.1994). Thus, to the extent that I have had to analyze the facts presented by the parties, I have sought not to make definitive findings of fact, but instead to assess the probabilities of the various contentions made by the parties passing muster upon my final adjudication of [creditor's] claim. In contrast, the parties' legal arguments must be evaluated not for the probability that they have merit, but rather for their correctness as a matter of governing law. *In re Thomson McKinnon Securities,* 191 B.R. at 979 (in estimating a claim, court is "bound by the legal rules which may govern the ultimate value of the claim.").

In re Ralph Lauren Womenswear, Inc., 197 B.R. at 775.

III

The estimation of MR 619's claim turns on the interpretation of the Purchase and Sale Agreement ("PSA" or "Agreement") of December 21, 2012, entered into between the Debtor, MR 619, and other parties. MR 619, as the "H Street Purchaser" under the Agreement, and the Debtor as the "H Street Seller" under the Agreement, agreed that MR 619 would purchase the Debtor's property known as the H Street Property if certain H Street Acquisition Requirements were timely met. MR 619 made a deposit (the "H Street Deposit") upon which the Debtor was entitled to make withdrawals but with the Debtor obligated to refund those withdrawals in the event that MR 619 canceled the sale if the H Street Acquisition Requirements were not timely met, an obligation evidenced by a note (the "H Street Deposit Note") and the payment of which was secured by a deed of trust (the "H Street Mortgage"). The Debtor drew on the deposit, MR 619 canceled the sale when the H Street Acquisition Requirements were not timely met, and MR 619 became a holder of a claim against the Debtor.

What complicates the matter is that the Agreement also addressed a separate sale of property known as the Eye Street Property by its owners (the "Eye Street Sellers") (collectively, 614 Eye Street L.L.C., Anthony Chun Yuk Cheng, and Yun–Li Cheng) to a purchaser (the "Eye Street Purchaser") (ACY and YL Cheng LLC). However, the Agreement made clear the H Street Property sale and the Eye Street Property sale were independent of each other. First, the Debtor does not dispute that the H Street Purchaser (MR 619) and the Eye Street Purchaser are separate legal entities. Second, the Agreement recited at page 1:

> WHEREAS, the Parties, intending to be bound by this Agreement, desire to set forth herein the terms, conditions and agreements under and by which (i) the Eye Street Seller shall sell to the Eye Street Purchaser and the Eye Street Purchaser shall purchase from the Eye Street Seller the Eye Street Property (as hereinafter defined), and (i)[sic] the H Street Seller shall sell to the H Street Purchaser and the H Street Purchaser shall purchase from the H Street Seller the H Street Property (as hereinafter defined).

***3** Third, and importantly, the opening paragraph of the Agreement, after listing the Eye Street Purchaser, the H Street Purchaser, the Eye Street Seller, and the H Street Seller as the parties, provided:

> Notwithstanding the above, (a) whenever the term **"Seller"** or **"Purchaser"** is used in this Agreement, it shall mean the seller or purchaser of the applicable portion of the Property referenced, or, as context requires, the sellers or purchasers of all or a portion of the Property, and (b) notwithstanding the conjunctive use of the term **"Seller"** or **"Purchaser"** in certain places in this Agreement, the obligations of Eye Street Seller and H Street Seller, as well as Eye Street Purchaser and H Street Purchaser, shall be independent and several obligations (and *not* joint and several obligations) except where the context of this Agreement clearly provides for a Seller or Purchaser performance obligation which, by its nature, is jointly applicable to Eye Street Seller and H Street Seller, or Eye Street Purchaser and H Street Purchaser, respectively. The Seller and the Purchaser may sometimes be referred to in this Agreement collectively as the **"Parties,"** and individually as a **"Party."**

(Emphasis (bold and italics) in original.) The parties did not intend that the sale of one Property was to be dependent upon whether a sale of the other Property closed. The Eye Street Property sale closed shortly after execution of the Agreement. The sale of the H Street Property awaited timely satisfaction of the H Street Acquisition Requirements.

IV

The Debtor's Second Amended Complaint attempts to hold MR 619 liable for an obligation under the Agreement, after the development of the Eye Street Property was completed, to convey space known as the Eye Street Retail Unit (carved out of the improved Eye Street Property) to the Eye Street Seller. (The Eye Street Seller has assigned its rights in that regard to the Debtor). For reasons discussed below, that was an obligation of the Eye Street Purchaser, not MR 619 as the H Street Purchaser.

A.

The term "Developer" in § 12.19.1 was unambiguous in meaning only the Eye Street Purchaser. Section 12.19.1 of the Agreement provides that:

> [u]pon the completion of the development of the relevant portion of the Project which incorporates the Eye Street Property and/or adjacent properties by Developer (the **"Eye Street Improvements"),** Developer shall convey to Seller (or Seller Affiliate) by special warranty deed (and deliver to Seller or such Seller Affiliate possession of) [the Eye Street Retail Unit].

(Emphasis in original.) Contrary to the Debtor's argument, the term "Developer" as used in that provision does not include MR 619. The Agreement is not ambiguous in that regard because the Agreement is, in context, not fairly susceptible of the interpretation the Debtor urges, for the following three reasons.

First, only the Eye Street Purchaser would have been able to convey the Eye Street Retail Unit as required by § 12.19.1. The Agreement did not contemplate that MR 619 (the H Street Purchaser) would acquire the Eye Street Property and be in a position to convey it to the Eye Street Seller. The H Street Purchaser was not acquiring the Eye Street Property out of which, after development was to be completed, the Eye Street Retail Unit was to be carved out and conveyed to the Eye Street Seller. Indeed, MR 619 has acquired no property pursuant to the Agreement. It made sense in § 12.19.1 to refer to the Purchaser as the Developer because it was only after the Eye Street Property was developed that the Eye Street Retail Unit was to be conveyed to the Eye Street Seller. Elsewhere, the Agreement referred to the "Purchaser" conveying the Eye Street Retail Unit to the Eye Street Seller:

***4** • Section 12.19.5 of the Agreement states that "[u]pon the conveyance and delivery by Purchaser to Seller of the Eye Street Retail Unit, Seller shall pay to Purchaser Five Hundred Thousand and No/100 Dollars ... which amount Seller may obtain by placing a mortgage, at Seller's cost, on the Eye Street Retail Unit at the time that Purchaser conveys and delivers the Eye Street Retail Unit to Seller."

• Section 12.19.6 of the Agreement states that "Purchaser will convey to Seller good and marketable fee simple title to the Eye Street Retail Unit."

Obviously, in context, "Purchaser" means the Eye Street Purchaser. The term "Developer" is defined under Section 12.18.2(d) of the Agreement:

> The term **"Developer"** shall mean and refer to the Purchaser, and any Purchaser Affiliate which (i) acquires title to all properties that are a part of Purchaser's Assemblage, and (ii) develops the Project in accordance with this Agreement. If more than one Purchaser Affiliate acquires title to any of the separate parcels and properties that form a part of Purchaser's Assemblage, then the term "Developer" shall be understood to mean, collectively, Purchaser and all Purchaser Affiliates.

(Emphasis in original.) The term "Purchaser Affiliate" is defined under § 12.4 of the Agreement, page 79, as follows:

> The term **"Purchaser Affiliate"** shall mean any entity which is directly or indirectly, through one or more intermediaries, controlled by, or under common control with, Purchaser or any of its affiliates, control being understood to mean the ownership of an economic and capital interest in the entity controlled, combined with the power and authority to make day-to-day management decisions for such entity

(Emphasis in original.) I agree with MR 619 that:

> By asserting that MR 619 falls under the definition of "Developer" as a "Purchaser" under the PSA, or otherwise, the Debtor completely ignores the first sentence of the definition which provides that a Purchaser and any Purchaser Affiliate must have acquired title to at least one parcel of property that comprises Purchaser's Assemblage and must have developed the Project. The second sentence of the definition is subject to the first sentence of the definition, and it is implicit in the second sentence of the definition that the reference to "Purchaser Affiliates" means Purchaser Affiliates that have acquired title to properties comprising Purchaser's Assemblage and that have developed the Project in accordance with the PSA. This is the only construction that is consistent with both the first sentence of the definition of "Developer" and

> with Section 12.19.1 of the PSA which section implicitly requires Developer to own the Eye Street Retail Unit [in] order to be able to convey the Eye Street Retail Unit "by special warranty deed."

Memorandum of Law of MR 619 H Street Capital LLC in Connection with Rule 3018 Hearing, at 10 (Dkt. No. 110).

Second, although the term "Project" (as defined at page 15 of the Agreement) can be read as including both Properties, MR 619 was created only to purchase the H Street Property and is not acquiring that Property or any other Property, and thus it (1) was not acquiring title to the Eye Street Property, and (2) had nothing to do with the development of the Eye Street Property, and thus is not a Developer with respect to the Eye Street Property. And, as discussed above, that is reinforced by § 12.19.1 which contemplates that the developer obligation regarding the Eye Street Retail Unit is to convey title by special warranty deed, something that only the Eye Street Purchaser could accomplish. To elaborate, interpreting the Agreement otherwise would be contrary to the opening provisions of the Agreement that:

> ***5** the obligations of Eye Street Purchaser and H Street Purchaser ... shall be independent and several obligations (and not joint and several obligations) except where the context of this Agreement **clearly provides** for a ... Purchaser performance obligation which, **by its nature,** is jointly applicable to ... Eye Street Purchaser and H Street Purchaser....

(Emphasis added.) By its nature, the obligation to convey the Eye Street Retail Unit was an obligation applicable to the Eye Street Purchaser, and was not an obligation applicable to the H Street Purchaser who would not have the necessary title to convey the Eye Street Retail Unit to the Eye Street Seller. Certainly, the Agreement did not **clearly** provide for a Purchaser performance obligation which, by its nature, is jointly applicable to the Eye Street Purchaser and MR 619 (the H Street Purchaser).

Third, the definition of "Developer" requires that an entity "develops the Project in accordance with this Agreement" in order to be a Developer. MR 619 is not included in the definition of "Developer" as a Purchaser, or otherwise, because it does not and will not own any property which comprises Purchaser's Assemblage and because it is not developing and will not develop the Project in accordance with the Agreement.

B.

Even if the Agreement were ambiguous as to the meaning of the term "Developer," which it is not, the background to this provision indicates that the term "Developer" should be interpreted in § 12.19.1 as not meaning MR 619 but only meaning the Eye Street Purchaser. Mark Tenenbaum, the attorney who was negotiating the drafting of the Agreement on behalf of Debtor never conveyed to his counterparts on the other side that he intended the definition of "Developer" to mean both Purchasers regardless of the particular part of the Agreement being interpreted. That is to say, Mr. Tenenbaum never told his counterparts on the other side that he meant the term "Developer" to make MR 619 liable for the obligations of the Eye Street Seller. In addition, the discussions that were held demonstrate that the reference to "Purchaser Affiliates" in the definition of Developer was intended to assure that whoever ended up with title to the properties within one of the two Purchasers' Assemblages would be on the hook to comply with the obligations relating to that Assemblage.

C.

Finally, even if MR 619 had an obligation to convey the Eye Street Property, which it does not, that obligation was terminated. Section 2.2.3(e)(ii)(D) makes clear that upon MR 619's exercising its right to cancel the H Street purchase, all of its obligations under the Agreement were terminated. The Debtor does not dispute that MR 619 was entitled under § 2.2.4(c) to terminate the Agreement because the H Street Acquisition Requirements had not been met timely, in which case § 2.2.3(e) would apply. Under § 2.2.3(e)(ii)(D), such a termination of the Agreement:

> shall be deemed to terminate any obligation on the part of Purchaser to develop Purchaser's Assemblage in a particular manner, or otherwise deliver the Condominium Properties to Seller, even if Purchaser thereafter acquires title to the H Street Property through a foreclosure of the H Street Mortgage pursuant to clause (C) of this subparagraph)[.]

This was reinforced by § 2.2.3(e)(iv), which provided:

> ***6** except as provided in the preceding clauses (i)—(iii) above, and any other provision of this Agreement that, by its terms, survives the termination of this Agreement, the

> Parties shall have no further obligations or liabilities to one another under this Agreement.

Accordingly, even if MR 619 could be viewed as a Developer obligated to convey the Eye Street Retail Unit, the provisions of § 2.2.3(e) make clear that MR 619 (as the H Street Purchaser) no longer had any such obligation upon its rightfully invoking a termination under § 2.2.4(c).

V

In the Second Amended Complaint, the Debtor also asserts that it has been damaged due to the breach of a promise under the Agreement to provide parking spaces, specifically alleging that "the PSA also promised the Seller that it would have the right to park in the new garage that would be constructed as part of the Eye Street Improvements." Second Amended Complaint, at 41, ¶ 160. Plainly it was the Eye Street Purchaser that was obligated under that provision of the Agreement, as it was to be the owner of the Eye Street Improvements.

VI

In the Second Amended Complaint, the Debtor asserts that by sending the Notice of Termination also signed by the Eye Street Purchaser, MR 619 violated the right of Debtor to receive the Eye Street Retail Unit. Second Amended Complaint, at 40–41, ¶¶ 156–57. This is the same argument raised by the Debtor during the hearing of July 29, 2015, that was "rejected" by this Court during the hearing and in its order of July 30, 2015. *See Order re Objection to Claim of MR 619 H Street Capital, LLC,* at 2 (Dkt. No. 62) ("The debtor argues that by joining in the [Notice of Termination] submitted collectively by the Eye Street Purchaser and itself as the Purchaser, MR 619 should be viewed as engaging in the breach of the *Purchase and Sale Agreement* by the Eye Street Purchaser. I rejected that argument.") (italics in original). MR 619 was not obligated to convey the Eye Street Retail Unit to the Eye Street Seller. Accordingly, any contractual breach by way of a letter stating that the obligation to convey that unit was terminated could only be committed by the Eye Street Purchaser.

VII

In the Second Amended Complaint, the Debtor asserts that the H Street Deposit Note "incorporated the terms and conditions of the PSA and was expressly subject to the terms and conditions of the PSA." Second Amended Complaint, at 32, ¶ 118. Based on the alleged "material breach of the PSA by Purchaser", Debtor asserts that it has the right to rescind the Agreement and terminate its obligations under the H Street Deposit Note. Second Amended Complaint, at 47, ¶ 189. The H Street Deposit Note is the basis of the Claim and a copy of the note is attached to MR 619's proof of claim. The Debtor's premise that the H Street Deposit Note incorporated the terms and conditions of the Agreement is incorrect. Only the "applicable terms" of the Agreement are deemed to be incorporated in the H Street Deposit Note, not all of the terms and conditions of the Agreement. Further, the Agreement clearly provides that the Debtor remains liable to pay the outstanding principal and all accrued interest under the H Street Deposit Note notwithstanding the termination of the Agreement. PSA, at § 2.2.3(f)(iv). Moreover, for the reasons stated herein, MR 619 has not breached the Agreement as is alleged by Debtor in the Second Amended Complaint.

VIII

***7** Finally, the Debtor attempts to hold MR 619 liable on a tort theory. Its Second Amended Complaint alleges on page 55:

> 212. Defendants knew that the Plaintiffs understood and interpreted the language added to § 2.2.3(e)(ii) of the PSA by the December 16 and December 18, 2012 drafts of the PSA as being limited only to making clear that if the H Street Purchaser acquired the H Street Property by way of foreclosure due to the failure of the H Street Seller to repay the H Street Deposit, that the H Street Purchaser would not be obligated to still deliver the H Street Condominium Units to the Plaintiffs.
>
> 213. Defendants failed to disclose to Plaintiffs its hidden and ulterior objective that the language being added to 2.2.3(e)(ii) of the PSA by the December 16 and December 18, 2012 drafts of the PSA would be relied upon by the Defendants to deny Plaintiffs the material benefits of the Eye Street Retail Unit should the H Street Purchaser elect not to acquire the H Street Property due to the failure to achieve the H Street Acquisition Requirements.

The probable outcome in the jury trial in the Superior Court is that the Debtor will not be able to demonstrate that MR

619 committed a tort and, even if it did, that any substantial damages would be awarded.

A

It is doubtful that a jury would conclude that MR 619 intentionally misled Mr. Tenenbaum on this aspect of the Agreement. Section 2.2.4(c)(i) of the Agreement allows the H Street Purchaser not to purchase the H Street Property due to the failure to achieve the H Street Acquisition Requirements, which provision incorporates by reference § 2.2.3(e)(ii), page 13 of the Agreement. Subpart (C) of § 2.2.3(e)(ii) stated that:

> if Seller fails to repay the outstanding principal balance of the H Street Note Deposit to purchaser within such 20 day period [i.e., 20 days after notice of termination due to the failure to achieve the H Street Acquisition Requirements was issued], H Street Purchaser will be entitled to commence the exercise of remedies under the H Street Mortgage up to the date all amounts outstanding under the H Street Deposit Note have been paid in full.

On December 16, 2012, Eugene Tibbs, the attorney for MR 619 and the Eye Street Purchaser, sent a revised redline version of the purchase and sale agreement to Mr. Tenenbaum, and among the many proposed changes in the document was a short phrase added by Mr. Tibbs to the end of subpart (C) of § 2.2.3(e)(ii) which read "in which case, all of Seller's rights in the Property shall be extinguished, and Purchaser shall be free to develop the Property without providing the Condominium Properties to Seller." Mr. Tibbs had added this additional phrase to a section of the Agreement which dealt exclusively with the rights and obligations of the H Street Seller and H Street Purchaser with respect to the H Street Property.

The obvious purpose of this additional phrase was to clarify that, should the H Street Purchaser end up acquiring the H Street Property through a foreclosure sale after termination of its obligation to purchase the H Street Property, the H Street Purchaser would not have a continuing obligation to convey to the H Street Seller the so-called H Street Retail Unit and H Street Basement Unit that were to be built as part of the H Street Improvements. However, the specific language proposed by Mr. Tibbs incorrectly stated that upon a default "all of the Seller's rights in the Property shall be extinguished." This was an incorrect statement as a matter of law in that the exercise of the rights to foreclose under the H Street Mortgage did not immediately extinguish at that time all of the Debtor's rights in the H Street Property. Rather, upon a default the Debtor would still retain fee simple ownership of the H Street Property, along with whatever rights and protections it had under the H Street Mortgage, until such time as the foreclosure process was completed and legal title to the H Street Property was conveyed to a third party as a result of the foreclosure sale.

***8** Upon receipt of the December 16, 2012, draft of the Agreement from Mr. Tibbs, Mr. Tenenbaum had a phone call with Mr. Tibbs and pointed out this problem with his proposed language. In order to make the phrase consistent with the intended purpose of the change and applicable law, Mr. Tenenbaum proposed alternative language in lieu of the phrase suggested by Mr. Tibbs, which read as follows:

> (D) the termination of this Agreement by Purchaser under this Section 2.2.3(e) shall be deemed to terminate any obligation on the part of Purchaser to develop Purchaser's Assemblage in a particular manner, or otherwise deliver the Condominium Properties to Seller, even if Purchaser thereafter acquires title to the H Street Property through a foreclosure of the H Street Mortgage pursuant to clause (C) of this subparagraph.

Mr. Tenenbaum discussed the changes to § 2.2.3(e) with Mr. Tibbs at the time the December 16 and December 18, 2012, drafts were exchanged. During that discussion, they did not discuss the meaning of "Condominium Properties." Mr. Tenenbaum did not believe it was necessary to clarify that it referred solely to the H Street Retail Unit and the H Street Basement Unit because he thought it was obvious that the whole section applied only to the H Street transaction. Mr. Tibbs also did not recall discussing this particular issue with Mr. Tenenbaum but his belief (both then and now) was that "Condominium Properties" would encompass both (1) the H Street Retail Unit and the H Street Basement Unit and (2) the Eye Street Retail Unit.

Both attorneys were under great pressure to quickly finish the drafting of the contract and only were discussing particular language if one of them thought there was a problem. There is no evidence to suggest that Mr. Tibbs or MR 619 intended to hide their interpretation of this clause from Mr. Tenenbaum and the Debtor, and indeed Mr. Tibbs's demeanor and testimony at the hearing indicated that he would not be the kind of person to engage in such chicanery. To the extent that Mr. Tenenbaum's addition of part (D) to § 2.2.3(e)(ii) benefitted MR 619, he is the one who drafted it, and MR 619

had no obligation to inform him that this provision would permit termination of the entire Agreement if the Agreement did indeed support such an interpretation.

B

Even if a jury found that the Debtor was intentionally misled, little or no damages would likely be awarded *against MR 619* based on this tort theory. The jury would likely conclude that, when MR 619 tendered its notice of termination, there was no termination of the obligation of the *Eye Street Purchaser* to convey to the Eye Street Seller the Eye Street Retail Unit. Like the rest of the Agreement, and as contemplated by the opening paragraph of the Agreement, the provisions that MR 619 argues resulted in a termination of the obligation to convey the Eye Street Retail Unit must be read in context, and when read in context they do not support MR 619's argument:

- The jury would likely conclude that the reference to "Condominium Properties" in § 2.2.3(e)(ii)(D) referred to the Condominium Properties that MR 619 was required to convey to the Debtor if the sale of the H Street Properties went through, not the Eye Street Retail Unit. This is because § 2.2.3(e)(ii)(D) is part of § 2.2.3 ("H Street Seller Withdrawal and Contingent Repayment of H Street Deposit"), dealing with the obligations and rights of the Debtor and of MR 619 under the Agreement, and not dealing with the obligations and rights of the Eye Street Seller and of the Eye Street Purchaser.

***9** • Similarly, the jury would likely conclude that the reference in § 2.2.3(e)(iv) to "the Parties shall have no further obligations or liabilities to one another under this Agreement" meant the Parties whose obligations were being addressed under § 2.2.3, namely, the Debtor and MR 619, and not as including the Eye Street Purchaser and the Eye Street Seller. The opening paragraph of the Agreement makes clear that "Parties" can refer to the Seller and Purchaser of one Property (the Eye Street Property or the H Street Property) and is not required to mean both Sellers and both Purchasers.

- The same is true of § 2.5.2(b)(iii)(A) in referring to "the Parties" because that provision is, again, part of a section, § 2.5.2 ("H Street Adjustments") that deals with the obligations and rights of the Debtor as the H Street Seller and of MR 619 as the H Street Purchaser.

- The H Street Retail Unit and the H Street Basement Unit were each a "Condominium Property" and thus the reference in § 2.2.3(e)(ii) to "Condominium Properties" can be read as meaning *those* Condominium Properties, as only the H Street Purchaser's obligation to convey those two unit was at issue in § 2.2.3(e)(ii).

Because the Eye Street Seller's right (now held by the Debtor) to receive the Eye Street Retail Unit would remain in place, the Debtor would be entitled to recover any damages for a breach of that Agreement. Therefore, the jury would not likely find it necessary to award damages under a tort theory other than, perhaps, attorney's fees incurred fighting against an interpretation of the Agreement that treated the entire Agreement terminated.

In any event, even if MR 619 could be held liable on this tort theory, the Debtor failed to quantify the amount of such attorney's fees, and a jury would have a difficult time allocating the attorney's fees in the parties' litigation between attorney time spent litigating contract issues versus attorney time litigating any damages arising from failure of MR 619 and the Eye Street Purchaser to disclose that they viewed § 2.2.3(e)(ii)(D) as permitting termination of the obligation of the Eye Street Purchaser to convey the Eye Street Retail Unit.

C

In light of the Agreement's true contextual meaning, the tort theory does not work at all. The Debtor relied upon what is the correct interpretation of the Agreement insofar as whether the Eye Street Purchaser's obligation to convey the Eye Street Retail Unit survived MR 619's termination of *MR 619's* obligations under the Agreement.

Assume that MR 619 and the Eye Street Purchaser knew that the Eye Street Seller held the view that an invocation by MR 619 of § 2.2.3(e)(ii)(D) would *not* terminate the Eye Street Purchaser's obligation to convey the Eye Street Retail Unit to the Eye Street Seller. Their failure to disclose their contrary view of the effect of § 2.2.3(e)(ii)(D) would have had adverse consequences only if their view was a correct view of what the Agreement, on its face, provided. In other words, concealing an erroneous view of what the Agreement provided caused no damage. Advancing now (and after the invocation of § 2.2.3(e)(ii)(D)) their *erroneous* view of the Agreement is meaningless as far as harming the Debtor is concerned because the Debtor's *correct* view of the Agreement will

prevail. In that regard, MR 619 and the Eye Street Purchaser are free in litigation, within the advocacy limits imposed by Fed. R. Bankr.P. 9011 (or its Superior Court equivalent) to urge the court to adopt their erroneous interpretation, and the Debtor does not suggest, in this complicated contract interpretation dispute, that the arguments that MR 619 and the Eye Street Purchaser have advanced here and in the Superior Court do not conform to those advocacy limits.

***10** Moreover, even if, hypothetically, the Agreement had contained a right to treat the obligation to convey the Eye Street Retail Unit as terminated if the H Street Purchaser invoked § 2.2.3(e)(ii), that obligation was the Eye Street Purchaser's obligation. It is only the Eye Street Purchaser who has standing to take the position that the obligation was terminated. If the Eye Street Purchaser declined to take the position that its obligation was terminated, it would not matter that the H Street Purchaser maintained that the obligation was terminated. So it is the Eye Street Purchaser who has engaged in conduct regarding the interpretation of § 2.2.3(e)(ii)(D) that has allegedly caused the Debtor harm. Stated differently, it was the Eye Street Purchaser that had a duty to deal fairly with the Eye Street Seller in not concealing its belief that the Agreement permitted it to treat the obligation as terminated upon the H Street Purchaser's invocation of § 2.2.3(e)(ii), if it understood that the Eye Street Seller was under the erroneous belief to the contrary. So any tort of concealing the belief that it, the Eye Street Purchaser, had such a right lies at the door of the Eye Street Purchaser, not the H Street Purchaser.

IX

An appropriate order follows.

All Citations

Not Reported in B.R. Rptr., 2015 WL 9283267

Footnotes

1 All citations in this decision to the Debtor's Second Amended Complaint will cite to the version attached to the *Memorandum of Law of MR 619 H Street Capital LLC in Connection with Rule 3018 Hearing* (Dkt. No. 110). Debtor has not disputed that that version is the correct version of the Second Amended Complaint.

Tab 25

2016 WL 4250681
Only the Westlaw citation is currently available.
United States Bankruptcy Court, D. Delaware.

IN RE: PACIFIC SUNWEAR OF CALIFORNIA, INC., a California corporation, et al.,[1] Debtors.

Case No. 16–10882(LSS) (Jointly Administered)
|
Signed August 8, 2016

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MEMORANDUM DECISION ON (A) TEMPORARY ALLOWANCE OF CLAMS FOR VOTING PURPOSES; AND (B) MOTION TO RECONSIDER AND/OR AMEND THE COURT'S JUNE 22, 2016 MEMORANDUM ON CLASS CERTIFICATION

LAURIE SELBER SILVERSTEIN, UNITED STATES BANKRUPTCY JUDGE

***1** By a previous memorandum opinion dated June 22, 2016,[2] I ruled on a request by Tamaree Beeney and Charles Pfeiffer to file claims against the PacSun estates for alleged violations of California wage and hour laws, which had been asserted prepetition in separate (but subsequently consolidated) lawsuits. Mr. Pfeiffer sought permission to file a claim pursuant to California's Private Attorney General Act (a "PAGA claim"). Ms. Beeney sought to file both a PAGA claim and a class proof of claim in her capacity as a prepetition court-approved class representative. For the reasons set forth in the First PacSun Memorandum, I ruled that court permission was not necessary to file a PAGA claim. On the other hand, I granted Ms. Beeney permission to file a class proof of claim for PacSun's alleged failure to properly compensate employees for rest breaks and security checks. In doing so, however, I found that Ms. Beeney was an adequate representative solely for absent class members who, like her, hold general unsecured claims. Accordingly, I circumscribed the time period relating to the proof of claim to March 18, 2007 through the 181st day prior to the filing of the bankruptcy petition.

Now, Ms. Beeney asks me to reconsider the First PacSun Memorandum and permit her to represent employees not only for the entire period certified by the state court prepetition (*i.e.,* March 18, 2007 through February 26, 2016), but also for the remainder of the priority period.[3] Alternatively, Ms. Beeney asks for permission to amend her proof of claim to permit Ms. Shin to be added as a class representative of employees whose claims would fall within 180–day priority period of section 507(a)(3) of the Bankruptcy Code.[4]

Several other motions were also filed that relate to the class and PAGA claims. Ms. Beeney and Mr. Pheiffer filed a motion for estimation and temporary allowance of their claims for purposes of voting on the Debtors' plan of reorganization.[5] The Debtors filed a cross-motion to estimate these claims for the same reason.[6] The Debtors additionally filed objections to, and motions to strike the, priority status of the PAGA and class claims.[7] Finally, the Debtors filed an adversary proceeding for a declaratory judgment that neither Ms. Beeney nor Mr. Pfeiffer have any administrative expense claims.[8] In the adversary proceeding, the Debtors filed a motion for summary judgment.[9] Objections and replies have been filed with respect to each of these motions.

***2** On July 18, 2016, I heard argument and accepted evidence. The declarations of Hyo Jeong "Alice" Shin, Steve Fox and Sandy Renteria were admitted into evidence without objection, as was Ms. Shin's deposition. I have also received the permitted post-hearing submissions. Each motion is now ripe for decision.[10] Familiarity with the First PacSun Memorandum is assumed.

Because my decision on the Estimation Motion and Cross–Motion influence my decision on the Motion to Amend or Reconsider, I will address the Estimation Motion and Cross–Motion first.

I. Estimation of Ms. Beeney's and Mr. Pfeiffer's Claims for Voting Purposes

A. Relevant Procedural Background

On May 20, 2016, Ms. Beeney and Mr. Pfeiffer filed their motion for leave to file their proofs of claim. Contemporaneously, they filed a motion for "estimation and temporary allowance" of the class and PAGA claims for purposes of voting on the Debtors' plan.[11] By the Estimation Motion, they seek an order "estimating and temporarily allowing" their claims in an amount equal to the dollar values included in the proofs of claim they then intended to file, if given permission. In the proofs of claim, Ms. Beeney asserts a prepetition general unsecured "Rest Break Claim" of $5,680,559 and a prepetition general unsecured "Off the Clock Claim" of $6,577,458. The PAGA claim was filed in the aggregate amount of $135,374,113.[12]

On June 2, 2016, the Debtors filed an opposition to the Estimation Motion. The Debtors first incorporated their objection to the motion for leave to file the class and PAGA claims. The Debtors next argued that the Estimation Motion should be denied because it did not suggest a methodology for estimating the claim, but instead simply asked the Court to adopt the to-be-filed claim. The Debtors also argued that the class action and PAGA claims were capped by the allegation in Ms. Beeney's complaint that the aggregate amount of the claims, inclusive of monetary damages, civil penalties and attorneys fees, is less than $5,000,000. Finally, the Debtors attached to their objection two motions to approve class action settlments in other cases filed by the firm representing Ms. Beeney and Mr. Pfeiffer, alleged to be settlements of similar wage and hour class actions. Based on their arguments, the Debtors ask me to value the class claims at $500,000, but in no case greater than $5,000,000, and the PAGA claims at $10,000.

The Debtors also filed a "cross-motion" to estimate the class and PAGA claims for voting purposes.[13] The stated purpose of the cross-motion was to ensure that a hearing would go forward on the Estimation Motion, as it had already been adjourned several times by Ms. Beeney and Mr. Pfeiffer. In the Cross–Motion, the Debtors stated that they had not yet objected to the class claim or the PAGA claim given the pendency of the Estimation Motion and the expense attendant to undertaking such an objection. Ms. Beeney and Mr. Pfeiffer objected to the Cross–Motion. They argued that: (i) notwithstanding their Estimation Motion, I cannot estimate their claims for voting purposes because the Debtors failed to file a substantive objection to their claims; as such, the Estimation Motion and Cross–Motion are moot; but (ii) if I were to estimate their claims, the Debtors' proposed figures have no evidentiary basis, whereas their proofs of claim are treated as *prima facie* evidence of their respective amount and validity. No new or different arguments were made at the hearing on these motions.

B. The Court Treats the Dispute as One for Temporary Allowance of a Claim for Voting Purposes

***3** As an initial matter, I am treating the Estimation Motion and Cross–Motion as requests for temporary allowance of the claims only for voting purposes, and not as a request for estimation for all purposes. While the parties and courts often use the term "estimation" for both undertakings, these concepts are not the same nor do they serve the same purpose.[14]

Estimation of claims is governed by section 502(c) of the Bankruptcy Code, which requires that the court estimate "for purpose of allowance under this section" any contingent or unliquidated claim "the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case."[15] Thus, by its very nature, estimation under section 502(c) results in allowing a claim for purposes of the entire case, and is no different than a claim allowed under section 502(a) or (b).[16] No particular procedure is required to estimate a claim; bankruptcy courts may use whatever method is best suited to the case as long as the procedure is consistent with fundamental bankruptcy policies, which require speed and efficiency.[17] Nevertheless, the Court must estimate the claim "in accordance with the legal rules that will govern the final amount of the claim."[18]

On the other hand, Bankruptcy Rule 3018 provides for the temporary allowance of a claim "in an amount which the court deems proper" for voting purposes only.[19] The policy behind Bankruptcy Rule 3018 "is to prevent possible abuse by plan proponents who might ensure acceptance of a plan by filing last minute objections to the claims of dissenting creditors."[20] Like estimation under section 502, neither the Bankruptcy Code nor the Bankruptcy Rules provide guidance on a methodology to be used, but commend the determination to the court's discretion.[21] Courts tend to look at the debtor's schedules, the proof of claim, and the objection filed to the

proof of claim.[22] At least one court has suggested that a determination under Rule 3018 "should ensure that the voting power is commensurate with the creditor's economic interests in the case."[23] Consistent with that notion, some courts have estimated a claim at $0 when the court finds it unlikely that the claimant will succeed on the merits.[24] Other courts have similarly assessed the probabilities of success on the merits and discounted the claim appropriately.[25]

***4** Here, the Debtors have not suggested that the prepetition class and PAGA claims must be estimated for all purposes. Accordingly, the Estimation Motion and Cross–Motion will be reviewed under Bankruptcy Rule 3018.

C. Under the Unique Circumstances of this Case, the Debtors' Failure to File an Objection is Not Fatal to Temporarily Allowance for Voting Purposes

The distinction between an estimation motion under section 502(c) and a motion to temporarily allow a claim for voting purposes is relevant to Ms. Beeney and Mr. Pfeiffer's argument that the Estimation Motion and Cross–Motion are moot. They argue that the Estimation Motion was filed protectively or anticipatorily to get a head start on the temporary allowance process.[26] But, no objection was ever filed. Accordingly, they contend that their proofs of claim are deemed allowed, and therefore, they are entitled to vote their claims as stated therein.

I agree with this position as a general proposition. Allowed claims may vote on a plan.[27] A proof of claim is deemed allowed unless a party in interest files an objection.[28] Thus, a claimant may vote on a proposed plan if he has filed a claim and there is no outstanding objection. A necessary corollary is that "a temporary allowance order only arises if there is an objection to a claim."[29]

The Debtors counter that no objection is necessary to invoke the temporary allowance process with a somewhat tortured reading of Bankruptcy Rule 3018. Bankruptcy Rule 3018(a) provides in relevant part:

> Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.[30]

Placing emphasis on the word "notwithstanding," the Debtors argue that reading this provision to require an objection before invoking Rule 3018 would change the meaning of "notwithstanding objection" to "if and only if a party has filed an objection."[31] They also cite *Armstrong* as stating that a creditor may request temporary allowance for multiple, non-exclusive reasons. The *Armstrong* court's nonexclusive reasons, however, all presuppose the filing of an objection (*i.e.,* objection is filed too late to be heard on the merits prior to confirmation; objection is frivolous; objection is questionable).[32] *Armstrong* does not suggest that an objection is unnecessary. Further, given its purpose is to enfranchise—not disenfranchise—creditors, there is no need to invoke the rule unless and until an objection is filed.

Here, however, Ms. Beeney and Mr. Pfeiffer did just that—they filed a motion to temporarily allow their claim before an objection was filed (and, even before they had filed their proofs of claim). In these unique circumstances, given the objection to the Estimation Motion, which asserts grounds for allowing the claims in a lesser amount, as well as the Cross–Motion, I find that these filings function as an objection to the class and PAGA claims. I will not, in this instance, penalize the Debtors, and more importantly, other creditors entitled to vote, because Mr, Pfeiffer and Ms. Beeney invoked a process they no longer believe is appropriate, but upon which others may have relied.

D. For Voting Purposes, the Class Claim Shall Be Temporarily Allowed at $5,000,000 and the PAGA Claim Shall Be Temporarily Allowed at $100,000

***5** The actual evidence before the Court is limited. Ms. Beeney and Mr. Pfeiffer rely on their proofs of claim, which they assert constitute *prima facie* evidence of the validity and amount of their claims pursuant to Bankruptcy Rule 3001. The proofs of claim contain detailed mathematical calculations for each category of alleged wage and hour violation based on the total number of work weeks, pay periods, or shifts as applicable and the applicable hourly rate. For example, Ms. Beeney asserts that the Debtors' off-the-clock bag searches result in a class claim of $6,577,458, based on the assumption that each absent class member was required to work 30 minutes per week off the clock at an hourly rate of $9.01, with 1,460,035 work weeks (*i.e.,* 1,460,035 work weeks × $9.01 hourly rate × .5 hours). The PAGA claim for off-the-clock work is asserted to be $40,544,300 (405,443 pay periods × $100 PAGA fine). Various assumptions and extrapolations are made as set forth in the proofs of claim, which are clearly based on an expert's analysis of the claims. The Debtors did not submit competing expert evidence,[33]

or any evidence or argument for that matter, critiquing the analysis supplied by the claimants. And, while they initially questioned the *prima facie* validity of the proofs of claim, at argument, they conceded that point solely in connection with these motions.[34]

The Debtors' request to temporarily allow the class claim at $500,000, but in no event at more than $5,000,000, is based on the following: (i) the complaint filed by Ms. Beeney in California state court established the aggregate amount in controversy (for both the class and PAGA claims) at less than $5,000,000, and the class should therefore be estopped from asserting a greater claim; (ii) the settlement examples from two unrelated cases before the California Superior Court filed by counsel representing Ms. Beeney and Mr. Pfeiffer in this action, each of which seeks to settle for hundreds of thousands of dollars, not millions; (iii) the rest break claims are tenuous because the employee manual given to managers always contained the correct policy and the employee handbook was corrected as of January 1, 2014; (iv) the recent decision out of the United States District Court for the Northern District of California effectively precludes the security check claims; and (v) the discretion given to courts by the PAGA statute to prevent an award from being "unfair, arbitrary and oppressive, or confiscatory" suggests a nominal PAGA award in this case.

Courts disagree about which party has the burden of proof in a Rule 3018 proceeding. Just as there is no guidance in the Bankruptcy Code on how to determine the proper amount of the claim, there is no guidance on the burden of proof in such a proceeding.[35] As the *Armstrong* court observed, some courts place the burden on the objector while others place it on the claimant.[36] I agree with the court in *Stone Hedge Properties v. Phoenix Capital Corp*[37] that because a Rule 3018 proceeding is meant to enfranchise claimants, there is an inconsistency in using the burden of proof rules that apply to objections to claims.[38] I need not decide this issue, however, because legal analysis rather than evidence fuels my decision in this case.

(i) Because the Class Has Been Certified, There Is a Potential that It Is Capped by the Limitation in the Complaint

In the jurisdiction and venue section of her *First Amended Class Action Complaint* filed on May 6, 2011, in the Superior Court of the State of California for the County of Orange, Ms. Beeney alleges:

> This class action is brought pursuant to California Code of Civil Procedure section 382. The monetary damages and restitution sought by Plaintiffs exceeds the minimal jurisdiction limits of the Superior Court and will be established accordingly to proof at trial. The amount in controversy for each class representative, including claims for compensatory damages and pro rata share of attorneys' fees, is less than seventy-five thousand dollars ($75,000). However, Plaintiffs allege on information and belief, that the aggregate amount in controversy for the proposed class action, including monetary damages, civil penalties, injunctive relief, restitution and attorneys' fees requested by Plaintiffs, is less than five million dollars ($5,000,000), exclusive of interests and costs.[39]

***6** It is clear on the face of these allegations that they are intended to establish the jurisdiction of the Superior Court. It is also clear, as the Debtors contend, that the $5,000,000 figure was not pulled out of thin air. The Class Action Fairness Act grants federal courts original jurisdiction over "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs" if the case is pled as a class action and there is minimal diversity.[40] The purpose of the statute is to "expand substantially federal court jurisdiction over class actions."[41]

The Debtors argue, based on *Morgan v. Gay,*[42] that Ms. Beeney and all absent class members are bound by their self-imposed $5,000,000 cap. *Morgan* discusses the rather unusual, but apparently not atypical, scenario in which the defendant asserts that the claims against it aggregate more than the plaintiff alleges so federal jurisdiction can be established. That scenario typically involves the following sequence of events: plaintiff first files a class action in state court asserting damages of less than $5,000,000, defendant then removes the action to federal court stating that damages exceed $5,000,000, and lastly plaintiff files a remand motion. The question the Third Circuit addressed in *Morgan* was whether the plaintiffs pleading was dispositive on the amount in controversy for jurisdiction purposes. The Third Circuit held it was not. But, given the "broad good faith requirement in a plaintiff's complaint with respect to the amount in controversy," the Third Circuit held that in order to remove a case to federal court the defendant had to prove "to a legal certainty" that the amount in controversy was over the statutory minimum.[43] In essence, the Third Circuit found that

a defendant was not bound by the plaintiff's allegation of the amount in controversy.

In what is most likely *dicta,* the Third Circuit then addressed whether the plaintiff in the remanded state court class action could ever recover more damages than the $5,000,000 limitation in the complaint. It recognized a tension between cases such as the U.S. Supreme Court's decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.,*[44] which holds that a plaintiff is the master of his own complaint and recognizes a broad good faith requirement with respect to a jurisdictional limits allegation, and Rule 54(c) and state analogues that may permit a plaintiff to obtain relief beyond that demanded in his pleadings. Looking at the relevant state law, which cautioned that "a verdict in excess of the demand is not prohibited unless it would clearly prejudice the opposing party[,]" the Third Circuit cautioned that such a verdict "could well be deemed prejudicial to the party that sought removal to federal court when the party seeking remand uses a damages limitation provision to avoid federal court."[45]

***7** Ms. Beeney responds by arguing that *Morgan* is inapposite because the Debtors never sought to remove the Beeney class action, and thus could not be prejudiced by having been on the losing side of a remand motion. She points out that under California law, a plaintiff is not limited to the amount in controversy pled in the complaint.[46] But, at argument, Ms. Beeney referred me to the U.S. Supreme Court's decision in *Standard Fire Insurance Co. v. Knowles,*[47] which holds that absent class members are not bound by a statement in a complaint limiting aggregate damages to less than $5,000,000[48] because a plaintiff filing a class action complaint "cannot legally bind members of the proposed class before the class is certified."[49] The Supreme Court reasoned that a non-named party is not party to a class action before it is certified. Because the Court examines the case at the time it was filed in state court for jurisdiction purposes, the plaintiff "lacked the authority to concede the amount-in-controversy issue for the absent class members."[50]

Recognizing that the law of class actions is complicated and nuanced, I asked the parties to address in their post-hearing submissions whether Judge Berle's certification of the class now bound the absent class members to the $5,000,000 cap in the Beeney complaint. Neither party provided a case directly on point (and, perhaps none exists). But, the Debtors do refer me to portions of the *Knowles* decision that suggest a binding effect. For example, the Supreme Court acknowledged that a class action might not be certified because of the existence of a limiting damages provision in the complaint or that a court might condition certification on the removal of any such provision.[51] The Supreme Court also suggested that a proposed class representative may be inadequate because he imposes an artificial cap in the complaint.[52] Finally, the Supreme Court set up a syllogistic counterargument to its conclusion, which includes within it the step that "if the state court eventually certifies the class, the stipulation will bind those who choose to remain as class members."[53]

Without evidence regarding the five-year history of the state court action, I am not prepared to say that the Debtors are prejudiced if the damages in the class action exceed $5,000,000, but, given the holding and discussion in *Knowles* as well as Judge Berle's certification of the class without excising the limitation from the complaint, there is a high possibility the claims would be capped at $5,000,000. As the Debtors point out, the $5,000,000 figure included all claims, not just those that were ultimately certified. And, as recognized in *Red Cab* and acknowledged by plaintiffs at argument,[54] there is a good faith component to an amount in controversy statement, if a plaintiff chooses to make one.

(ii) The Court Will Not Consider the Debtors' Submission of Settlements in Other Class Actions

In an effort to minimize the class and PAGA claims, the Debtors attached to their filings two settlement approval motions ("Settlement Motions") from other class actions asserting California wage and hour violations and seeking both damages and penalties under the PAGA. These Settlement Motions were filed by Capstone Law APC, the same firm the Debtors assert represent Ms. Beeney and Mr. Pfeiffer in the California state court. The Debtors argue that I may take judicial notice of these settlements because "they are reflected in the pleadings on file in courts of competent jurisdiction."[55]

***8** At the reconsideration hearing, the Debtors moved the Settlement Motions into evidence, drawing opposition from Ms. Beeney and Mr. Pfieffer. They asserted multiple grounds to exclude the Settlement Motions, including lack of foundation, no indicia of reliability, and no way to evaluate, objectively, the statements in the Settlement Motions. They posited that the only way I could consider the Settlement Motions would be in the context of expert testimony.

I agree with Ms. Beeny and Mr. Pfeiffer. The Settlement Motions, absent testimony to explain the similarities and differences between the circumstances in those cases and the circumstances here is simply unhelpful. Moreover, the only basis the Debtors offered for their admission into evidence was judicial notice. The Debtors cite *Southmark Prime Plus, L.P. v. Falzone*[56] for the proposition that a court may take judicial notice of the contents of records from another jurisdiction.[57] While undoubtedly true, the district court also recognized that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[58] The Debtors ask me to take judicial notice of "facts" (*i.e.,* the claims being the settled, the aggregated asserted amounts of those claims, and the settlement amounts) to draw a conclusion that the claims before me should be set at similar amounts. These are not the types of "facts" that courts take judicial notice of, and I decline to do so even in the arguably more liberal context of this proceeding. Accordingly, the Settlement Motions will not factor into my decision.

(iii) The Debtors Have Not Presented Any Evidence on Which to Reduce the Rest Break Claims

Without much elaboration, the Debtors argue that a downward departure from the settlements embodied in the Settlement Motions is warranted because the certified rest break claims are tenuous, given that the employee manual distributed to managers always contained the correct policy and the employee handbook was corrected as of January 1, 2014. That change is not dispositive for the prepetition class, which spans eight years. Further, the Debtors have not submitted any information, or even an alternative mathematical calculation, that cuts off the class claim at January 1, 2014. Accordingly, there is no basis to discount Ms. Beeney's claims because of the "tenuous" nature of the rest break claims.

(iv) *Frlekin v. Apple Inc.* Causes Significant Challenges to Recovery on the Off–the–Clock Claims

On November 7, 2015, the United States District Court for the Northern District of California decided cross motions for summary judgment in the case of *Frlekin v. Apple,*[59] a class action suit alleging violation of California's wage and hour laws. Employees of Apple retail stores located in California were subject to both bag and technology searches to ensure against theft. The searches occurred whenever an employee left the store premises carrying a bag, purse, backpack or an Apple product, such as an iPhone. As here, the named plaintiffs in the class action sought compensation for the time spent waiting for the searches to be performed. As part of the class certification, the named plaintiffs agreed to limit the reasons for bringing bags to work. The class, as certified, was authorized to bring claims "based on the most common scenario, that is, an employee who voluntarily brought a bag to work purely for personal convenience."[60] On summary judgment, then, the issue was "whether the time spent waiting for the exit searches to be completed deserved compensation under California law."[61]

***9** California law requires employees to be paid for all hours worked, which is defined as "the time during which an employe[e] is subject to the control of an employer, and includes all the time that the employee is suffered or permitted to work, whether or not required to do so."[62] The court addressed these two independent bases with respect to the off-the-clock bag searches and found them wanting.

The first basis—that the employee was subject to the control of the employer—has two prongs: (i) the employer restrained the employee's action during the activity; and (ii) the activity was mandatory, not optional. As to the first prong, the Court easily concluded it was met because if an employee wished to leave an Apple store, he was subject to a bag search.[63] But, as the Court explained, the second prong was not met because the employee could choose not to bring a bag to work. The Court found that if an employee had a real choice over whether to engage in the conduct, as opposed to an illusory choice, then the activity was optional, not mandatory. As applied to Apple, the evidence was clear that some employees did not bring bags to the store, and, therefore, did not undergo searches when they left the store. With a class limited to those who voluntarily brought a bag to work for their own convenience, the court found nothing illusory about the choice.[64]

As for the second basis—that the employee is suffered or permitted to work—the court held that waiting to be searched was not compensable, observing that "[o]ur plaintiffs merely passively endured the time it took for their managers or security guards to complete the peripheral activity of a search. Neither the searches nor waiting for them to be completed

had any relationship to their job responsibilities."[65] In making this decision, the court took guidance from the U.S. Supreme Court's decision in *Integrity Staffing Solutions, Inc. v. Busk,*[66] which held for purposes of the Fair Labor Standards Act that preliminary and postliminal activities are only compensable if the activities are an "integral and indispensable" part of an employee's duties.[67]

While the Debtors argue that *Apple* is directly on point, Ms. Beeney and Mr. Pfeiffer try to distinguish the case legally and factually. First, they argue that a close reading of *Apple* shows that the issue is not whether the choice to bring a bag is voluntary, but whether the search itself is voluntary. This is a misreading of *Apple,* which, based on the class certified, necessarily focused on the employee's choice to bring a bag. Second, they distinguish *Apple* factually by arguing that the Debtors' employees were searched regardless of whether they carried a bag. This argument is new, and when pressed at argument to identify the nature of a search unrelated to a bag check, counsel could not.[68] Regardless, common experience shows that most employees bring bags to work voluntarily. Finally, Ms. Beeney and Mr. Pfeiffer argue that I should ignore the *Apple* case altogether, as Judge Berle "was not convinced by the Debtors ['] first effort to use *Apple* to get rid of the bag check claim."[69] As Judge Berle stated, however, he was not attempting to ascertain the merits of the claim, only whether Ms. Beeney met the class action requisites; thus, this argument is not persuasive.[70]

***10** Based on a review of *Apple* and the arguments of counsel, claims based on the searches of bags, backpacks or the like brought voluntarily to a PacSun store are likely foreclosed. While there may have been other types of exit searches conducted, to date, Ms. Beeney and Mr. Pfeiffer have not satisfied me that such claims exist.

(v) PAGA Provides Discretion to Ensure that Any Penalties Are Not Unfair, Arbitrary and Oppressive, or Confiscatory.

The PAGA provides that in actions brought by aggrieved employees as private attorney generals for the state of California "a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."[71] The statute, itself, does not give any guidance on what facts or circumstances would warrant a reduction and neither did any of the parties to this case.

In his proofs of claim, Mr. Pfeiffer asserts PAGA claims in the aggregate amount of $135,374,113.[72] With respect to the Estimation Motion and Cross–Motion, other than the objections based on the Settlement Motions, which I am not considering, the only other argument made is that I should use the discretion given by the statue to ensure that the award is not unjust, arbitrary and oppressive, or confiscatory.

Permitting the PAGA Claim to be voted in its full amount would not be arbitrary because it is based on the calculations made in the proofs of claim, which, while they contain assumptions and extrapolations, have not been specifically challenged by the Debtors. I do find, however, that given the court's duty to divine the "proper" amount of the claim for voting purposes, awarding the full amount of this penalty claim would give the PAGA claim an outsized influence over the plan process.

(vi) Proper Amount of the Class and PAGA Claims for Voting Purposes

The Debtors did not provide any evidence of the size of other creditors' claims in the general unsecured class at the hearing on the Estimation Motion and Cross–Motion. A review of the previously approved disclosure statement[73] reveals that the Debtors estimated the claims in the general unsecured class to be between $11 million and $22 million without including the class and PAGA claims. Taking into account the legal arguments that have been made as well as the evidence presented, I find on the record made that the class claim will be temporarily allowed in the amount of $5,000,000 for voting purposes only. Because the employee claims will have a voice through the class claim, and given the statutory permission to ensure the claims are not unjust or confiscatory, the PAGA Claim, which is punitive in nature, will be temporarily allowed in the amount of $100,000 for voting purposes only.

II. While I Will Entertain Reconsideration of the First PacSun Memorandum, I Find No Basis to Change that Decision.

***11** Ms. Beeney asks me to reconsider my previous ruling that she is not an adequate representative of any absent class members other than those, like her, who hold general unsecured claims. Ms. Beeney cites to Federal Rule of Civil Procedure 59(e), made applicable by Bankruptcy Rule 9023, which permits alteration or amendment of a judgment based on (i) an intervening change in the law; (2) the availability of new evidence; or (3) the need to correct a clear error of law or to prevent manifest injustice. While she does not state which section is applicable, process of elimination (there is no citation to intervening law or new evidence) points to "preventing manifest injustice."

My ruling in the First PacSun Memorandum that Ms. Beeney cannot adequately represent absent class members who may hold priority claims was based on the Third Circuit's decision in *Dewey v. Volkswagen Aktiengesellschaft,*[74] which was cited by the Debtors, but, quite candidly, was not a focus at the original argument. Accordingly, at the July 18 hearing, I permitted Ms. Beeney's counsel to address the First PacSun Memorandum, including *Dewey.* Having now considered her arguments, I have no reason to change or revise my original conclusion.

In her papers and at argument, Ms. Beeney did not cite any case law that suggests that *Dewey* is not binding, applicable authority or that I applied it incorrectly as a matter of law. Rather, Ms. Beeney makes four different arguments: (i) the structural conflict that I found exists in this case is merely a "potential conflict which may never materialize;" (ii) my decision presupposes that Ms. Beeney will breach her fiduciary duty to the absent class members; (iii) the so-called "Straddle Employees"—those whose dates of employment are both before and after, the priority class period cutoff of October 10, 2016—will act as "natural watchdogs" against any improper treatment of one class over another; and (iv) that my decision unfairly, and retroactively, creates a forfeiture of a subset of claims in the state certified class. I will address these arguments in order.

First, Ms. Beeney urges that I reverse my decision and address the adequacy of representation requirement "in real-time—when and if such conflict issues actually materialize."[75] She contends that a conflict may never arise because, for example, this matter may be litigated rather than settled, as evidenced by the five years of litigation that preceded the filing of the petition.[76] In making this argument, Ms. Beeney misapprehends the structural conflict inherent in the prepetition class now that the Debtors have filed their bankruptcy cases. As explained in the First PacSun Memorandum, because section 1129(a)(9)(B) requires payment in full of claims having priority under the Bankruptcy Code, there is a fundamental conflict between those claimants and the holders of general unsecured claims. And, as the *Dewey* court emphasized, it is irrelevant whether the proposed settlement actually leaves the weaker positioned class members unharmed; the point is that the structural protection that is the foundation of Rule 23(a)(4) must be met throughout the process of bargaining for settlement.

***12** Since the First PacSun Memorandum, the United States Court of Appeals for the Second Circuit in In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation,[77] refused to certify a class and approve a proposed settlement of litigation spanning ten years because of the inadequacy of the class representatives. Agreeing with the Third Circuit, but stating the principle differently, the Second Circuit explained:

> Adequacy must be determined independently of the general fairness review of the settlement; the fact that the settlement may have overall benefits for all class members is not the "focus" in "the determination whether proposed classes are sufficiently cohesive to warrant adjudication."[78]

Waiting for a final resolution as Ms. Beeney suggests does not cure any fundamental intra-class conflict. Moreover, I do not find it efficient in the context of this case to essentially preclude settlement discussions with the Debtors because of an inadequate representative.

It is also clear that because Ms. Beeney is no longer an adequate representative for all absent class members, I could have simply denied the filing of any class proof of claim a la *Dewey* and *Payment Card Interchange.* Instead, I permitted the filing of a class claim for those absent class members who would, if their claims are valid, hold general unsecured claims.[79] That ruling permits Ms. Beeney to file a class proof of claim covering a period of 8 years and seven months; it excludes claims covering only a four month period, albeit the priority period. Under these circumstances, to borrow from the Second Circuit, the only interest that may be served by this request under the circumstances is that of class counsel.[80]

Dewey and *Payment Card Interchange* also dispense with Ms. Beeney's arguments that my decision presupposes that Ms. Beeney will breach her fiduciary duty to the absent class members and that the existence of Straddle Employees solves any fundamental intra-class conflict. I do not, as Ms. Beeney would have me do, look to bankruptcy law to determine

whether Ms. Beeney is an adequate representative; I look to Rule 23. Interpreting Rule 23, the Second Circuit, citing United States Supreme Court decisions as well as its own, specifically rejects the argument that class representatives who hold claims in more than one subgroup can adequately represent any one of those subgroups. It explains: such class representatives will have the incentive to maximize their own total recovery rather than the recovery of any single group.[81]

***13** Finally, Ms. Beeney argues that my decision unfairly, and retroactively, creates a forfeiture of a subset of claims in the state certified class. Ms. Beeney contends that neither she nor Judge Berle could have anticipated the bankruptcy filing, and thus my ruling is "untenable and unfair ... because the perceived conflict can only possibly be known *six months after it first arises* " creating a race to find a substitute representative prior to a bar date and a "highly-elevated [ ] risk of forfeiture."[82] While this may be true, it is not unique to bankruptcy. What Ms. Beeney ignores is that neither class certification nor approval of a class representative is set in stone.

There is no absolute right to proceed by class action, which is an exception to the general rule that parties assert and litigate their own claims.[83] To certify a class, therefore, all of the Rule 23(a) requisites and one of the Rule 23(b) criteria must be satisfied. A necessary corollary to certification is the court's duty to monitor the litigation to ensure that the requisites are maintained throughout the case.[84] A judge must "define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts."[85] So, for example, if during the course of the litigation, the size of the class is reduced because class members opt out, or evidence revealed in discovery narrows the class such that joinder is now possible, the class may be decertified.[86] Or, if evidence garnered during discovery reveals new information about the class claims such that common law and facts no longer exist, a class may likewise be decertified.[87]

Lack of adequate representation is also a basis for decertifying a class.[88] In *Birmingham Steel Corp. v. Tennessee Valley Authority,*[89] a case cited by Ms. Beeney, Birmingham Steel brought a class action on behalf of a group of 400 large-volume industrial consumers against Tennessee Valley Authority. On December 5, 2000, the district court certified the class action with Birmingham Steel as the class representative. The class notice sent to members provided that the class did not include any member in a bankruptcy proceeding. In or around June 2002, Birmingham Steel filed a voluntary bankruptcy proceeding. Shortly thereafter, Tennessee Valley Authority moved to decertify the class. After argument, the district court decertified the class finding that Birmingham Steel was no longer an adequate representative because it was no longer a member of the class.[90] On appeal, the Eleventh Circuit remanded with instructions to allow a "reasonable period of time for a member of the class to intervene or to be substituted as the class representative[,]" failing which, the district court could decertify the class action.[91]

***14** Here, while the class was certified only two months prior to the Debtors' bankruptcy filings, the commencement of bankruptcy with the attendant application of the Bankruptcy Code changed the playing field such that Ms. Beeney is no longer adequate to represent the entire state certified class. While that may seem unfair, it is no different than non-bankruptcy cases where the facts or law develop in a way such that Rule 23 is no longer satisfied. Nor is there a forfeiture of any wage and hour claims arising between October 10, 2015, and February 26, 2016 because each person in that priority period will have an opportunity to file his or her own proof of claim, and claimants with priority claims after February 26, 2016 did not have the benefit of the tolling of the statute of limitations. Accordingly, I find no basis to reconsider the First PacSun Memorandum.

III. Ms. Shin Will Not Be Permitted to File Proof of Claim on Behalf of a Class of Priority Claimants

Since the First PacSun Memorandum, Ms. Beeney's counsel, ostensibly on her behalf, has been busy attempting to find a substitute and/or additional class representative to represent those absent class members who would hold priority claims. Ms. Beeney argues that Ms. Shin should be permitted to substitute in or file a late proof of claim because the First PacSun Memorandum was an unforeseeable event that constitutes excusable neglect and there is no prejudice to the Debtors because Ms. Beeney's timely filed proof of claim included claims arising in the priority period. She also argues that I should not analyze whether Ms. Shin is an adequate representative of the class or consider any matter that may have been placed in front of Judge Berle prior to certification as the Debtors did not ask Judge Berle to reconsider his decision nor did the Debtors appeal it.

The Debtors oppose the motion arguing that: (i) excusable neglect cannot exist because Ms. Shin and others with claims in the priority period were served with the bar date notice and did not file their own proofs of claim; (ii) I must perform a complete analysis of the priority claims, including not only whether the class comports with Rule 23, but whether I should exercise my authority to apply Rule 23 with respect to the priority period claims; (iii) that factual differences exist which preclude class certification of a priority period class; and (iv) in any event, Ms. Shin is not an adequate representative of the priority class.

As an initial matter, to the extent excusable neglect is a factor in this analysis, I agree with Ms. Beeney that it is met on the circumstances of this case. Ms. Beeney sought permission to file a class proof of claim, and timely filed such a claim. It is only my decision that she is not an adequate representative for claims in the priority period that created the possibility of an untimely proof of claim. The Debtors are incorrect in their position that Ms. Shin's failure to file an individual claim is the operative question. Rather, the question is whether I should permit Ms. Shin to file a class claim. This position is also consistent with the non-bankruptcy law cited by Ms. Beeney[92] and not contradicted by the Debtors. As stated in *Tennessee Valley Authority,* once certified, "a class acquires a legal status separate from that of the named plaintiffs[,]"[93] and thus a deficiency in the class representative does not necessarily call for dismissal of the action if another member of the class can serve as an adequate representative.[94] Under the circumstances of this case, therefore, Ms. Shin, if all other requisites are met, will be permitted to file a proof of claim on behalf of the class that attained a separate legal status.

***15** Given my duty, however, to ensure that a class action at all times comports with Rule 23, I agree with the Debtors that I must review both the proposed class and the class representative for compliance with that rule. Further, because this is a bankruptcy proceeding I must determine in the first instance whether I should apply Rule 23.

A. I Will Decline to Apply Rule 23 to the Off–the–Clock Search Claims Because to Do So Will Adversely Affect the Administration of the Estate

As discussed in the First PacSun Memorandum, whether to apply Rule 23 once a bankruptcy case has commenced is within the court's discretion.[95] The court's consideration should include an analysis of the three factors articulated in *Musicland* :[96] (i) whether the class was certified prepetition; (2) whether the members of the putative class received notice of the bar date; and (3) whether class certification will adversely affect the administration of the estate.[97]

Application of the *Musicland* factors to the purported priority class differs in at least two respects from the analysis applied to the general unsecured class. First, the entire priority class was not certified prepetition as the state certified class term ended approximately five weeks prior to the filing of the petition. Second, each potential priority claimant received actual notice of the bar date, and thus had an opportunity to file an individual proof of claim. As set forth in the Declaration of Benjamin J. Steele, "only seven proofs of claim have been filed by natural persons in California that assert entitlement to any type of priority."[98]

As for the impact on the administration of the estates, the Debtors argue that the passing of the bar date fundamentally changes the analysis of this factor. Relying on *Musicland,* the Debtors contend that this weighs against the applicability of Rule 23. Several courts, however, have recognized that the class action tolling rule[99] applies in bankruptcy, such that if a self-described class representative timely filed a class proof of claim (or an adversary proceeding) and the court declines to allow it, a reasonable bar date should be set to allow claimants—who would have fallen into the class—time to file individual claims.[100] This is the case notwithstanding that these claimants were sent the bar date notice.[101]

***16** Looking solely at these arguments, I would apply Rule 23 to the portion of the priority period that was included in the state certified class action. The Debtors would not be prejudiced because they have been on notice of the class action claims for years. I would not, however, find it appropriate to apply Rule 23 with respect to the priority period after February 26, 2016, the end of the class period certified by Judge Berle.[102]

At the July 18 hearing, in response to argument by Ms. Beeney's counsel about continuing violations, I asked two questions: (i) whether a state court would entertain continuing violations as part of a preexisting certified class and (ii) what are Ms. Beeney's obligations with respect to claims outside the class period. I also permitted post-hearing submissions on that issue. Neither of the parties cited a case directly on point (and there may be none). But, the parties seem to agree that some further action would be necessary before

claims arising after the class period could proceed in state court[103]—whether that would be the filing of a new complaint to cover the portion of the priority period not included in the class definition or some type of motion to extend the class period previously certified. Ms. Beeney has cited me to no law which requires her to take on this burden or that makes her a fiduciary for claimants outside the state certified class period. Further, holding any class claim to the prepetition certified period honors the separate legal status the class attained through certification.

Nonetheless, there is another consideration that compels me to decline to exercise my discretion to apply Rule 23 to the off-the-clock security check claims. Having considered the Estimation Motion and the Cross–Motion, I have concluded that it is highly unlikely that those claims survive *Frlekin v. Apple.* And, while I could be incorrect, given my conclusion, it is clear that permitting the filing of the off-the-clock security check claims will adversely impact the estate. Litigating these claims on a priority basis could delay consideration of the Debtors' plan of reorganization and cause expenditures of fees which these Debtors can ill afford, each of which impacts other parties-in-interest in these cases.

I recognize that courts do not generally consider the merits of the claims when considering certification of a class action. But, when, as here, I have already considered the claims and found them wanting, I find that injecting a priority class claim into these cases "would inappropriately clash with bankruptcy needs and concerns"[104] and, thus, adversely impact the estate and other creditors. Accordingly, I decline to apply Rule 23 to the off-the-clock security check claims.

B. The Rest Break Claims During The Priority Period Do Not Satisfy Rule 23.

***17** By the First PacSun Memorandum, I permitted Ms. Beeney to file a class proof of claim with respect to her allegations that PacSun's rest break policy and off-the-clock security checks violate California law. Central to my holding was the fact that PacSun was alleged to maintain certain companywide policies contravening state wage and hour laws, such that there were common legal issues to be decided and that legal issues predominated over factual issues.[105] As previously noted, if the Debtors are correct that their policies do not violate California law, no class member will have a claim.

Concerning the rest break policy, my holding was based on the then uncontested fact that PacSun's employee handbook (which differed from the manual given to managers) contained a uniform rest break policy alleged to be facially non-compliant with California law.[106] In support of the Debtors' objection to the Motion to Amend or Reconsider, the Fox Declaration was admitted into evidence. Mr. Fox, the Senior Human Resource Manager of Pacific Sunwear Stores Corp. since 2010, states that the employee handbook was changed on January 1, 2014, to reflect the manual given to managers.[107] As such, the rest break policy in the updated handbook is now facially compliant with California law. Neither Ms. Beeney nor Ms. Shin assert otherwise, nor do they argue that the modified handbook was not in effect during the priority period.

The updated handbook changes the Rule 23 analysis. It turns the rest break claims from those based on an allegedly violative companywide policy into those that arise only when a specific store deviates from an otherwise compliant companywide policy. The changed nature of these claims creates an inherently fact-driven inquiry. The change is illustrated not only by the Fox Declaration, but also by Ms. Shin's own testimony. Specifically, Ms. Shin testified that she that she did not take a rest break unless instructed to by her manager.[108] There is no suggestion that other employees similarly relied on a manager to direct them to take breaks. Her allegation indicates the need to look into individualized factual issues, including the practice of each manager and whether other employees felt similarly constrained, neither of which was alleged to be uniform. As such, I find that the rest break allegations for the priority period do not satisfy Rule 23(b) because questions of law or fact do not predominate over questions regarding individual employees.[109] While in individual instances the Debtors may have violated California law on rest breaks, there is not a common question of law on liability during the priority period. Accordingly, I will not permit a class proof of claim based on rest break violations for the priority period.

Conclusion

***18** I have previously permitted the filing of a class proof of claim covering a period of 8 years and seven months—from March 18, 2007 through October 10, 2016. For the reasons set forth in this Memorandum, the Court will not permit the filing of a class proof of claim for the period after October

10, 2016. Given this ruling, however, a second bar date notice must go to employees who worked in PacSun's California retail locations from October 11, 2016 through February 26, 2016.

For purposes of voting on the Debtors' plan, the class claim will be temporarily allowed in the amount of $5,000,000 and the PAGA claim will be temporarily allowed in the amount of $100,000.

An appropriate order will enter.

All Citations

Not Reported in B.R. Rptr., 2016 WL 4250681

Footnotes

1 The Debtors and the last four digits of their respective federal taxpayer identification numbers are as follows: Pacific Sunwear of California, Inc. (9463–CA); Miraloma Borrower Corporation (0381–DE); and Pacific Sunwear Stores Corp. (5792–CA) (collectively, "PacSun" or the "Debtors"). The Debtors' address is 3450 East Miraloma Avenue, Anaheim, CA 92806.

2 *In re Pac. Sunwear of Cal., Inc.,* 2016 WL 3564484 (Bankr.D. Del. June 22, 2016) ("First PacSun Memorandum").

3 Motion (First Amended) of Class Claimants (A) for Leave to Amend Proof of Claim to Substitute Class Representative or, Alternatively, to Provide Additional Time for Priority Class Representative to File Class Proof of Claim, and (B) for Partial Reconsideration ("Motion to Amend or Reconsider") [Dkt. No. 563].

4 United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

5 Motion of Class and PAGA Claimants for Estimation and Temporary Allowance of Claims of Class and PAGA Claimants for Purposes of Accepting or Rejecting the Joint Plan of Reorganization of Pacific Sunwear of California, Inc. and Subsidiary Debtors ("Estimation Motion") [Dkt. No. 379].

6 Debtors' Cross–Motion to Estimate Class of Tamaree Beeney and PAGA Claims of Tamaree Beeney and Charles Pfeiffer for Voting Purposes ("Cross–Motion") [Dkt. No. 415].

7 Debtors' Objection to, and Motion to Strike, Priority Status or Classification for Claim Number 986 [Dkt. No. 509]; Debtors' Objection to, and Motion to Strike, Priority Status or Classification for Claim Number 989 [Dkt. No. 510].

8 Adv. Proc. No. 16–51019.

9 Plaintiffs' Motion for Summary Judgment [Adv. Dkt. No. 4].

10 In this Memorandum, I address all motions other than the summary judgment motion, which will be the subject of a separate ruling.

11 Motion of Class and PAGA Claimants for Estimation and Temporary Allowance of Claims of Class and PAGA Claimants for Purposes of Accepting or Rejecting the Joint Plan of Reorganization of Pacific Sunwear of California, Inc. and Subsidiary Debtors ("Estimation Motion") [Dkt. No. 379].

12 It is not necessary to determine the amount of the prepetition priority claims because, under the Debtors' plan, they are not impaired and are deemed to vote in favor of the plan.

13 Debtors' Cross–Motion to Estimate Class Claims of Tamaree Beeney and PAGA Claims of Tamaree Beeney and Charles Pfeiffer for Voting Purposes ("Cross–Motion") [Dkt. No. 523].

14 *Stone Hedge Props. v. Phx. Capital Corp. (In re Stone Hedge Props.),* 191 B.R. 59, 64–65 (Bankr.M.D.Pa.1995); *In re Innovasystems, Inc.,* 2014 WL 7235527, at *7 (Bankr.D.N.J. Dec. 18, 2014).

15 11 U.S.C. § 502(c).

16 4 Collier on Bankruptcy ¶ 502.04[3] (Alan Resnick & Henry J. Sommer eds., 16th ed.) (further noting that the Court could limit the allowance if the parties so request, or out of deference to a nonbankruptcy court for the ultimate determination of the claim).

17 *In re Adelphia Bus. Solutions, Inc.,* 341 B.R. 415, 422 (Bankr.S.D.N.Y.2003).

18 *In re Armstrong World Indus., Inc.,* 348 B.R. 111, 123 (D.Del.2006).

19 Fed. R. Bankr.P. 3018(a).

20 *Armstrong v. Rushton (In re Armstrong),* 294 B.R. 344, 354 (B.A.P. 10th Cir.2003) (citing *Stone Hedge,* 191 B.R. at 64).

21 *In re Quigley Co.,* 346 B.R. 647, 653 (Bankr.S.D.N.Y.2006).

22 *Stone Hedge,* 191 B.R. at 65.

23 *Quigley,* 346 B.R. at 654; *see also Innovasystems,* 2014 WL 7235527, at *8–9 (discussing *Matter of Gardinier, Inc.,* 55 B.R. 601 (Bankr.M.D.Fla.1985) and noting that "[t]he Court considered that the potential size of the claim could allow the creditor to exert undue influence with other creditors in its class under the plan and thus 'scuttle' the proceeding.").

24 *Innovasystems,* 2014 WL 7235527, at *9

25 *Id.* at *7.

26 Reconsideration Hr'g Tr. at 65.

27 11 U.S.C. § 1126(a).

28 11 U.S.C. § 502(a)

29 *Armstrong,* 294 B.R. at 354.

30 Fed. R. Bankr.P. 3018(a).

31 Debtors' Reply in Support of Cross–Motion to Estimate Class Claims of Tamaree Beeney and PAGA Claims of Tamaree Beeney and Charles Pfeiffer for Voting Purposes ¶ 5 [Dkt. No. 560].

32 *See Armstrong,* 294 B.R. at 354.

33 It appears the Debtors retained an expert in the California action who provided differing figures to Judge Berle in connection with certification of the class. California Certification Hr'g Tr. At 33:17–19, Nov. 24, 2015 (Ex. D. to Dkt. No. 414).

34 Reconsideration Hr'g Tr. at 71, 88.

35 *Armstrong,* 294 B.R. at 354.

36 *Id.* (citing *In re Zolner,* 173 B.R. 629, 633–36 (Bankr.N.D.Ill.1994) (burden of proof is on the claimant), *aff'd,* 249 B.R. 287 (N.D.Ill.2000) and *Stone Hedge,* 191 B.R. at 64–65 (suggesting that burden of proof may be on objector)).

37 191 B.R. 59 (Bankr.M.D.Pa.1995).

38 *Id.* at 65.

39 First Amended Class Action Complaint ¶ 1 (Ex. A to Dkt. No. 414).

40 28 U.S.C. § 1332(d)(2).

41 *Morgan v. Gay,* 471 F.3d 469, 472 (3d Cir.2006). In her post-hearing submission, Ms. Beeney asserts, for the first time, that her class action is a "local controversy" which she contends falls within the exception to CAFA's preference for federal jurisdiction. *See* 28 U.S.C. § 1332(d)(4). While this may be true, she does not suggest that the $5,000,000 aggregate amount in controversy was not pled to avoid CAFA jurisdiction nor does she identify a state-based reason for the allegation.

42 471 F.3d 469 (3d Cir.2006).

43 *Id.* at 474.

44 303 U.S. 283 (1938).

45 *Morgan v. Gay,* 471 F.3d at 477.

46 *Patel v. Nike Retail Servs.,* 58 F.Supp.3d 1032, 1036 (N.D.Cal.2014) (citing *Damele v. Mack Trucks, Inc.,* 219 Cal.App.3d 29, 41–42 (1990)).

47 133 S.Ct. 1345 (2013).

48 The complaint also attached an affidavit stipulation to the same effect. *Id.* at 1347.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 Reconsideration Hr'g Tr. at 92.

55 Debtors' Opposition to Motion of Class and PAGA Claimants for Estimation and Temporary Allowance ¶ 12 ("Opposition to Estimation") [Dkt. No. 415].

56 776 F.Supp. 888 (D.Del.1991).

57 Opposition to Estimation ¶ 12.

58 *Falzone,* 776 F.Supp. at 892 (quoting Fed. R. Evid. 201(b)(2))

59 2015 WL 6851424 (N.D.Cal. Nov. 7, 2015).

60 *Apple,* 2015 WL 6851424, at *2. Any class members with special needs could intervene, but none did. *Id.*

61 *Id.* at *1.

62 *Id.* at *3.

63 *Id.*

64 *Id.* at *6.

65 *Id.* at *11.

66 135 S.Ct. 513 (2014).

67 *Apple,* 2015 WL 6851424, at *10.

68 Counsel pointed to the deposition of Ms. Shin, who, in response to somewhat leading questioning from her counsel, testified that male colleagues, to the best of her knowledge, underwent a security check regardless of whether they brought a backpack or not. Shin Dep. at 62, July 14, 2016 (Ex. C. to Dkt. No. 572).

69 Reconsideration Hr'g Tr. at 56.

70 California Certification Hr'g Tr. at 28.

71 PAGA § 2699(e)(2).

72 The claim breaks down as follows: Rest Break Claims: $18,654,759; Off–the–Clock Claims: $47,121,758; Meal Period Claims: $4,880,300; Business Expense Claims: $8,108,900; Vacation Claims: $578,800; On–Call Claims: $20,272,150; § 203 Penalties: $35,374,113.

73 Disclosure Statement for the Joint Plan of Reorganization of Pacific Sunwear of California Inc. and Subsidiary Debtors [Dkt. No. 521].

74 681 F.3d 170 (3d Cir. 2012).

75 Motion to Amend or Reconsider ¶ 10.

76 *Id.* Ms. Beeney states that the most likely outcome—a litigated outcome—was unaccounted for in the First PacSun Memorandum. The possibility of a litigated outcome, while theoretically possible, is not practicable in the context of this case. As reflected in the other motions before me, the looming confirmation hearing makes it necessary to either estimate or resolve any administrative or priority claims, which must be paid in full in order to confirm a plan. 11 U.S.C. § 1129(a)(9). Further, while the Debtors' current plan provides for holders of "Qualified Unsecured Trade Claims" (which, by definition, do not include the alleged class claims) to receive a 100% recovery, holders of general unsecured claims are limited to their share of $400,000. Assuming for the sake of argument that the current plan is confirmable and confirmed (on which I make no comment), it seems unlikely that the class claim would be litigated.

77 2016 WL 356719 (2d Cir. June 30, 2016).

78 *Id.* at *5 (quoting *Denney v. Deutsche Bank AG,* 443 F.3d 253, 268 (2d Cir.2006)).

79 Ms. Beeney suggests that Judge Berle's order and, thus, my order, may already permit the filing of priority proofs of claim for Straddle Employees. To avoid any such unintended result, I will amend my June 22, 2016 order to clarify that Ms. Beeney may only file a general unsecured claim on behalf of her class.

80 *Payment Card Interchange,* 2016 WL3563719, at *8.

81 *Payment Card Interchange,* 2016 WL 3563719, at *7 (citing *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 627 (1997), *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999), and *In re Literary Works in Elec. Databases Copyright Litig.,* 654 F.3d 242 (2d Cir.2011)); *see also Dewey,* 681 F.3d at 189–90 (suggesting that one of the ways to satisfy Rule 23(a)(4) is to divide the class into two subclasses each with representative plaintiffs).

82 Motion to Amend or Reconsider ¶ 44–45.

83 *Wal–Mart Stores Inc. v. Dukes,* 564 U.S. 338, 348 (2011) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " (quoting *Califano v. Yamasaki,* 442 U.S. 682, 700–01, (1979)).

84 Newberg on Class Actions § 7:37 (5th ed.2011).

85 *Richardson v. Byrd,* 709 F.2d 1016, 1019 (5th Cir.1983). I recognize that *Byrd* was decided under a previous version of Rule 23, but, as other courts, I find the holding still applicable. *See, e.g., Lightfoot v. District of Columbia,* 246 F.R.D. 326, 334 n.6 (D.D.C.2007); *See also, Alberton v. Commonwealth Land Title Ins. Co.,* 299 F.R.D. 109 (2014) (reviewing certification standards six years after original certification due to the significant changes in the governing procedural and substantive law, and decertifying two subclasses). Judge Berle recognized his duty as a state court judge to ensure that the class action requisites are maintained during the course of the case. He specifically acknowledged that his ruling was without prejudice to decertification under certain circumstances, which included failure to establish the validity of her expert's statistical sampling and whether that analysis was appropriate in the case. First PacSun Memorandum *1.

86 Newberg on Class Actions § 7:38.

87 *Id.* (citing *Anderson v. Boeing Co.,* 2006 WL 2990383, at *4 (N.D.Okla.2006)),

88 *Id.* § 7:38.

89 353 F.3d 1331 (11th Cir.2003).

90 *Id.* at 1334.

91 *Id.* at 1343.

92 Motion to Amend and Reconsider ¶ 29.

93 *Tenn. Valley Auth.,* 353 F.3d at 1336 (citing *Lynch v. Baxley,* 651 F.2d 387, 388 (5th Cir. Unit B July 1981)).

94 *Id.*

95 First PacSun Memorandum, 2016 WL 3564484, at *5.

96 *In re Musicland Holding Corp.,* 362 B.R. 644 (Bankr.S.D.N.Y.2007).

97 *Id.* at 654–55.

98 Steel Declaration 5. Mr. Steele is a Vice President of Prime Clerk, the claims agent appointed in these cases. While it is conceivable that the Debtors' former or current California employees currently live outside of California, it is unlikely that that would add appreciably to the total priority claims filed. Further, although it does not appear that the Steel Declaration was admitted into evidence, Ms. Beeney did not question this point.

99 *See, e.g., In re Kaiser Grp. Int'l, Inc.,* 278 B.R. 58, 63–64 (Bankr.D.Del.2002) ("[T]he filing of a class action tolls the statute of limitations otherwise applicable to all class members in their individual capacities. (citing Bailey v. Sullivan, 885 F.2d 52, 65 (3d Cir.1989)).

100 *In re MF Global Inc.,* 512 B.R. 757, 764–65 (Bankr.S.D.N.Y.2014); Schuman v. The Connaught Grp. (In re The Connaught Grp.), 491 B.R. 88, 97–98 (Bankr.S.D.N.Y.2013); *see also* Kaiser Grp. Int'l, 278 B.R. 58, 63–64 (Bankr.D.Del.2002).

101 *See Kaiser Grp. Int'l,* 278 B.R. at 63–64; *MF Global,* 512 B.R. at 763–65 (distinguishing *Musicland,* upon which the Debtors rely).

102 This is but one instance of each party taking the inconsistent position that I should be bound by Judge Berle's decision when it favors them and ignore it when it does not.

103 Ms. Beeney's post-hearing submission suggests for the first time that the state court certified class may already include claims arising after February 26, 2016. I do not read Judge Berle's order that way, nor is this new found position consistent with previous positions taken by Ms. Beeney in these cases. Moreover, the cases cited actually support the opposite position, considering the language in those cases that defines the class specifically references future class members. *See J.D. v. Nagin,* 255 F.R.D. 406, 417 (E.D.La.2009) (certifying a class of "all children who are now or in the future will be confined at the Youth Study Center in New Orleans, Louisiana."); *Morel v. Giuliani,* 927 F. Supp, 622, 632 (S.D.N.Y.1995)

(certifying class consisting of "all residents of New York City who have received, receive, or will receive AFDC, Food Stamp or Home Relief benefits....).

104 *In re Motors Liquidation Co.,* 447 B.R. 150, 164 (Bankr.S.D.N.Y.2011).

105 First PacSun Memorandum, 2016 WL 3564484, at *7 (with respect to commonality), *8 (with respect to typicality) and *10 (with respect to predominance).

106 California law requires a rest break for every four hours or "major fraction thereof." The handbook stated that employees are provided: "one 10 minute break for every four hours of work. If you are working a shift of less than 3½ hours you will not be entitled to a rest period." Fox Declaration ¶ 5. On the other hand, the manual required store managers to provide one 10–minute break to all employees working 3.5 hours or more, two 10–minute breaks for a shift of 6 hours or more, and three 10–minute breaks for a shift of 10 hours or more. *Id.*

107 Declaration of Steve Fox in Opposition to Motion of Class Claimants (A) for Leave to Amend Proof of Claim to Substitute Class Representative or, Alternatively, to Provide Additional Time for Priority Class Representative to File Class Proof of Claim, and (B) for Partial Reconsideration ("Fox Declaration") [Dkt. No. 563 Ex. G].

108 Shin Dep. at 32–33. This type of allegation was not previously raised in this Court.

109 The rest break claims may also fail the "commonality" requirement of Rule 23(a)(ii), even though that standard is usually "easily met." *See* First PacSun Memorandum, 2016 WL 3564484, at *7. This is because now that there is no more common legal question regarding liability, there may be no common question at all. Those claims may also fail the typicality requirement, given the lack of evidence that Ms. Shin's failure to take breaks 10–20% of the time was for reasons typical of others—*i.e.,* lack of managerial approval.

End of Document

Tab 26

2009 WL 1374261
Only the Westlaw citation is currently available.

United States Bankruptcy Court,
S.D. Texas,
McAllen Division.

In re Marco A. CANTU and Mar–Rox, Inc., Marco A. Cantu, Roxanne Cantu, Debtor(s).

No. 08–70260.
|
May 15, 2009.

West KeySummary

1 **Bankruptcy** Estimation of Value

A holder of a judgment against a debtor was entitled to have his claim against the debtor estimated at its full face value of $2,100,986.50. The holder obtained a final judgment against the debtor in Florida and it appeared that it was entitled to full faith and credit in Texas. Thus, because it was very likely that no Texas court would allow a collateral attack on the final judgment from Florida, the probability of success favored the holder and the holder's claim was properly estimated in the full amount for voting purposes. 11 U.S.C.A. § 502(c).

MEMORANDUM OPINION AND ORDER ON MOTION FOR ALLOWANCE OF CLAIM FOR VOTING PURPOSES

RICHARD S. SCHMIDT, United States Bankruptcy Judge.

***1** On this day came on for consideration the Amended Motion to Allow the Claim for Purpose of Accepting or Rejecting Debtors' Plan of Reorganization filed by Howard S. Grossman, P.A. ("Grossman"), which the Court will treat as a motion for claims estimation pursuant to 11 U.S.C. § 502(c). The Court, having heard the evidence and arguments of counsel, and having reviewed the pleadings and briefs on file herein, finds as follows:

BACKGROUND

Grossman sued the Debtor, Marco Cantu ("Cantu") in Florida State Court for tortious interference with the attorney/client relationship. Cantu filed an answer *pro se.* Later, Cantu's Florida attorney made at least four appearances on behalf of Cantu at hearings involving discovery disputes. Cantu's pleadings were ultimately stricken by the Florida Trial Court after Cantu disobeyed six Orders of the Florida Trial Court. A Final Judgment was entered against Cantu on January 7, 2004, in the amount of $1,349,665.00, to which was later added a judgment for attorney's fees of $25,530.00, on June 23, 2004, and judgment for appellate attorney's fees of $128,605.64, on December 7, 2006.

Cantu appealed the Final Judgment to the District Court of Appeals in the State of Florida, Second District (the "Florida Court of Appeals"), raising two points on appeal: 1) that Florida lacked *in personam* jurisdiction over him and, 2) that he was improperly sanctioned for contumaciously disobeying repeated orders of the court. On May 4, 2005, the Florida Court of Appeals affirmed the Florida Trial Court's rulings in favor of Grossman and rejected Cantu's points of error. Cantu's Motion for Rehearing was denied

Grossman then sought to enforce his judgment in Texas. He filed his domestication action in Harris County, Texas. Cantu responded by filing his Motion to Transfer Venue, and Subject Thereto, Motion for New Trial, Alternatively, Motion for Denial of Recognition of Foreign Judgment in the Harris County District Court. The Harris County District Court denied the Motion and Cantu appealed. The Court of Appeals for the 14th District of Harris County reversed the Harris County District Court's ruling on venue and held that proper venue of the foreign judgment enforcement action was Hidalgo County, Texas, where Cantu resides. The case was remanded to the Harris County District Court for transfer of venue.

Thereafter, Cantu filed his chapter 11 bankruptcy petition. Grossman filed a proof of claim in the case for the total amount of $2,100,986.50. Cantu filed an Objection to Grossman's proof of claim which has been abated pending the State Court appeal relating to Cantu's complaints about the

domestication of the Florida Judgments in Texas. Grossman seeks estimation of his claim against Cantu for voting purposes.

DISCUSSION

1. BANKRUPTCY CODE PROVISIONS FOR ESTIMATION OF CONTINGENT OR UNLIQUIDATED CLAIMS

Section 502(c) of the Bankruptcy Code provides, in pertinent part, that "[t]here shall be estimated for purpose of allowance under this section(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case...." 11 U.S.C. § 502(c)(1) (2005). Section 502(c) was enacted to "further the requirement that all claims against a debtor be converted into dollar amounts." *Interco Inc. v. ILGWU Nat'l Ret. Fund (In re Interco Inc.),* 137 B.R. 993, 997 (Bankr.E.D.Mo.1992). Courts use estimation "to facilitate the speedy resolution of claims in bankruptcy courts." *Id.*

***2** Estimation serves at least two purposes. It helps "avoid the need to await the resolution of outside lawsuits to determine issues of liability or amount owed by means of anticipating and estimating the likely outcome of these actions." *First City Beaumont v. Durkay (In re Ford),* 967 F.2d 1047, 1053 (5th Cir.1992). Estimation also "promote[s] a fair distribution to creditors through a realistic assessment of uncertain claims." *Id.* The principal consideration in an estimation proceeding must be an accommodation of the underlying purposes of the Bankruptcy Code. *Bittner v. Borne Chem. Co.,* 691 F.2d 134, 135 (3d Cir.1982).

2. ESTIMATION METHODS

The Bankruptcy Code does not establish the method for estimating contingent or unliquidated claims. While the Bankruptcy Code is silent on the methodology that the Court should employ in estimating a claim, the Code provides the Court with wide discretion regarding the methodology that it may employ and as a result, the courts have consistently ruled that a bankruptcy court may use whatever method and procedures are appropriate to estimate the particular claim. *See, e.g., In re Brints Cotton Marketing, Inc.,* 737 F.2d at 1341; Bittner, 691 F.2d at 135; *In re Continental Airlines, Inc.,* 57 B.R. 842, 845 (Bankr.S.D.Tex.1985).

The Fifth Circuit has stated that the bankruptcy court should use "whatever method is best suited to the circumstances" in estimating a claim. *In re Brints Cotton Mktg.,* 737 F.2d at 1341; *see also Bittner,* 691 F.2d at 135 (the bankruptcy court should use "whatever method is best suited to the particular contingencies at issue."); *In re Eagle Bus Mfg., Inc.,* 158 B.R. at 437 (citing *Brints Cotton*).

> In reviewing the method by which a bankruptcy court has ascertained the value of a claim under section 502(c)(1), an appellate court may only reverse if the bankruptcy court abused its discretion. That standard of review is narrow. The appellate court must defer to the congressional intent to accord wide latitude to the decisions of the tribunal in question.

Bittner, 691 F.2d at 136 (footnotes omitted).

Courts have utilized a variety of different procedures for estimation proceedings, "run[ning] the gamut from summary trials to full-blown evidentiary hearings to a mere review of pleadings, briefs, and a one-day hearing involving oral argument of counsel." *In re Windsor Plumbing Supply Co.,* 170 B.R. 503, 520 (Bankr.E.D.N.Y.1994) (citations omitted).[1]

In the *Bittner* case, the Third Circuit Court of Appeals affirmed an estimation approach that evaluated the "ultimate merits" of the claims in question, which the bankruptcy court estimated to be zero. *Bittner,* 691 F.2d at 135. The Third Circuit noted that the bankruptcy court's findings "plainly indicated that the [claim at issue] lacked legal merit" and that as result, the court's estimation of the claims at zero "was consistent both with the claims' present value and with the court's assessment of the ultimate merits." *Id.* at 139. "Assuming however that the bankruptcy court did estimate their claims according to their ultimate merits rather than the present value of the probability that they would succeed in their state court action, we cannot find that such a valuation method is an abuse of the discretion conferred by section 502(c)(1)." *Id.* at 136 (footnote omitted). Other courts also have used the "ultimate merits" approach to estimating claims.[2]

***3** Some courts estimating claims have focused on a probabilistic methodology in which "[t]he estimated value of the claim is ... the amount of the claim diminished by probability that it may be sustainable only in part or not at all." *In re Windsor Plumbing,* 170 B.R. at 521 (estimating asserted claim of $3,502,860 at $145,000).[3] A 1997 Wake Forest Law Review article[4] titled "A Statistical Approach to

Claims Estimation in Bankruptcy" by Salsburg and Williams discusses seven different estimation models, including (1) the face value method which estimates future claims at the face amount of the claim; (2) the zero value method which estimates the claim at zero but then exempts the claim from discharge; (3) the market theory model which estimates the claim at its market value if you can determine such a thing;[5] (4) the forced settlement model which estimates the claim at an amount that parties would be willing to accept in a hypothetical settlement;[6] (5) the discounted value model which estimates the claim at the face amount discounted by the probability of prevailing; (6) the summary trial model which estimates the claim after an abbreviated hearing but employs traditional standards of proof; and (7) the statistical model which is essentially the discounted value model using statistical methods to more accurately predict values. The authors recommend the statistical model as the most useful and coherent approach.

In accordance with the evidence presented at the hearing, the Court agrees that the probabilistic approach is the most useful in this case, but also has reviewed the evidence presented in light of other models to estimate the value of the claim.

3. ESTIMATION OF GROSSMAN'S CLAIM

In this case, based on the probability of ultimate success, the Court finds that Grossman's claim should be estimated in its full face value of $2,100,986.50. The evidence suggests that Cantu submitted to the jurisdiction of the Florida Trial Court by filing an answer, and by the appearance of his attorney at numerous hearings. Moreover, Cantu raised the issue of personal jurisdiction, as well as contesting the sanctions award, at the Florida Appellate Court level. The Florida Court of Appeals affirmed the Florida Trial Court.

The Florida judgments are final orders. The facts of this case strongly suggest that the Florida judgments are entitled to full faith and credit in Texas. The leading case interpreting the meaning of the full faith and credit clause of the United States Constitution is *Durfee v. Duke,* 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963). The *Durfee* court concluded that once a matter, including jurisdiction, has been fully litigated and judicially determined, it cannot be re-litigated in another state between the same parties. Texas courts recognize the *Durfee* holding, acknowledging that each state must give full faith and credit to the judgments of another state. *Bard v. Charles R. Meyers Ins. Agency,* 839 S.W.2d 791 (Tex.1992). The scope of the inquiry into a foreign judgment's jurisdiction is limited to the question of whether the jurisdiction was fully and fairly litigated and finally decided by the court which rendered the original judgment. If so, the question of personal jurisdiction cannot be raised again in a Texas court. *Merritt v. Harlis,* 685 S.W.2d 708 (Tex.App.-Dallas, 1984, no writ); *Roark v. Swigart,* 848 S.W.2d 837 (Tex.App.Amarillo, 1993, no pet.). Here, Cantu contested jurisdiction and the merits of the sanctions at the Florida Court of Appeals. He was unsuccessful. This Court doubts that any Texas Court would allow a collateral attack on the final judgment from Florida.

***4** Moreover, this Court is precluded from exercising appellate jurisdiction over the final, non-appealable Florida Judgment under the *Rooker–Feldman* doctrine. *Lance v. Dennis,* 546 U.S. 459, 463, 126 S.Ct. 1198, 163 L.Ed.2d 1059 (2006). Under *Rooker–Feldman,* "lower federal courts lack the power to modify or reverse state court judgment because 28 U.S.C. § 1257 vests exclusive jurisdiction to review or modify a state court judgment in the Supreme Court." *LAC Real Estate Holdings, LLC v. Biloxi Marsh Lands Corp.,* 2009 FL 937165 *2 (5th cir.2009). *Rooker–Feldman* is designed to prevent a losing party from complaining of injuries caused by a state court judgment and seeking review and rejection of the judgment. *Dean v. Mississippi Board of Bar Admissions,* 2009 WL 1262430 *2 (5th Cir.2009).

When this case is viewed under the light of the full faith and credit clause of the United States Constitution, cases interpreting that clause, and the *Rooker–Feldman* doctrine, this Court must conclude that the probability for success lies with Grossman and his claim should be estimated in the full amount for voting purposes.

CONCLUSION

For the reasons stated above, the Court finds that Grossman's request for estimation of his claim for voting purposes should be granted and the claim should be estimated at its face amount of $2,100,986.50.

IT IS SO ORDERED.

All Citations

Not Reported in B.R., 2009 WL 1374261, 62 Collier Bankr.Cas.2d 974

Footnotes

1 *See, e.g., In re Eagle Bus Mfg.,* 158 B.R. at 437 (court conducted a mini-trial; parties were given seven hours each to present evidence and testimony by affidavit with live cross-examination, and were permitted to introduce into evidence documents, charts, summaries and other visual aids); *In re MacDonald,* 128 B.R. 161, 166–67 (Bankr.W.D.Tex.1991) (court approved a "summary trial" procedure involving proffers of evidence and limited live testimony); *In re Nova Real Estate Inv. Trust,* 23 B.R. 62, 65 (Bankr.D.Va.) (court heard eight days of testimony prior to estimating claim).

2 *See, e.g., Ryan v. Loui (In re Corey),* 892 F.2d 829, 834 (9th Cir.1989) (estimating claims at zero because of their "highly speculative nature"); *In re Pac. Gas & Elec. Co.,* 295 B.R. 635, 675–76 (Bankr.N.D.Cal.2003) (estimating antitrust claims at zero where claimants failed to make their case, the debtor asserted defenses that appeared to have merit, and the claimants had not established any meaningful measure of damages); *In re Kaplan,* 186 B.R. 871, 874, 878 (Bankr.D.N.J.1995) (noting that "the court must determine the value of the claim according to its best estimate of the claimant's chances of ultimately succeeding in a state court action" and estimating the claim at zero because the claimant "most likely would not succeed on a state court action"); *In re Thomson McKinnon Secs., Inc.* 143 B.R. 612, 621 (Bankr.S.D.N.Y.1992) (pursuant to section 502(c)(1) of the Bankruptcy Code, court disallowed claim in its entirety because claimant "failed to establish by a preponderance of the evidence" its causes of action against the debtor); *In re The Bible Speaks,* 65 B.R. 415, 427 (Bankr.D.Mass.1986) (selecting the "ultimate merits" method "because of its fairness and finality"); *In re Baldwin–United Corp.,* 55 B.R. 885, 903, 911 (Bankr.S.D.Ohio 1985) (disallowing claims in their entirety in estimation proceedings where court found it more probable than not that the claims would be dismissed in the court where they were pending).

3 *See also In re Wallace's Bookstores, Inc.,* 317 B.R. 720, 726 (Bankr.E.D.Ky.2004) (determining that "the estimation process should take into account the likelihood that the claimant would prevail on the merits and apply that probability to the amount of the damage."); *In re Farley, Inc.,* 146 B.R. 748, 754 (Bankr.N.D.Ill.1992) (estimating claims of personal injury claimants and contribution claims arising out of an explosion at $1.25 million "by taking the stipulated figure for damages [$5 million] and then discounting that figure by the high probability that Farley will not be found liable in tort under Illinois law.").

4 David S. Salsburg and Jack F. Williams, *A Statistical Approach to Claims Estimation in Bankruptcy,* 32 Wake Forest L.Rev. 1119 (1997).

5 This test has been criticized for being too hypothetical. Because there is no established market for environmental claims, "courts must conjure up hypothetical markets. One legal fiction builds on another without thought to the internal coherence of the model." Salsburg & Williams, 32 Wake Forest L.Rev. at 1134; *see also* Alison J. Brehm, David N. Copas, Jr., and Colleen Kotyk Vossler, *To Be, or Not to Be: The Undiscovered Country of Claims Estimation in Bankruptcy,* 8 J. Bankr.L. & Prac. 197, 252–53 (1999).

6 The "forced settlement" method also has been criticized as too hypothetical and difficult to apply because the variety of unquantifiable factors that go into a decision to settle make it very hard to value a hypothetical settlement. *See, e.g.,* Brehm, Copas, & Vossler, 8 J. Bankr.L. & Prac. at 253.

Tab 27

See para. 2

COURT FILE NO.: 03-CL-004932
DATE: 20040809

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

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

AND IN THE MATTER OF SECTION 191 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

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

BEFORE: FARLEY J.

COUNSEL: *Sean Dunphy* and *Shana Ivall*, for Air Canada

Peter J. Osborne and *Monique Jilesen*, for Ernst & Young Inc., Monitor

Larry Steinberg, for CUPE

Hugh O'Reilly, for IAMAW

Gregory Azeff, for GECAS

Howard A. Gorman, for the Ad Hoc Unsecured Creditors Committee

Lyle Kanee, for CAW

HEARD: August 9, 2004

E N D O R S E M E N T

(CUPE Appeal)

[1] CUPE appealed the decision of July 30, 2004, rendered by Geoffrey Morawetz as Claims Officer ("CO") with respect to CUPE's pay equity claim. At the end of the hearing today I dismissed the appeal and promised written reasons. These are those written reasons.

[2] At paragraphs 36 and 37 of his reasons, the CO stated:

> (36) CUPE's pay equity claim is a contingent claim in that it has not been successful on its merits as of the date of the commencement of Air Canada's CCAA proceedings. The contingency in question is the resolution of the pay equity complaint process underway before the Tribunal (and possibly the courts via appeals of the Tribunal's decision). As with any contingent claim, there are two fundamental aspects to the determination of the claim; namely, (i) as assessment of the happening of the contingency in question; and (ii) the quantification of the claim. If CUPE successfully discharges its onus of establishing that there is some basis to presuppose the happening of the contingency, a reasonable value must then be established for the claim (and it is common in practice to discount the aggregate value of the claim in a "best case" scenario by some reasonable percentage that reflects the risk that a less optimistic scenario may in fact result). For the reasons that follow, I find that CUPE has failed to provide any evidence to substantiate the happening of the contingency in question and that the quantification of CUPE's contingent claim would in any event be negligible.
>
> (37) There is, in these proceedings, a Claims Procedure Order of Farley J. dated September 18, 2003, as amended by Order of Farley J. dated July 9, 2004, which provides that all creditors (including CUPE with respect to its pay equity claim for the Relevant Period) must prove their claims in accordance with the procedures set out therein. In short, CUPE has to prove its claim now, and not at some future date, and the failure to do so results in CUPE being barred from asserting such a claim at a future date. If CUPE fails to adduce sufficient evidence to substantiate its contingent pay equity claim at the present time, it is not open to CUPE to assert that some weight ought to be given to the likelihood or possibility that it may, in the future, be able to adduce sufficient evidence so as to prove its claim in respect of the Relevant Period. That is to say, I cannot conclude that there is a 50% chance (or 40%, or 30%, etc.) that CUPE will be able to substantiate its claim in the future if it has not already done so in these proceedings and that some percentage of the value of its pay equity claim ought to be allowed at this time. CUPE cannot on the one hand admit that it has no evidence to substantiate its claim at the present time and on the other hand seek to have a claim admitted by the Monitor nonetheless on the basis that it might at some date find evidence to substantiate its claim. The merits of CUPE's contingent pay equity claim must be established in these proceedings.

He went on to observe at paragraph 39:

> (39) To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

Further at paragraph 40, the CO stated:

> (40) … As noted by counsel to Air Canada, there are three pre-requisite elements of a human rights complaint, without which there is no claim: (i) difference in wages; (ii) within the same establishment; and (iii) the performance of work of equal value as between the groups in question. … But, with respect to the third criterion, I agree with Air Canada that there is no evidence before me to indicate that the work performed by Flight Attendants is of equal value to the work performed by the Comparative Groups, which is the very basis of CUPE's claim. It is entirely unclear that there is any principled basis of comparison between Flight Attendants and the Comparative Groups and, in any event, no evidence before me that the outcome of such comparison establishes that there is work of equal value being performed.

[3] CUPE submitted that notwithstanding my views in *Re Olympia & York Developments Ltd.*, [1994] O.J. No. 1335 (Gen. Div.), that I should follow the Alberta practice as set out by Paperny, J. in *Re Canadian Airlines Corp.*, [2001] A.J. No. 226 (Q.B.) of hearing this matter on a *de novo* basis as opposed to a true appeal. Even if I were to agree with that notwithstanding the difference in practice related to Alberta Masters, I would observe that on the basis of the record before me, I would have come up with the same conclusions as the CO save and except as to what I might describe as wholehearted acceptance of his views at paragraph 46 when he describes "the intuitive appeal of Air Canada's argument with respect to the manner in which wages are determined". It is clear from his reference later in that paragraph to "yet another reason" that this argument of Air Canada was not a determinative feature. Indeed it may well be that the CO merely intended paragraph 46 to be simply a point which could be characterized as a buttressing observation on a check of reasonability, not that there is an obligation to do so to provide a foundation for a pay equity claim. Collective bargaining is a process of give and take. Secondly I would not be of the view that as per his observation in paragraph 47 that CUPE had an obligation to lead evidence as to:

> (b) more importantly, that the wage gap cannot be explained, in full or in part, by factors other than system gender discrimination (such as consideration of the factors set out in section 11(2) of the CHRA).

While it would seem to me that CUPE was not under any positive obligation to provide such evidence (that seemingly being Air Canada's role if it wished to do so), again that observation by the CO is not in my view determinative of the wage gap question.

[4] See also my views in *Re Air Canada (Corporate Travel Management CTM Inc.)* and *Re Air Canada (Always Travel Inc.)* matters released August 3 and 5, 2004 respectively relying on the Court of Appeal decision in *Shelson* v. *Gowling Lafleur Henderson LLP*, [2004] O.J. No. 850 (C.A.) released March 9, 2004 at paragraph 20 relating to deference notwithstanding that a matter may be decided originally on a paper record.

[5] The onus is on a claimant to prove its claim. As discussed in paragraph 38 of his reasons, the CO required that "CUPE must demonstrate that its claim is not too speculative or remote, but it need not establish that success is probable". He went on to say at paragraph 39:

> (39) In the present case, I am satisfied for the reasons set out below that CUPE's claim has not been proven. The claim is remote and speculative as there is no evidence to substantiate that the claim has any merit. To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

It seems to me to be an unreasonable analysis of his reasoning that would allow CUPE to advance at paragraph 46 of its factum:

> (46) To require scientific certainty is to set up inappropriate roadblocks to the goal of the CHRA, namely to remedy discrimination…

The fact of the matter is that CUPE provided <u>no evidence</u> as to the particular case involving Air Canada (and the "merged Canadian Airlines" question) as to the third criterion.

[6] It is indeed troubling that a *Canadian Human Rights Act /* pay equity case could rattle around the Commission, the Tribunal and the courts for 14 years and for this Court to be advised that it is likely to take another decade before this matter can be adjudicated to the end under that legislation. However, that process is not the one which is required to be followed in the determination of a claim under the CCAA. Contingent unliquidated claims are determined under the CCAA claims process even in the most complicated of litigation and even though a claim may not have been actually initiated in a court or otherwise. I do not wish or intend to minimize the hurdles and hoops which may be involved in the payment equity litigation in the established "ordinary course", but I would observe that if CUPE had provided an acceptable expert report on job evaluation, even if in "simplified form" (as opposed to no evidence), then Air Canada would have had to respond to that evidence. Would that report have had to be precise (apparently to the degree envisaged by parties in pay equity disputes)? The simple answer to that is that is not necessary in a CCAA claims process.

[7] The appeal is dismissed. While that claim as agreed between Air Canada and CUPE only deals with the monetary aspect of the claim up to September 30, 2004, I would trust that with respect to the process otherwise continuing, that with respect to the determination of this

as with any other human rights issue (which the Supreme Court of Canada has determined should be regarded as a quasi-constitutional right) such determination can be accomplished with cooperation in very significantly less time than a further decade. The resolution of such an important question demands nothing less.

J.M. Farley

Released: August 9, 2004

Tab 28

See para. 230

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **MARCH 31, 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
And
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND AND LABRADOR
Petitioner
And
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AND THE ATTORNEY GENERAL OF BRITISH COLUMBIA
Intervening parties

JUDGMENT ON AMENDED MOTION FOR A DECLARATION REGARDING ORDERS ISSUED PURSUANT TO THE ENVIRONMENTAL PROTECTION ACT (#445)

JG1793

INTRODUCTION

[1] This judgment deals with the impact of potential environmental obligations of a debtor company upon its restructuring process under the *CCAA*[1].

[2] On one hand, Her Majesty the Queen in Right of the Province of Newfoundland and Labrador (the "**Province**") contends that ministerial orders issued in relation to environmental matters are not "claims" under the *CCAA* when they do not require the Debtors ("**Abitibi**") to make payments to the Province.

[3] Therefore, when such orders merely command taking steps to comply with statutory duties for the protection of the environment, the Province submits that the resulting obligations imposed upon Abitibi are not subject to compromise under the Act.

[4] On the other hand, Abitibi considers that when these orders concern pre-filing liabilities and obligations, and remain in substance financial or monetary in nature, they are subject to both the stay of proceedings and the claims process contemplated by the *CCAA*.

[5] For Abitibi, to rule otherwise would grant a kind of super-priority status to a regulatory body for pre-filing claims, since the liabilities arising therefrom would then remain unaffected by the restructuring process. That would in turn significantly challenge its ability to successfully emerge from the present *CCAA* proceedings.

[6] Whatever the outcome is, the likely consequences for all stakeholders involved are serious. The potential environmental obligations at issue may entail expending huge sums of money in remediation costs: at minimum, tens of millions of dollars, quite probably, well over 100, perhaps, much higher than that.

[7] As stated by the Monitor[2], amounts of that magnitude are likely to be material to the estate of Abitibi and to impact on its ability to effect a viable plan of arrangement.

[8] For an understanding of the context, it is necessary, before analysing each side's arguments, to review the motion at issue, the positions of the parties involved, and the applicable factual background and legal framework.

THE MOTION AT ISSUE

[9] On April 17, 2009, the Court issued an initial order (the "**Initial Order**") pursuant to the *CCAA* with respect to Abitibi. The initial stay of proceedings was first extended to September 4, 2009, then, to December 15, 2009, afterwards, to March 15, 2010, and more recently, to June 18, 2010.

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1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "***CCAA***").
2 See, Monitor's 34th Report, dated February 19, 2010.

[10] During the complex restructuring process undertaken as a result, the Court notably issued a First Stay Extension Order, on May 14, 2009, and a Claims Procedure Order, on August 26, 2009.

[11] The First Stay Extension Order included, at the request of the Attorney General for Canada, the following amendment to the Initial Order:

> **10.1. ORDERS** that the aforementioned stay cannot be interpreted as to restrict or prevent Her Majesty the Queen, or her agents, from exercising powers, rights or duties in relation to matters involving public health, safety, security, public order or the environment against the Petitioners, the Partnerships, the Property, the Directors or others, providing that any financial or monetary fines or orders shall be stayed.

[12] As for the Claims Procedure Order, its purpose was to set up a claims procedure for Abitibi's creditors. Paragraph 3(t) thereof defined "Claim". That definition was similar, if not identical, to that used in the vast majority of similar orders issued in *CCAA* proceedings over the recent years:

> "Claim" means any right or claim of any Person against one or more of the Canadian Petitioners or Partnerships in connection with any indebtedness, liability or obligation of any kind whatsoever of one or more of the Canadian Petitioners or Partnerships, whether reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including without limitation any claim arising from or caused by the repudiation by a Canadian Petitioner or Partnership of any contract, lease or other agreement, whether written or oral. the commission of a tort (intentional or unintentional), any breach of duty (legal, statutory, equitable, fiduciary or otherwise), any right of ownership or title to property, employment, contract, a trust or deemed trust, howsoever created, any claim made or asserted against any one or more of the Canadian Petitioners or Partnerships through any affiliate, or any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any grievance, matter, action, cause or chose in action, whether existing at present or commenced in the future, based in whole or in part on facts which existed on the Canadian Filing Date, together with any other claims of any kind that, if unsecured, would constitute a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3; provided that "Claim" shall not include any Excluded Claim.

[13] Paragraph 15 stated in turn that unless otherwise ordered by the Court, any creditor who did not deliver a proof of claim in accordance with paragraphs 10, 12 and 13 of the Claims Procedure Order would be forever barred from asserting such against Abitibi. Accordingly, such a claim would be extinguished for good, with no entitlement to vote on, or receive any distribution from, any plan.

[14] On November 12, 2009, the Province, through its Minister of Environment and Conservation (the "**Minister**"), issued five (5) Ministerial Orders (the "**EPA Orders**")[3] against Abitibi pursuant to s. 99 of its *Environmental Protection Act* (the "***EPA***")[4].

[15] The EPA Orders were in relation to five (5) sites located in Newfoundland and Labrador ("**NL**") where Abitibi had carried on industrial activities at different times between 1905 and 2008. In essence, they purported to order Abitibi to perform, at its own expense, the following:

(a) the submission for approval by the Province, by January 15, 2010, of a detailed Remediation Action Plan for all sites identified as allegedly having exceedances greater than the applicable limits;

(b) the completion of the approved site remediation actions by January 15, 2011, or by another date as may be agreed upon with the Province's Department of Environment and Conservation ("**ENVC**"); and

(c) the closure of all landfills and lagoons/impoundments associated with each site by January 15, 2011.

[16] On the day of issuance of the EPA Orders, the Province served the Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act (the "**EPA Motion**") that is the object of this judgment.

[17] In the EPA Motion, the Province asserts that the First Stay Extension Order does not prevent the federal or provincial governments from exercising their powers, rights or duties in relation to public health, safety, security, public order or the environment, save for the financial or monetary fines or orders issued by these governments that remain stayed as a result of the Initial Order.

[18] This notwithstanding, the Province maintains that it is possible to interpret the Claims Procedure Order in such a manner that renders it inconsistent with the First Stay Extension Order. For instance, according to the Province, whereas the First Stay Extension Order permits it to issue non-monetary orders requiring Abitibi to comply with statutory environmental obligations, the Claims Procedure Order appears to bar, extinguish or otherwise affect the enforceability of such orders.

[19] To avoid this result, the Province, by the EPA Motion, seeks a declaration:

(a) that the Claims Procedure Order shall not bar, extinguish or affect the enforceability of orders made against the Debtors, the Property or the Directors (all as defined in the Initial Order) by the federal or provincial governments pursuant to their exercise of powers, rights or duties in relation to matters involving public health, safety, security, public order or

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3 Exhibit NL-6.
4 S.N.L. 2002, c. E-14.2.

the environment, provided that any financial or monetary fines or orders may be affected by the Claims Procedure Order; and

(b) that the EPA Orders are not barred or extinguished and their enforceability is not affected by the Claims Procedure Order, in particular, by paragraphs 3(t) and 15 thereof.

THE POSITIONS OF THE PARTIES

1) The Province[5]

[20] For the Province, the EPA Orders are in relation to the environment. They are not financial or monetary fines or orders and cannot be qualified as "claims" under the *CCAA*. They simply require Abitibi to take steps to comply with its statutory obligations for the protection of the environment.

[21] In this respect, the Province relies on some decisions[6] that have ruled that similar non-monetary statutory obligations, being public duties owed to the community in general, are not "claims provable" under the *BIA* since the enforcing authority does not act as a "creditor" of the person owing the duty.

[22] As such, the Province argues that the EPA Orders fall within the ambit of paragraph 10.1 of the First Stay Extension Order and are neither stayed nor subject to the claims process. It adds that it could not have been the intention of the Court to issue a Claims Procedure Order with terms that conflict with and undermine the First Stay Extension Order.

[23] In the alternative, if the Court intended for the Claims Procedure Order to nevertheless bar, extinguish or otherwise affect the enforceability of orders like the EPA Orders, the Province considers that the Court acted outside of its statutory jurisdiction.

[24] The Province pleads that these orders are within its constitutional competence. Conversely, the ability to bar, extinguish or otherwise affect their enforceability is not within the constitutional competence of Parliament. Therefore, to the extent that paragraph 15 of the Claims Procedure Order affects this enforceability, it is constitutionally ineffective.

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5 See, Amended Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act, dated February 15, 2010.

6 Notably, *Panamericana de Biennes Y Servicios (Receiver of)* v. *Northern Badger Oil & Gas Ltd.,* (1991) 81 D.L.R. (4th) 280 (Alta C.A.) ("*Panamericana*"), leave to appeal to the Supreme Court refused; *Strathcona (Country)* v*. Fantasy Construction Ltd. (Trustee of),* (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*"); *Canada Trust Co. v. Bulora Corp.,* (1980) 39 C.B.R. (N.S.) 152 (Ont. C.A.) ("*Bulora*"), affirming (1980) 34 C.B. R. (N.S.) 145 (Ont. S.C.).

[25] In that regard, the Province served a Notice of Intention pursuant to Article 95 *C.C.P.* to the Attorney Generals for Canada and all the other provinces, indicating that it was hereby seeking a declaration that:

> (1) a court vested with jurisdiction over a company pursuant to the *CCAA* does not possess the constitutional competence to exercise a statutory or discretionary power to bar or extinguish liabilities, obligations or duties owed to a province arising out of laws enacted by its legislature pursuant to s. 92 of the *Constitution Act, 1867*[7], save and except to the extent that the liability, obligation or duty is a "claim provable" within the meaning of s. 2 of the *BIA*[8];
>
> (2) a court vested with jurisdiction over a company pursuant to the *CCAA* does not possess the constitutional competence to exercise a statutory or discretionary power to fetter the discretion of a Minister of a provincial Crown under a law validly enacted by that province; and
>
> (3) the Quebec Superior Court does not have the constitutional competence to exercise a statutory or discretionary power under the *CCAA* to bar the enforcement of or to extinguish the non-monetary EPA Orders issued by the Province or to fetter the discretion of the Minister under the *EPA*[9].

2) The Intervening Parties[10]

[26] As a result of this Notice of Intention, Her Majesty the Queen in right of the Province of British Columbia ("**HMQBC**") and the Attorney General for British Columbia (the "**AGBC**") intervened to support the EPA Motion. The other Attorney Generals did not.

[27] From a factual standpoint, the situation in British Columbia ("**BC**") is, however, quite different than the one prevailing in NL. Even though the Debtors still own properties in that province, HMQBC confirmed that in BC, no orders of any sort are outstanding against Abitibi in terms of environmental obligations.

[28] Nevertheless, HMQBC and the AGBC elected to intervene herein because, similarly to the Province, they are concerned about the definition of "Claim", be it in the Claims Procedure Order or as such definition may be carried forward into Abitibi's proposed plan of arrangement or in any other orders in these proceedings.

[29] HMQBC submits that any such definition is not, as a matter of statutory interpretation, within the meaning of "claim" under the *CCAA*, nor otherwise contemplated to be subject to compromise or arrangement under that Act. Accordingly,

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7 30 & 31 Vict., c. 3 (U.K), reprinted in R.S.C., 1985, App. II, nº 5 (the "***Constitution Act, 1867***").

8 *Bankruptcy and Insolvency Act,* R.S.C.,1985, c. B-3 (the "***BIA***").

9 It is worth noting that the Province never contested the Claims Procedure Order, nor did it lodge any appeal against it. As one of the numerous parties appearing on the Service List, it had been made aware of its existence.

10 See, Intervention, dated January 12, 2010.

it would be beyond the jurisdiction of the Court, through any order containing or adopting such a definition, to purportedly capture, compromise, enjoin future proceedings respecting and/or extinguish any statutory non-monetary obligations arising under a provincial or federal enactment.

[30] On the constitutional issue raised by the Province, the AGBC adds that:

(a) the *CCAA* should not be interpreted in a manner that would exceed the proper bounds of the ability of Parliament, under s. 91 of the *Constitution Act, 1867*, to make laws on matters of bankruptcy and insolvency. It should not be interpreted so as to impair the operation of a validly enacted provincial legislative scheme and intrude into the provinces' exclusive authority under s. 92 of that Act. It would be contrary to those principles if the *CCAA* was interpreted to support orders based on or including the definition of "Claim" used in the Claims Procedure Order. The *CCAA*, and the definition of "claim" in that Act, are properly interpreted not to include statutory non-monetary obligations of Abitibi under any provincial enactment;

(b) in *CCAA* proceedings, the Court's jurisdiction to rule provincial enactments inapplicable or inoperative is predicated on the application of doctrines of constitutional law. It would be contrary to these doctrines for the Court (i) to give effect to a law or purpose of Parliament that is not within or necessarily incidental to the powers granted under s. 91(21) of the *Constitution Act, 1867*, or (ii) to apply the *CCAA* to impair the operation of provincial legislative schemes enacted pursuant to the powers granted to provinces under s. 92 of the Act. Hence, it would be beyond the Court's jurisdiction to render any provincial enactment creating statutory non-monetary obligations constitutionally inapplicable to or inoperative in respect of Abitibi through any order approving the definition of "Claim" used in the Claims Procedure Order; and

(c) it is beyond the ability of Parliament to make laws on or necessarily incidental to matters of bankruptcy and insolvency empowering a court in proceedings under the *CCAA* to effectively engage in a judicial review of the exercise of statutory powers under provincial enactments. It is therefore beyond the jurisdiction of the Court to make orders or declarations affecting or enjoining, other than temporarily, any regulatory body proceedings or decisions relating to statutory non-monetary obligations of Abitibi.

3) Abitibi[11]

[31] Abitibi contests the EPA Motion and concludes that it should be dismissed entirely. Moreover, it seeks itself a declaration confirming that:

[11] See, Amended Contestation, dated January 20, 2010.

(a) the EPA Orders are stayed by the stay of proceedings issued in the Initial Order and are not subject to the narrow exception provided at paragraph 10.1 of the First Stay Extension Order; and

(b) the Province's filing of any claim based in whole or in part on the EPA Orders is now barred by paragraph 15 of the Claims Procedure Order, such that no extension of the Claims Bar Date should be granted to allow the latter to file a claim on that basis in the claims process.

[32] Abitibi takes the position that the EPA Orders are in pith and substance financial or monetary in nature. They were thus issued in violation of both the Initial Order and First Stay Extension Order. As the EPA Orders are not exempted from the stay of proceedings, Abitibi says that there is no basis to grant the conclusions of the EPA Motion that, in effect, would give the Province a preference over the other creditors.

[33] Abitibi pleads that the EPA Orders primarily concern assets that are no longer in its power, possession or control.

[34] Three of the five EPA Orders relate to assets which, on December 16, 2008, have been unilaterally expropriated without compensation by the Province pursuant to its *Abitibi-Consolidated Rights and Assets Act*[12]. That being so, in respect of these assets, it is the Province that bears the primary environmental responsibility as the "person responsible" under its own legislation.

[35] For Abitibi, the EPA Orders are, consequently, nothing more than a thinly disguised demand for money, in effect asking it to improve the value of the confiscated property for the benefit of its "illegitimate" new owner, the Province.

[36] Abitibi adds that by suddenly issuing the EPA Orders, the Province displayed a total lack of impartiality and was in a situation of conflict of interest, as the EPA Orders were clearly designed to enhance the property value of lands confiscated from Abitibi and now allegedly owned by the Province.

[37] With respect to the two other sites at issue, Abitibi contends that it ceased conducting any active business on these lands well prior to the commencement of the *CCAA* proceedings. As such, the two EPA Orders pertaining to these assets are fundamentally monetary in nature as well: they seek to compel Abitibi to expend material sums of money for assets not used in its business and with no net value.

[38] As a matter of fact, Abitibi submits that these assets are in the process of being disposed of, failing which they will be placed in the hands of a receiver prior to Abitibi's emergence from these CCAA proceedings. During the hearing of the EPA Motion, Abitibi indeed served a specific Motion in that regard[13].

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12 S.N.L. 2008, c. A-1.01 (the "***Abitibi Act***").

13 See, Motion for the issuance of an Order Authorizing the Sale of Non-core Properties, dated February 25, 2010.

[39] In short, Abitibi argues that it either is, or will shortly be, nothing else than a former owner or occupier in respect of all of the assets that are the subject matter of the EPA Orders.

[40] That being so, Abitibi suggests that, by their true nature, the EPA Orders are financial or monetary orders. Their real intended effect is to require millions of dollars of expenditures of creditor money for the improvement of lands confiscated by the Province or which will shortly be placed in the hands of a receiver.

[41] In light of the bad faith displayed by the Province in issuing the "tactical" EPA Orders, as well as its unlawful and confiscatory actions in relation to the *Abitibi Act*, Abitibi states that the Court should not grant the Province any extension of the Claims Bar Date. Rather, by failing to file a claim in due course, the Province deliberately and knowingly chose to ignore the Claims Bar Date established by the Claims Procedure Order. As a result, Abitibi concludes that all the Province's claims in that regard are now barred.

[42] Key groups of creditors of Abitibi support its position herein. They include the Term Lenders, the Senior Secured Noteholders and the Ad Hoc Committee of the Bondholders. The Monitor also supports the position of Abitibi for the dismissal of the EPA Motion. The Monitor does not express any view, however, on the issue of the extension, if any, of the Claims Bar Date for the benefit of the Province.

THE FACTUAL BACKGROUND[14]

[43] The factual background relevant to the debate revolves around three issues: the industrial activities of Abitibi in NL, the enactment of the *Abitibi Act* and the EPA Orders.

1) Abitibi's Industrial Activities in NL

[44] Abitibi is one of the world’s largest publicly traded pulp and paper manufacturers. It produces a wide range of newsprint and commercial printing papers, market pulp and wood products. It owns interests in or operates pulp and paper facilities, wood products facilities and recycling facilities located in Canada, the United States, the United Kingdom and South Korea.

[45] From approximately 1905 to the end of 2008, it carried on extensive industrial activities in NL. These activities extended from mining and processing minerals, to cutting and milling timber, to making wood pulp and paper products, to shipping and storing materials, and to related activities.

[46] These activities were carried on at several locations in NL (the "**Abitibi Sites**"):

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[14] The Province, the Intervening Parties and Abitibi agree that the record is properly constituted of 1) the written proceedings filed by each one, all duly supported by affidavits, 2) Exhibits NL-1 to NL-16 and D-1 to D-6, 3) the Monitor's 34th Report of February 19, 2010, and 4) the *viva voce* testimonies of two witnesses, Mrs. Ballard for the Province and Mrs. Minville for Abitibi.

(i) mining and processing of minerals: at Buchans;

(ii) pulp and paper operations: at Grand Falls-Windsor and Stephenville;

(iii) shipping and storing: at Botwood; and

(iv) logging camps: at many different locations across NL.

[47] According to the Province, Abitibi's industrial activities resulted in the release of substances into the environment in amounts, concentrations and at rates which have caused and could continue to cause an adverse effect both on and adjacent to the Abitibi Sites. As far as the Province is concerned, by the spring of 2009, Abitibi had not fulfilled all of its obligations under the *EPA* with respect to these Abitibi Sites.

[48] Conversely, for Abitibi, merely in the fifteen years prior to the end of 2008, it had spent approximately $138.5 million in environmental compliance or remediation efforts in NL. These investments in assessments, environmental compliance or remediation activities have been, with rare exceptions, made on its own initiative, without the requirement or necessity of ministerial action. Abitibi considers it has been proactive in its efforts to ensure that its operations were fully in compliance with prevailing environmental requirements in NL.

[49] For example, Abitibi's investments in environmental compliance, assessment and remediation over the past decade included the following:

(a) environmental assessments and clean-ups (at woodland camps, Stephenville, Botwood and Grand Falls);

(b) decommissioning and clean-up activities (at Stephenville);

(c) mill effluent treatment plant improvements related to discharge requirements (at Stephenville and Grand Falls);

(d) mill air emissions control improvements related to discharge requirements (at Stephenville and Grand Falls); and

(e) activities related to environmental sustainability including land donations (at Botwood and woodlands), the Exploits River Salmon Diversion Program, reforestation and forest improvements.

[50] Abitibi believes it has always placed a high value upon its environmental compliance efforts in areas where it has carried on business. It emphasizes that it has made concerted efforts to anticipate environmental issues rather than merely react to orders. This includes environmental site assessment work and remediation work at many of the Abitibi Sites.

[51] Abitibi adds that during all those years of industrial activities, it founded and built communities, roads, schools and hospitals. By way of example, the town of Grand Falls-Windsor was founded and originally owned by one of its predecessors.

2) The *Abitibi Act*

[52] Notwithstanding this long history of industrial activities, since December 2008, Abitibi has had no material active operations in NL, save for the orderly closure of its Grand Falls mill.

[53] Effectively, on December 4, 2008, Abitibi announced the closure of its last remaining mill operation in NL, located at Grand Falls-Windsor. Following this mill closure scheduled to be effective March 2009, Abitibi would have normally retained valuable hydroelectric facilities, hydroelectric rights, lands and other assets in NL.

[54] However, despite this, on December 16, 2008, twelve days after this announcement, the Province introduced and passed within a single day the *Abitibi Act*. Pursuant to this Act, the Province purported:

a) to seize with immediate effect substantially all of the assets, property and undertakings of Abitibi in NL;

b) to cancel substantially all outstanding water and hydroelectric contracts and agreements between Abitibi and the Province;

c) to cancel pending legal proceedings of Abitibi against the Province seeking the return of several hundreds of thousands of dollars in unlawfully assessed payments in respect of water rights;

d) to deny Abitibi any compensation for the seized assets; and

e) to deny Abitibi access to the Province's courts to seek redress.

[55] Amongst the assets so confiscated were certain hydroelectric facilities only partially owned by Abitibi and subject to third party debt obligations. The substantial interests of such third parties were similarly expropriated in the sweep of the *Abitibi Act*.

[56] Without surprise, the *Abitibi Act* was strongly criticized and denounced by Abitibi. To put it mildly, the relationships between the Province and Abitibi have apparently been quite difficult since then.

[57] For its part, the Province considers the *Abitibi Act* to be constitutional, even though it is retrospective, targeted and confiscatory in nature[15]. In contrast, Abitibi views the enactment as contrary to fundamental principles of the *Canadian Charter of*

[15] To that end, it refers notably to *British Columbia* v. *Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, at 503-504.

Rights and Freedoms and the *Canadian Bill of Rights*, as well as being unconstitutional. It considers it to be punitive, confiscatory in nature and repugnant to public policy[16].

[58] While the Province argues that the potential claims of Abitibi against it as a result of the *Abitibi Act* are without merit, the latter maintains that if the Province ever files any claim in the restructuring process, the Court will have to assess the value of its cross-claims or set-off claims against the Province for this wrongful expropriation.

[59] According to Abitibi, its losses resulting from the enactment of the *Abitibi Act* well exceed $300 million. The most valuable assets confiscated by the Province include:

(a) surface rights which the Province had offered to purchase from Abitibi for $19.3 million in November 2008;

(b) Abitibi's 51% interest in Star Lake Hydro Partnership, a joint venture with CHI Hydroelectric Company Inc. ("**CHI**"), which owns and operates the Star Lake Hydroelectric Project. At the time of expropriation, Abitibi had agreed to sell its interest to its partner CHI in a transaction that was days away from closing. In her testimony, Mrs. Minville assessed the value of that interest at some $60 million;

(c) Abitibi's 49% interest in the Exploits River Hydro Partnership, a partnership with Central Newfoundland Energy Inc., which operates the Bishop's Falls hydroelectric facility and a part of the Grand Falls hydroelectric facility. Again, in her testimony, Mrs. Minville assessed the value of that other interest at about $74 million;

(d) Abitibi's remaining wholly-owned interest in the Grand Falls hydroelectric facilities; and

(e) Abitibi's wholly-owned interest in the Buchans hydroelectric facility.

[60] Although the Province publicly announced that the *Abitibi Act* did not include the Grand Falls mill then still in operation, a review of the *Abitibi Act* revealed that, whether deliberately or as a result of the haste in which the Act was drafted, the Grand Falls mill site was, in fact, included in the confiscated assets.

[61] Whether due to its haste or by design, the Province did not, however, expropriate certain assets then owned by Abitibi in NL. These consist primarily of the former Botwood shipping terminal site, closed in February 2009, and the Stephenville newsprint mill, idled in October 2005 and closed in December 2005.

[16] Amongst others, it invokes *Reference Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 and *Laane & Baltser* v. *Estonian S.S. Line*, [1949] S.C.R. 530.

[62] In April 2009, Abitibi[17] filed a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement ("**NAFTA**") for the losses arising from this confiscation effected by the Province. At the hearing, the Court was advised that since the negotiations failed to result in an acceptable amount of compensation, Abitibi officially filed, on February 25, 2010, a Notice of Arbitration under Chapter 11 of NAFTA to pursue its claim for redress.

[63] In her testimony, Mrs. Ballard confirmed that the Province had not paid so far any compensation to Abitibi as a result of these expropriations.

[64] According to Abitibi, its claim for compensation under NAFTA includes almost no material amounts in respect of any of the assets that are the subject of the EPA Orders. The only incidences of overlap are the claims for the confiscated surface rights and the Grand Falls mill site.

3) The EPA Orders

i) the sequence of events

[65] Meanwhile, on June 12, 2009, the Province asked Abitibi to provide certain reports for the Abitibi Sites, including environmental site assessment ("**ESA**") reports[18].

[66] On June 18, 2009, Abitibi replied that the Province's request would remain under consideration in light of (a) the *Abitibi Act*, (b) the Initial Order issued by the Court and (c) another pending ministerial order concerning Buchans[19].

[67] In this letter, Abitibi's Counsel noted that efforts to comply with Abitibi's obligations under the *EPA* were, in any event, ongoing. In a subsequent letter dated August 14, 2009, Abitibi again acknowledged its ongoing environmental obligations pursuant to the *EPA*[20].

[68] In July 2009, in order to apparently ensure that it had complete and accurate information about the environmental condition of the Abitibi Sites and that Abitibi's obligations to protect the environment would be fulfilled, the Province's attorneys retained the services of environmental consultants, Conestoga-Rovers & Associates ("**CRA**"), to undertake ESAs at the Abitibi Sites.

[69] CRA was able to begin its assessment work at one of the Abitibi Sites, Buchans, in the latter part of July 2009. However, it needed to obtain access to the remaining Abitibi Sites in order to complete its work. On September 3, 2009, after extensive

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17 Even though headquartered in Montreal, QC, AbitibiBowater inc. is a U.S. corporation formed under the laws of Delaware.

18 Exhibit NL-1.

19 Exhibit NL-2.

20 Exhibit NL-3.

negotiations, Abitibi and the Province entered into an agreement whereby Abitibi would provide access to the Abitibi Sites to CRA for the purpose of conducting the ESAs, subject to a number of conditions[21].

[70] Again, Abitibi indicated that its position was subject to further consideration in light of (a) the *Abitibi Act* and (b) the Initial Order issued by the Court.

[71] On October 16, 2009, while these exchanges were taking place, the Province filed a Motion for a Declaration that the Petitioner is entitled to Access the Electronic Data Rooms Created by the Debtors (the "**Data Room Motion**").

[72] In that motion, the Province alleged that it needed to access the electronic data rooms of Abitibi to properly assess its financial status and make informed decisions in the restructuring. It maintained that it had a duty to inform itself of the present and future potential ability of Abitibi to cover the Province's claims.

[73] In particular, the Province argued that Abitibi was responsible towards it for alleged environmental contamination from the mine located in Buchans. Relying on numerous media reports that it then filed in the record, the Province claimed that because of Abitibi's economic activities, the latter had exposed itself to many environmental obligations, the precise extent of which remained unclear.

[74] The Province notably alleged that it had incurred significant costs in that regard. It added, furthermore, that agreements had been entered into for the Province's environmental consultants to have access to the sites for the purpose of determining the full nature and extent of Abitibi's environmental obligations.

[75] On November 9, 2009, the Court dismissed the Data Room Motion with costs. The Province did not appeal that ruling.

[76] The Court notably concluded that the Province had not yet provided reasonable and convincing evidence in support of its alleged status of potential creditor for environmental problems resulting from Abitibi's economic activities.

[77] The Court emphasized that the Province wanted access to the electronic data rooms not to enhance the restructuring process, but to assess the extent of Abitibi's present and future ability to cover its undetermined and potential environmental claims that had yet to be filed in the claims process:

> [88] Lastly, the alleged legitimate public interest relied upon by the Province is not in furtherance of the purposes of the *CCAA*. It is, to the contrary, in furtherance of the Province's own interest of determining the real value of its potential claims that are yet to be established.

[21] Exhibit NL-4.

> [89] Put otherwise, the Province wants to have access to the electronic data rooms to better evaluate whether Abitibi's pockets will, one day, be deep enough[22].

[78] While this Data Room Motion was being debated and ruled upon, CRA issued, in November 2009, the reports setting out the results of its ESAs on each of the Abitibi Sites. These reports concluded that the Abitibi Sites covered by the assessments (and, in many instances, the property adjacent thereto) suffered from extensive contamination allegedly in excess of applicable standards[23].

ii) the orders issued

[79] Accordingly, on November 12, 2009, three days after the dismissal of its Data Room Motion, the Province issued against Abitibi the EPA Orders[24] pursuant to s. 99 of the *EPA*, requiring it to submit detailed Remediation Action Plans for approval by January 15, 2010 and to complete the approved site remediation actions by January 15, 2011.

[80] It is not disputed that the EPA Orders were in respect of liabilities or obligations that existed prior to the commencement of the *CCAA* proceedings. None of the sites related to any active operations of Abitibi from or after the date of the Initial Order. The orders were all in respect of past matters.

[81] The evidence indicated that a “base case” remediation plan could cost Abitibi in a range of value from the mid-to-high eight figures. A “worst case” to “extreme case” scenario could be several times higher.

[82] The evidence showed as well that the EPA Orders were inappropriate in their sequencing and unrealistic in their scheduling:

(a) to submit detailed Remediation Action Plans as requested would have required close to a full year to be carried out adequately;

(b) the closure of all landfills and lagoons or impoundments associated with each site being logically the last task to perform when a remedial action plan is implemented, requiring Abitibi to close these units no later than January 15, 2011 was unrealistic;

(c) given the magnitude and scope of the work ordered by the Province to be carried out simultaneously at the five locations targeted in the EPA Orders, based on Abitibi's past experiences with such projects in NL, it was doubtful that there existed sufficient resources (engineering firms, specialty providers, laboratories and authorized specialty contractors) to carry out the work within the prescribed one-year time frame.

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22 *AbitibiBowater Inc. (Re the Plan of Compromise or Arrangement of),* 2009 QCCS 5482.
23 Exhibit NL-5.
24 Exhibit NL-6.

[83] On January 11, 2010, Abitibi appealed the EPA Orders to the Minister. On February 8, 2010, the Minister dismissed the appeals[25]. Of course, the initial deadline of January 15, 2010, for Abitibi to file its Remediation Action Plans was not abided by.

[84] According to Abitibi, the EPA Orders stem from a desire to "throw the book" at Abitibi with a view to seeing what, if anything, may stick for purposes of offsetting Abitibi's well-known compensation claims.

[85] Since the adoption of the *Abitibi Act*, Abitibi considers that the Province has indeed used the full range of its powers, including the misuse of discretionary authority granted under the *EPA*, to wage a campaign of retribution and harassment against it, with the apparent goal of dissuading Abitibi from pursuing its claims for compensation.

[86] For Abitibi, what was dredged up in this process included matters that were, to the Province's knowledge, the responsibility of third parties. Often, they related to situations that had been known for decades. Moreover, with some limited exceptions, the Abitibi Sites at issue are on lands that have been confiscated by the Province pursuant to the *Abitibi Act*, when they were not surrendered to the latter years ago.

[87] In the case of such lands that are not in its possession anymore, Abitibi suggests that it has likely no power to comply with the EPA Orders. It cannot realistically access lands in the possession of third parties (including the Province) to complete the remediation ordered by the EPA Orders.

[88] Even if it has the right, based on procedural fairness and natural justice, to challenge the EPA Orders, Abitibi states that its well-known reality is quite different. Given that it is under *CCAA* protection, it considers that it is precluded, from a practical standpoint, from seeking a judicial review of the EPA Orders. The time and costs associated with challenging them would significantly drain Abitibi's limited resources and the potential recovery for all of its stakeholders.

[89] Of course, the Province refutes these assertions. In its view, the EPA Orders are merely the result of the proper exercise of the Minister's statutory duties and powers under the *EPA*. Be it as current or former owner, Abitibi is a "person responsible" under the *EPA*. What is being required in the EPA Orders simply derives from Abitibi's industrial activities in NL.

iii) the CRA Reports

[90] That said, the EPA Orders are based on the CRA Reports[26] that relate to the five sites where there are alleged violations of the *EPA*, namely Grand Falls–Windsor, Stephenville, Botwood, Buchans and the Logging camps.

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[25] Exhibit NL-14.
[26] Exhibit NL-5.

[91] Abitibi contends that the failures and weaknesses evident in the CRA Reports lead to the reasonable inference that they were commissioned for the purpose of providing support for political decisions already taken, rather than for the purpose of forming a good faith view of the matter.

[92] While it is certainly not the role of the Court to analyze in details these reports upon which the EPA Orders were issued, in assessing the true nature of these orders, the Court cannot, however, ignore the following general observations that appear from a superficial review of these reports:

(a) each CRA Report states that it was prepared for the Province's NAFTA/*CCAA* Counsel, WeirFoulds LLP. They were thus, apparently, produced for litigation purposes rather than in pursuit of a statutory duty;

(b) the CRA Reports consistently fail to distinguish between lands owned or operated by Abitibi and those owned or occupied by third parties; and

(c) the CRA Reports, in the absence of applicable criteria identified in the Province's regulations, apply environmental standards from the provinces of Ontario and BC, which, according to Abitibi, technically do not apply as they are not adapted to NL distinctive hydro geological characteristics.

[93] In addition, the following particular highlights coming from these CRA Reports are worth mentioning at this stage.

[94] The CRA Report concerning the Grand Falls-Windsor site focuses primarily on anticipated issues that would arise as and when the mill site is actually decommissioned. Yet, although the Province is no doubt aware that it is now the owner of the Grand Falls mill site as a result of its *Abitibi Act*, it has issued the EPA Order in respect thereof only to Abitibi, not to itself.

[95] With respect to the Stephenville site mill, Abitibi's operations were shut down in December 2005. Between 2006 and 2008, Abitibi completed a decommissioning and demolition program that included the levelling of the majority of the main mill buildings and related infrastructure. Since the closure of the mill, it has allegedly expended some $2 million in environmental assessments and site clean up.

[96] It is not seemingly disputed that substantial portions of the Stephenville mill served as the Harmonville Base of the United States Air Force ("**USAF**") between 1941 and 1966. During that time, several fuel storage and dumpsites for by-products of the air force base were apparently established.

[97] Moreover, in the late 1960s, the Province passed legislation that allowed for the construction of a kraft linerboard mill in Stephenville, which was taken over and operated by a Crown corporation, Labrador Linerboard Limited ("**Linerboard**"), from 1972 to 1977. This linerboard mill was ultimately closed in 1979 when it was purchased by Abitibi, converted to a pulp and paper production mill and operated as such until its closure in 2005.

[98] On December 18, 2008, simultaneously with the *Abitibi Act*, the Province revoked the agreement for the timber supply rights in relation to the Stephenville mill by passing the *Labrador Linerboard Limited Agreement 1979 Repeal Act*[27].

[99] In view of this background, Abitibi estimates that a substantial portion of the costs associated with the remediation of the Stephenville site are directly attributable to the 25 years of intensive use of the site by USAF and Linerboard, under the stewardship and responsibility of the Province.

[100] Yet, according to Abitibi, despite being the lessor of the Stephenville site to the USAF and the owner of the Crown corporation for the former linerboard operation, the Province has made no effort to establish its own level of responsibility under the *EPA*, nor has it taken any steps to pursue itself, USAF or Linerboard under the Act.

[101] Turning to the CRA Report concerning the Botwood site, it refers to an area around the Town of Botwood where Abitibi formerly had a storage and shipping operation relating to its Grand Falls mill.

[102] The Botwood Report does not, however, limit itself to Abitibi's operations at Botwood. It also reviews the following:

(a) storage and shipping operations utilized by ASARCO, a corporation unrelated to Abitibi or its predecessors, for its mining operations at Buchans, which CRA erroneously conflated with Abitibi for the purposes of the Botwood Report;

(b) the bed of a railway (the Botwood - later Grand Falls - Central Railway) owned and operated by a company which has now been dissolved following the transfer to third parties of its property interests; and

(c) storage and other facilities transferred to the Town of Botwood in the 1980's and used for storage of construction materials, vehicle servicing and other activities, including an area for a community mail box.

[103] Similarly to the situation prevailing for the Stephenville site, these other parties were not targeted by the EPA Orders concerning the Botwood site.

[104] As to the Buchans site where Abitibi's operations ceased in 1984, it was part of the original lands granted in 1905 under a "Charter Lease" to the Anglo-Newfoundland Development Company, a company that merged with Abitibi's predecessor in 1961. Mining operations were developed on certain lands at Buchans in the 1920s as part of a joint venture with a predecessor of ASARCO, under an agreement pursuant to which the latter operated the mine.

[27] S.N.L. 2008 c. 42, filed as Exhibit D-2.

[105] The land beneath the Town of Buchans was surrendered to the Province by grants in 1978 and 1979. In 1994, most of the remaining interests of Abitibi in the area surrounding Buchans were also relinquished to the Province following the ending of mining operations by ASARCO in the early 1980's. In 2005, ASARCO filed for Court protection under Chapter 11 of the *U.S. Bankruptcy Code*.

[106] At the time of the passage of the *Abitibi Act*, Abitibi retained some residual surface and timber rights in the area, as well as a small 2 MW hydroelectric power station near the town.

[107] Here again, neither ASARCO nor the Town of Buchans was included in the scope of the EPA Orders.

[108] Finally, the CRA Report concerning the Logging camps allegedly recounted an inspection of some forty-eight (48) camps. Development and use of the Logging camps by Abitibi began in the 1940s and continued until recently. However, Abitibi only has active records for twenty (20) Logging camps, which have all been closed after 1965.

[109] As it only has active records of twenty (20) such camps closed since 1965, Abitibi considers that the other twenty eight (28) logging camps investigated by CRA are either not its logging camps, or date back to decades when horse power was the predominant source of power in the camps and few, if any, refueling sites were likely to have existed.

[110] The Logging camps report does not segregate the impact of third party activities from what may have resulted from Abitibi's prior activities. Yet, many such sites have, after dismantling and clean up by Abitibi, been used for other purposes by third parties, including seasonal fishing or snowmobile camps, cottages and other similar activities.

[111] In fact, soil and other samples were taken by CRA at only six of the locations, with no method of distinguishing whether results obtained were attributable to these subsequent activities or to the original logging camps.

[112] For Abitibi, the lack of objectivity and "directed verdict" nature of the EPA Orders is shown by the Lake Ambrose logging camp, at s. 2.2.3 of the Logging Camps Report.

[113] After noting in the report that chainsaws and motorized vehicles were not used in the logging operations of Abitibi until the late 1950's (as prior operations were performed using horse and man power), and after noting the closure of this camp in the mid-1950's, the report nevertheless went on to attribute various readings of fuel contamination to Abitibi's operations.

[114] The fact that the Lake Ambrose site is currently used recreationally and that there are nearby cottages was not considered at all in the Logging camps report.

[115] Between Abitibi, who had not operated on the site for fifty years and used only horse power and man power, and current recreational dwellers, most likely with power

boats, snowmobiles, ATV's, automobiles and generators, the Province still chose the probable source for the observed contaminations of waste oil, fuel and similar items as being Abitibi.

[116] For Abitibi, this telling example gives a good idea of what the Province is ready to accept and do under the circumstances.

THE LEGAL FRAMEWORK

[117] This factual background summarized, the legal framework relevant to this case includes, besides the paragraphs of the First Stay Extension Order and Claims Procedure Order referred to before, statutory provisions from both the *CCAA* and the *BIA*, as well as sections of the *EPA*.

1) The *CCAA* and the *BIA*

[118] The term "claim" is defined as follows in the *CCAA* (as applicable to this restructuring):

> *Definition of "claim"*
>
> **12.** (1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act.
>
> *Determination of amount of claim*
>
> (2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> *(a)* the amount of an unsecured claim shall be the amount:
>
> […]
>
> (iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and[…]
>
> (Our emphasis)

[119] The reference to "debt provable" is a misnomer. It is commonly agreed that it is rather meant to refer to the expression "claim provable" of the *BIA*. Under s. 2 of the *BIA,* "claim provable in bankruptcy", "provable claim" or "claim provable" include any claim or liability provable in proceedings under the *BIA* by a creditor. Pursuant to s. 121(1) of the *BIA*, "claims provable" and "contingent claims" consist of:

> **Claims provable**
>
> 121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation

> incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> **Contingent and unliquidated claims**
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> (Our emphasis)

[120] Aside from that, both the *CCAA* and the *BIA* contain provisions pertaining to environmental costs and claims, which state the following:

Subsections 11.8(8)&(9) of the *CCAA*	**Subsections 14.06(7)&(8) of the *BIA***
Priority of claims (8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge (*a*) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and (*b*) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.	*Priority of claims* (7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security (*a*) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and (*b*) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.
Claim for clean-up costs (9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced. (Our emphasis)	*Claim for clean-up costs* (8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

[121] Finally, it is worth noting that amongst the new amendments to the *CCAA* that came into force on September 18, 2009, the following provision dealing with regulatory bodies was added:

> *Meaning of "regulatory body"*
>
> **11.1** (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.
>
> *Regulatory bodies — order under section 11.02*
>
> (2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.
>
> *Exception*
>
> (3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
>
> (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
>
> (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.
>
> *Declaration — enforcement of a payment*
>
> (4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

2) The *EPA*

[122] Turning to the *EPA*, s. 7 provides that a person shall not release or permit the release of a substance into the environment in an amount that may cause an adverse effect. S. 99 allows for the issuance of orders where the Minister believes on reasonable grounds that a person responsible has contravened or will contravene the *EPA*:

> **99.** (1) Where the minister believes on reasonable grounds that a person responsible has contravened or will contravene this Act or the terms or conditions of an agreement, approval, amended or varied approval, licence or an undertaking exempted or released under this Act, the minister may, whether or not that person has been charged or convicted in respect of the contravention, issue an order, in writing, requiring a person at that person's own expense, to

(a) stop or shut down an activity or an undertaking immediately, permanently, or for a specified time, where, with respect to that activity or undertaking, there has been a contravention of this Act, the regulations or a term or condition applicable to that activity or undertaking;

(b) do all things and take all steps that are necessary to control, manage, eliminate, remedy or prevent an adverse effect or an environmental effect and to comply with this Act, the regulations or terms or conditions applicable to an approval, activity or undertaking in accordance with directions set out in the order;

(…)

and there shall be served on the person responsible a copy of the order and a statement showing the reasons for the making of the order and upon receipt of the copy and statement, that person shall comply with the order.

(…)

(3) In addition to other requirements that may be included in an order issued under this Part, an order may contain provisions

(a) requiring a person, at that person's own expense, to

(i) maintain records on a relevant matter and report periodically to the minister or a person appointed by the minister,

(ii) hire an expert to prepare a report for submission to the minister or a person appointed by the minister,

(iii) submit to the minister or a person appointed by the minister, a proposal, plan or information specified by the minister setting out an action to be taken by the person,

(iv) prepare and submit a contingency plan,

(v) undertake tests, investigations, surveys and other action and report results of these to the minister, and

(vi) take another measure that the minister considers necessary to facilitate compliance with the order or to protect or restore the environment;

(b) establishing the manner, method, or procedures to be used in carrying out the measures required by the order; and

(c) establishing a time within which a measure required by the order is to be commenced and the time within which the measure, order or a portion of the measure or order must occur.

(…)

(Our emphasis)

[123] S. 102 further provides that the Minister may do the following to insure compliance of the orders issued:

> **102.** (1) Where an order is served upon the person to whom it is directed, that person shall comply with the order immediately or, where a period of compliance is specified in the order, within the time period specified.
>
> (2) Where a person to whom an order is directed does not comply with the order or part of the order or service of that order cannot be carried out, the minister may take whatever action he or she considers necessary to carry out the terms of the order.
>
> (3) Where the minister
>
> (a) takes an action under subsection (2) to carry out the terms of an order; or
>
> (b) incurs costs, expenses or charges in order to investigate and monitor the compliance of a person with an order,
>
> the reasonable costs, expenses or charges incurred by the minister in taking that action are recoverable by the minister from the person to whom the order was directed as a debt owed to the Crown and the minister shall notify the person against whom the order is made of his or her determination of the amount of the recoverable costs, expenses and charges.
>
> (…)
>
> (Our emphasis)

[124] Finally, a "person responsible" is defined in the *EPA* (s. 2 (x)) as including, amongst others:

> (i) the owner of a substance or thing,
>
> (ii) the owner or occupier of land on which an adverse effect has occurred or may occur,
>
> (iii) the owner or operator of an undertaking,
>
> (iv) a previous owner of a substance or thing.
>
> (…)
>
> (Our emphasis)

THE QUESTIONS AT ISSUE

[125] Based on this review of the motion at issue, the positions of the parties involved, and the applicable factual background and legal framework, the questions to be resolved in this case can be summarized as follows:

a) what is the true nature of the EPA Orders? Are they orders issued in regard of statutory non-monetary obligations of Abitibi or orders that are in substance financial or monetary in nature?

b) if the EPA Orders are orders issued in regard of statutory non-monetary obligations of Abitibi, does the Court have either the statutory jurisdiction or constitutional authority to include them in the definition of "Claim" found in the Claims Procedure Order?

[126] Both the Province and the HMQBC agree that if the EPA Orders are financial or monetary in nature as opposed to pure regulatory orders, they then fall within the meaning of claim under the *CCAA* and provable or contingent claim under the *BIA*. A claims process such as the one ordered in this restructuring can therefore cover them.

ANALYSIS AND DISCUSSION

1) Overview

[127] Contrary to Abitibi, the Province and the HMQBC did not put much emphasis on the factual context relevant to the questions at issue. With all due respect to their position, the Court considers that this case must, in the end, be decided first and foremost taking into consideration the particular fact pattern in dispute.

[128] To that end, nobody truly contests that in facilitating the conclusion of an arrangement under the *CCAA*, the Court has jurisdiction to subject "claims" to a claims process and to determine who Abitibi's "creditors" might be in that regard. In doing so, the Court can certainly seek to uncover the true nature of the EPA Orders. Their proper characterization is within the jurisdiction of the Court.

[129] Despite being framed as "regulatory orders", the EPA Orders have the effect of compelling Abitibi to expend material sums of money to remediate property that it either no longer owns or no longer uses in its business, while having little or no net value to Abitibi and its stakeholders.

[130] In the Court's opinion, based on the evidence filed in the record, the EPA Orders are in substance financial or monetary in nature. Consequently, they are not exempted from the First Stay Extension Order or the Claims Procedure Order.

[131] As a result, the monetary consequences of these orders should be treated as claims in these *CCAA* proceedings. Such claims shall be subject to compromise and the Province, if it asks and is allowed to file a late proof of claim in this respect, shall be entitled to participate in the negotiation of, and to receive its pro-rata distribution under, any plan of arrangement to be filed by Abitibi.

[132] There is, accordingly, no basis in fact or in law to grant the conclusions sought in the EPA Motion. This would have the effect of giving the Province a preference over other creditors, which is simply unacceptable.

[133] To reach this conclusion, the Court relies on many considerations, including:

- The provisions of the *CCAA*;
- The true nature and impact of the EPA Orders;
- The factual context of their issuance and their content;
- The Province's behavior prior and after their issuance;
- The *EPA* and the applicable case law; and
- The end result of the Province's position.

[134] In view of this conclusion, it is not necessary to discuss the Province's and the Intervening Parties' other arguments on the lack of statutory jurisdiction or constitutional authority for the Court to include statutory non-monetary obligations in the definition of "Claim" found in the Claims Procedure Order.

[135] As the Court concludes that the Province's EPA Orders are indeed claims because of their obvious financial and monetary nature, the determination of these other questions will have to wait another day, if not another restructuring. Declaratory judgments and questions of statutory jurisdiction or constitutional authority should not be issued or decided in a factual vacuum. As shown here, the facts involved are normally critical in assessing such matters.

[136] This finding entails the dismissal of the Intervention of HMQBC and the AGBC as well.

[137] Abitibi remains in ownership and occupation of the relevant properties it still possesses in BC. No orders of any sort and no notice of non-compliance are outstanding in regard of any environmental obligations of Abitibi in that province. Simply put, there are no pending issue to resolve between Abitibi and the Intervening Parties.

[138] This being so, the conclusions sought by Abitibi in its Amended Contestation will be granted, albeit only in part. The Court considers that it is premature to immediately rule that the Province is barred from filing any late claim in the claims process as a result of the EPA Orders. This issue will be addressed, if need to, if and when such a request is in fact presented.

[139] The Court's explanations follow.

2) The *CCAA*

[140] It is widely accepted that the *CCAA* is a remedial statute. Its purpose is to facilitate the making of a compromise or arrangement between an insolvent debtor and

its creditors. The goal is for the former to be able to continue in business and avoid the devastating social and economic consequences of a cessation of operations[28].

[141] In any restructuring conducted under the *CCAA,* the courts must keep in mind these key objectives, while also giving weight to these broader socio-economic or public interest considerations. As it happens, *CCAA* courts in Canada have generally found considerable interpretive flexibility in the provisions of the *CCAA* to enable them to facilitate the achievement of its purposes[29].

[142] To that end, any analysis of the *CCAA* must be guided by "the modern rule" of statutory interpretation. Pursuant to this rule, "[t]he 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"[30].

[143] Likewise, in exercising its jurisdiction in a broad and flexible manner to insure the *CCAA'*s effectiveness, the Court must remember that its role is one of judicial oversight. It is expected to supervise the process and keep it moving towards its ultimate goal, that of an acceptable arrangement. In doing so, it has a broad jurisdiction to decide all matters that arise and to create an orderly environment for the restructuring. This would, no doubt, be negatively affected if, for instance, debtors were forced to expend resources to deal with claims outside of the *CCAA* process.

[144] Applying these considerations to the situation at hand, the Court is of the view that it has the authority to decide if the EPA Orders qualify as claims under the *CCAA* and can be described as provable or contingent claims under the *BIA*.

[145] In that regard, the *CCAA* contains no restrictive definition of "creditor" other than the circular definition of "unsecured creditor" to mean any "creditor" who is not a secured creditor. S. 12(1) of the *CCAA* further defines "claim" in the broadest possible terms as "any indebtedness, liability or obligation of any kind, that, if unsecured, would be a debt (sic) provable in bankruptcy". In fact, under s. 12(2)(a), the "amount of an unsecured claim shall be the amount […] (iii) […] proof of which might be made" under the *BIA*.

[146] As for the *BIA*, s. 2 similarly has a non-exhaustive definition of "claim provable in bankruptcy" which "includes any claim or liability provable in proceedings under this Act

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[28] *Stelco Inc., (Re),* (2005) 9 C.B.R. (5th) 135, 2005 CanLII 8671 (Ont. C.A.), at paras 32ff; *Metcalfe & Mansfield Alternative Investments II Corp., (Re),* 2008 CanLII 587 (Ont. C.A.), at paras 44-61; *Cliffs Over Maple Bay Investments Ltd.* v. *Fisgard Capital Corp.,* 2008 CanLII 327 (B.C.C.A.), at paras 27-29; *Hongkong Bank of Canada* v. *Chef Ready Foods Ltd.,* (1990) 51 B.C.L.R. (2d) 84 (B.C.C.A.), at para. 22. See also SARRA, Janis, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thompson Carswell, 2007), at p. 9.

[29] See, for instance, *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp,* 2008 CanLII 587 (Ont. C.A.), pertaining to third parties releases in a plan of arrangement.

[30] See, *Bell ExpressVu Ltd. Partnership* v. *Rex,* [2002] 2 S.C.R. 559, at para. 26, and *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21.

by a creditor". Ss. 121 and 135 also define provable or contingent claims in very broad terms.

[147] The amended *CCAA* does not depart from this scheme. If anything, it re-confirms the intentionally broad and remedial goals of the Act, with terms that place in the courts' hands the powers necessary to secure its ends.

[148] Accordingly, environmental obligations arising from a regulatory order that remain, in a particular fact pattern, truly financial and monetary in nature can be qualified as claims under the *CCAA*. Likewise, if one is convinced that there exists, in such a fact pattern, a claim that "might" be filed, it is open to be compromised on the plain reading of s. 12 of the *CCAA*.

[149] Regarding this, the principles that generally apply to the determination and compromise of contingent claims under the *CCAA* process can apply to claims like those arising from the EPA orders. Contingent claims may be compromised under the *CCAA* and the Court has the authority to decide if a contingent claim exists by reason, for instance, of past obligations.

[150] While not applicable to these proceedings, s. 11.1 of the amended *CCAA* is instructive on this matter of jurisdiction. It operates to limit the broad jurisdiction of the court to stay proceedings (under what is now s. 11.02 of the amended *CCAA*) in relation to regulatory bodies.

[151] However, even s. 11.1 does not contain any bright line between regulatory and financial orders. S. 11.1(2) restricts the power of the court in its general stay under s. 11.02 from impacting regulatory proceedings "other than the enforcement of a payment ordered by the regulatory body". S. 11.1(3) allows the supervising court to remove this restriction on the general stay power if (i) it is of the opinion that "a viable compromise or arrangement could not be made in respect of the company" if the restriction were to apply, and (ii) making such an order is not contrary to the public interest.

[152] Further, s. 11.1(4) reserves to the court the power to decide when a regulatory body is seeking to enforce rights as creditor.

[153] These amendments make two points quite clearly.

[154] First, the structure of the amended *CCAA* is as follows: (i) a general stay power is granted in s. 11.02 (in language identical to s. 11(3) of the *CCAA* applicable here); (ii) the general stay is initially restricted from applying to regulatory proceedings other than payment orders (similarly to the First Stay Extension Order here); and (iii) that restriction may be lifted by the court after a hearing.

[155] It follows from this that the general stay power in s. 11.02 of the amended *CCAA* (s. 11(3) of the *CCAA*) does permit the court to order a stay of regulatory proceedings,

the only change being that a second hearing is required to stay any proceedings other than "a payment ordered".

[156] Second, the court, not the regulatory body, decides when a body is "seeking to enforce its rights as a creditor" and if so found, the court may stay that as well.

[157] Parliament has therefore confirmed that the *CCAA* may be employed to place an appropriate check on regulatory actions, particularly when they are purely "monetary orders". This is exactly the kind of jurisdiction the Court is exercising here. Of course, this exercise requires the Court looking at substance over form.

[158] From that standpoint, it is true that the Province has sought to frame the EPA Orders so as to fall within the limited environmental exemption of paragraph 10.1 of the First Stay Extension Order.

[159] Yet, an examination of their consequences, their content, the Province's behavior regarding them and the statutory framework within which they were issued show that they are and were most likely intended to be in substance financial or monetary orders.

3) The True Nature and the Impact of the EPA Orders

[160] The true regulatory character or otherwise financial and monetary nature of a given order is influenced by who issues the order, who stands to benefit from it, what remains its genuine objective and what means of enforcement truly exist in reality.

[161] Although presented as injunctive orders, the facts demonstrate that the practical, intended and inescapable result of the EPA Orders was the creation of monetary claims. Money is, clearly, the only remedy in this case. In fact, given the lack of assets or activities of Abitibi in the Province, the EPA Orders can, in all likelihood, only be enforced by action taken outside NL.

[162] In this case, the true character of the EPA Orders must be assessed in the context of the assets of Abitibi having been expropriated by the Province and Abitibi no longer being in control of the bulk of the property that gave rise to the remediation orders.

[163] The monetary nature of the orders is indeed highlighted by the fact that they relate, for the most part, to properties that the Province has confiscated under the *Abitibi Act* or that Abitibi has otherwise surrendered possession or control of years ago.

[164] This situation is quite different from that of an existing owner of lands being asked to remedy an environmental condition in respect of ongoing operations. While the latter might be said to derive a corresponding benefit from the expense incurred arising from the improvement to the lands thereby occasioned, a former owner or a victim of confiscation has no such benefit.

[165] In her testimony, Mrs. Minville confirmed the obvious: decommissioning or remediation costs are normally offset by the added value eventually regained in the subsequent divestiture of the equipment, metal and real estate involved. Provided, of course, that you are still the owner. Otherwise, compliance with such an order is an expense devoid of any direct or indirect benefit.

[166] In the present situation, as the current owner of most of the lands in respect of which the remediation expenses have been ordered, the Province ends up being the intended beneficiary of the expenditures that it has used its discretion to order.

[167] In essence, the EPA Orders seek to require Abitibi to incur costs for the primary purpose of improving the value of lands, the bulk of which have been confiscated (and much of the remainder of which was surrendered to the public years ago). Put otherwise, Abitibi is expected to spend money to increase the value of properties for the benefit of those who took them from it.

[168] This is, at a minimum, rather awkward. The expression "having your cake and eat it too" comes to mind. Some would go as far as to say that it is preposterous.

[169] Be that as it may, this definitely justifies, at the very least, the Court, as opposed to the regulator involved, ascertaining the exact nature of the EPA Orders and deciding whether the Province is, in reality, seeking to enforce rights as a creditor. This is precisely what the amended *CCAA* has now codified at s. 11.1 (4).

[170] While the dividing line between regulatory claims and their financial consequences may be blurred at times, there can be no confusing the two when the regulatory authority is seeking to make orders concerning solely past actions and activities in relation to properties that the debtor has disposed or been dispossessed of.

[171] The broad *CCAA* and *BIA* provisions referred to above contain no comfort for a regulatory authority seeking to limit the Claims Procedure Order from impacting their plainly financially material actions with artificial distinctions about "regulatory" orders and "financial" ones. To an insolvent company in *CCAA* restructuring, an order to pay tens of millions of dollars directly is no different from an order to spend an equivalent amount on specific actions that will benefit others.

[172] Where, as here, the EPA Orders are moreover founded exclusively upon alleged actions in the past and relate in no way to activities taken after the commencement of proceedings, the supervising *CCAA* court applying such broad definitions has the jurisdiction to intervene.

[173] In the context of the EPA Orders and the *Abitibi Act*, the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.

[174] With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.

[175] This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.

[176] From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator. Between the suggestion that the Province is merely seeking compliance with the *EPA* and the inference that it is rather looking to ascertain a monetary value and financial benefit through the execution in nature of its EPA Orders, the Court prefers the latter view based on the evidence as a whole.

[177] The fact that two of the five EPA Orders relate to property still owned by Abitibi does not change this end result. It is the global situation that must be considered here. This is, in fact, how the Province approached the situation and still treats it today.

[178] In all likelihood, the pith and substance of the EPA Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAFTA claims for compensation. The evidence presented at the hearing indeed supports this assertion.

[179] During Mrs. Ballard testimony, the Province's Counsel filed in the record a newspaper article of December 2009 reporting on an interview made with the Province's Premier on the Abitibi situation[31].

[180] In that article, the Premier is quoted as saying that the Province is currently trying to put a price tag on what it will cost to clean the environmental damage Abitibi allegedly left behind at operations such as Grand-Falls, Botwood and Buchans.

[181] He is further quoted as stating that "if the assets do not exceed the liabilities, there will be no cash payment coming from the government" and that "in our assessment, at this point in time, there would not be a net payment to Abitibi".

[182] While the probative value of a newspaper article may generally appear weak at first sight, the situation at hand is different. This exhibit was filed by the Province itself and questions thereon were allowed without objection by anyone. Most importantly, there were no attempts to deny the truthfulness of its content.

[183] The Court cannot ignore it in assessing the true nature of the EPA Orders.

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[31] Exhibit NL-16.

4) The Factual Context and the Content of the EPA Orders

[184] That is not all. When considering the true intent and nature of the EPA Orders, consideration of the broader context in which they have been issued and what their content reveals are also relevant.

[185] In this regard, the evidence shows that the EPA Orders were, on the balance of probabilities, most likely expected not to be complied with in nature by Abitibi, such that their enforcement would only be achieved through monetary condemnations. Accordingly, from the outset, the Province must have known that they were to be, in reality, nothing else than a strategic bargaining tool for its negotiations with Abitibi.

[186] This being the case, they can hardly be qualified as true regulatory orders. This rather supports the finding that they were, to the contrary, financial and monetary in nature, and intended to have this impact. Many factual elements justify this conclusion.

[187] First, in the months preceding the EPA Orders, the *Abitibi Act* was announced and passed, less than two weeks after Abitibi made public the intended closure of its Grand Fills mill operation.

[188] This lead to Abitibi filing a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of NAFTA for the losses arising from this confiscation effected by the Province. As indicated earlier, according to Abitibi, the losses resulting from this enactment are well in excess of $300 million.

[189] Not only was the Province fully aware of this, but it was known as well that if it were to ever file a claim in the restructuring process, Abitibi would raise the value of its cross-claims or set-off claims for this expropriation against the Province. While the *Abitibi Act* denies Abitibi the right to use the Province's courts to that end, the Province cannot, however, prevent Abitibi to raise this counter-claim argument in front of the *CCAA* Court.

[190] As a result, it is a reasonable inference to draw that the Province had a definite interest in trying to avoid any claims process in the *CCAA*, so as to shield itself from the counter claim it knew Abitibi would surely oppose in compensation for the alleged wrongful expropriation of the *Abitibi Act*.

[191] Interestingly, in this case, the third party consultants (CRA) who issued the reports that formed the basis of the EPA Orders were retained not by the Minister in the exercise of her statutory duties, but by the Toronto litigation Counsel to the Province in the NAFTA proceedings. This is apparent from the face of each of the CRA Reports filed by the Province, which are addressed not to the Minister but to these lawyers.

[192] Second, the EPA Orders issued on November 12, 2009, over six (6) months after Abitibi filed for Court protection under the *CCAA*, ordered Abitibi to perform the following positive acts:

i) the submission for approval by January 15, 2010, of detailed Remediation Action Plans for all sites identified by CRA as having exceeded the allegedly applicable limits;

ii) the completion of the approved site remediation actions by January 15, 2011 or by another date as may be agreed upon with EVNC; and

iii) the closure of all landfills and lagoons/impoundments associated with each site by January 15, 2011.

[193] However, based on the evidence of Mrs. Minville, to submit detailed Remediation Action Plans as requested would have rather required close to a full year to be carried out adequately.

[194] Similarly, the closure of all landfills and lagoons or impoundments associated with each site being logically the last task to perform when a remedial action plan is implemented, requiring Abitibi to close these units no later than January 15, 2011 was unrealistic.

[195] In addition, given the magnitude and scope of the work ordered by the Province to be carried out simultaneously at the five locations targeted by the EPA Orders, based on Abitibi's past experiences with such projects in NL, it is highly doubtful that there existed sufficient resources (engineering firms, specialty providers such as drillers and laboratories and authorized specialty contractors) to carry out the work within the prescribed one-year time frame.

[196] All this suggests that the Province never truly intended for the EPA Orders to be abided by or complied with in nature given the unrealistic time frame imposed.

[197] Third, at the time the EPA Orders were issued, the Province knew or should have known that, in any event, it would be impossible for Abitibi to comply with them. There were a number of reasons for this.

[198] To begin with, since the approval of the ACI DIP Facility on May 6, 2009, Abitibi's operations have been funded through debtor-in-possession facilities under the supervision of the Monitor and Abitibi's creditors, including its secured lenders. Abitibi's access to funds was therefore limited to funding for its ongoing business operations and Abitibi enjoyed little discretion as to how these funds are allocated.

[199] Furthermore, even if Abitibi was in possession of the funds necessary to comply with the EPA Orders, it would not be possible for it to comply with the EPA Orders in the sequencing and timeframe imposed by these orders while seeking to manage the complex task of raising financing and organizing its emergence from *CCAA* proceedings.

[200] Finally, the EPA Orders targeted sites that were expropriated (Grand Falls-Windsor, Buchans and the Logging camps) or surrendered to the Province long ago, such that Abitibi could doubtfully access properties that were now in the possession of third parties to complete the remediation efforts sought.

[201] The fact that Abitibi acknowledged in the past having on-going environmental obligations, like, for instance, for the Buchans site[32], does not carry much weight when the sites at issue are not in its ownership, possession or control anymore.

[202] In all fairness, a regulator can hardly pretend to realistically order that a "person responsible" carry out actions upon properties that it no longer owns. This order would be unenforceable for obvious reasons. In such situations, non-compliance can only be compensated through monetary damages.

[203] One example will suffice. In view of the *Abitibi Act*, the Province is now the owner of the Grand-Falls paper mill. As such, the expenses of safely demolishing the mill and removing it normally belong to the Province as its new owner. In spite of this, the EPA Orders purport to require Abitibi to prepare a plan for the demolition of the Grand Falls mill that is now owned by and in possession of the Province.

[204] This order is as unenforceable as it is unjustifiable.

[205] When an order is most likely expected to be complied with through compensation in money rather than enforcement in nature, the regulator cannot avoid the qualification of the order as being a claim simply by refusing to wear the hat of a creditor for strategic purposes and financial or economic advantages, instead of valid public policy reasons.

[206] Actually, on February 8, 2010, the Minister noted in her decisions rejecting Abitibi's appeals of the EPA Orders that, in respect of each site, Abitibi had failed to comply with the EPA Orders within the set deadlines.

[207] Over all, it appears obvious that the Province knew that Abitibi could not, would not and will not be in a position to comply with its so-called injunctive or purely regulatory orders.

[208] Fourth and last, the Province is the transferee of most of the lands in respect of which the EPA Orders were issued. Yet, it has pointedly declined to make an order against itself despite the fact that it would be the beneficiary (in terms of improved land value) of any remediation work performed. The Province, as owner and occupier of the lands, is clearly a "person responsible" under s. 99 of the *EPA*.

[209] In a similar fashion, the Province, in its role as regulator, never asked other persons responsible under its *EPA*, like the towns involved, USAF, ASARCO or

[32] Exhibits NL-8 to NL-11.

Linerboard, to deal with the environmental obligations allegedly outstanding on the Abitibi Sites.

[210] In other words, the evidence suggests that the target was not the enforcement of statutory duties or obligations. The target was Abitibi.

[211] In light of these considerations, it is reasonable to infer that the intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question.

5) The Province's Behavior prior and after the EPA Orders

[212] There is more. Be it before or after the EPA Orders, the Province acted as a creditor with respect to the claims that they include.

[213] For instance, only days prior to issuing the allegedly non-monetary EPA Orders, the Province was before the Court in the Data Room Motion, arguing that it was a creditor of Abitibi precisely because of, amongst others, various environmental claims it allegedly possessed, including claims relating to Buchans, a site targeted by the orders.

[214] In the judgment on the Data Room Motion, the Court noted in fact that "the Province claimed that because of Abitibi's economic activities, it has exposed itself to numerous environmental obligations, the precise extent of which remains to be determined" and that "the Province alleged that it has incurred significant costs in that regard".

[215] Put another way, in its Data Room Motion, the Province alleged that it had already incurred significant costs and liabilities as a result of a) Abitibi's alleged failure to meet its obligations and b) its hiring of CRA environmental consultants.

[216] In a contradictory manner however, in the EPA Motion, the Province now alleges that the very same monetary claims that it sought to advance as a basis to seek access to the electronic data rooms of Abitibi are no longer monetary claims, and thus remain unaffected by the stay of proceedings and the Claims Procedure Order.

[217] While the arguments of the Province for access were denied for the reasons set forth in the judgment on the Data Room Motion, the fact that such potential claims are financial and monetary in nature remains plain and obvious.

[218] For the Province to now contend otherwise is not very convincing and seems opportunistic at best. Admittedly, if the hat of the creditor (be it actual or potential) was proper then, it certainly would fit as well now.

[219] In a similar vein, the evidence showed that the Province actually began the process of seeking third party tenders for some of the remedial work that it was

allegedly expecting Abitibi to perform pursuant to the EPA Orders, the whole merely days after issuing the orders and weeks before the compliance deadline had expired.

[220] Mrs. Ballard confirmed this. Requests for proposals concerning the remediation work at the Buchans site were released as soon as in December 2009[33].

[221] Mrs. Ballard explained as well that the Province did some emergency work to repair the integrity of a dam near Buchans, and even dealt with some health issues arising from potential lead exposures in that town. Both issues were covered in the CRA Reports that were the source of the EPA Orders.

[222] The Province thus appears to have so far taken some steps to liquidate, at least partially, the extent of its claims against Abitibi arising from the EPA Orders. This is consistent with the true financial nature of these orders and the status of creditor of the Province. The interview of December 2009 of its Premier is along the same lines[34].

[223] On the whole, not only have some alleged damages been liquidated and related costs incurred, but it also seems that the Province has already a very good idea of the total costs involved. Certainly precise enough for the Premier to say that in all likelihood, no net payment to Abitibi will ensue.

[224] This is quite far from a behavior that would be consistent with a pure regulatory order. It is rather conduct analogous to those cases where courts have concluded that it amounted to provable claims of regulatory bodies in bankruptcy processes[35].

[225] As matter of fact, these claims can easily be characterized as contingent. They are far from being too remote or even too speculative. To the contrary, they bear strong elements of probability and the Province has definite means of valuing them. It has in fact started the process, to such an extent that the Premier was able to affirm that there were no expectations of any net payment to Abitibi as early as in December 2009[36].

[226] Therefore, as things stand presently, the EPA Orders are more than likely to result in a debt and liability of Abitibi towards the Province in the short term at worst.

[227] In such a case, s. 12 of the *CCAA* authorizes the Court to determine the "amount" of the claim that may be compromised. It corresponds to the amount that "proof of which might be made". The *CCAA* does not provide solely for the compromise of filed or actual claims but has from its inception been correctly interpreted as permitting contingent claims to be included. Here, there is definitely a claim that "might"

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33 Exhibit NL-15.
34 Exhibit NL-16.
35 See, for instance, *Re Shirley*, (1995) 36 C.B.R. (3d) 101 (Ont. Ct. J.) and *Re General Chemical Canada Ltd.*, 2007 CarswellOnt 5497 (Ont. C.A.) ("*General Chemical*"), leave to appeal to the Supreme Court refused.
36 Exhibit NL-16.

be filed. That objective fact, not the subjective choice of the creditor to hold the claim in its pocket for tactical reasons, is the test under the *CCAA*.

[228] There may be difficulty in proving the amount or the right. Abitibi certainly contests every element of them. However, these objections would not put such a claim on a footing any different from other complex contingent claims that a claim officer or a court is called upon to consider in the course of *CCAA* proceedings.

[229] The fact that a claim may not be ascertained and may in fact be contested in its entirety during the *CCAA* process does not prevent it from being compromised. In many situations, courts have been called upon to determine the value of contingent or disputed claims for the purpose of having such claims included in compromises. The provable values of such claims are determined based on an assessment of the likelihood of the contingency occurring, followed by a quantification of the claim[37].

[230] The same process may be adopted whether the claim is a complex litigation claim, a claim under human rights legislation, a claim under a guarantee not yet demanded or a claim for environmental remediation under the *EPA* in respect of formerly owned properties[38].

[231] If, under the *CCAA*, a debtor can compromise contested debts arising from pay equity and labor standards statutes, class actions and personal injuries claims, or even pension plans disputes, it can certainly compromise environmental claims that are financial in nature and whose likely enforcement is through a monetary condemnation as opposed to an execution in nature upon the debtor.

[232] There is no reason to make an exception in this case. In *Anvil Mining Range Corp*.[39], Farley J. sanctioned a liquidation plan of arrangement under the *CCAA* in respect of mines against which certain government creditors held secured claims. One of these was a $60 million claim by the Department of Indian Affairs and Northern Development that included future environmental remediation costs. In a judgment upheld by the Ontario Court of Appeal, Farley J. noted that the claim had been acknowledged as "contingent since it relates to reclamation costs in the future".

[233] Contingent claims are nothing more than incomplete claims, the enforceability of which depends on some contingency or future event that has not yet occurred (and may never occur). In the case of a guarantee, it might be the non-payment by the principal debtor. In the case of an environmental claim of the sort advanced by the Province, it would be the decision of the latter to carry out the remediation and pass along the cost as the *EPA* provides.

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37 See, *Air Canada, Re*, 2004 CanLII 6674 (Ont. S.C.), at para. 6; *Air Canada*, *Re*, 2006 CanLII 42583 (Ont. S.C.), at paras 24 and 25.

38 See, with respect to guarantee claims, *Algoma Steel Corp.* v. *Royal Bank*, 1992 CarswellOnt 162 (Ont. S.C.), at paras 12ff.

39 *Anvil Range Mining Corp., Re*, 2001 CarswellOnt 1325, at para. 15 (Ont. S.C.); aff'd. in *Anvil Range Mining Corp., Re,* 2002 CarswellOnt 2254 (Ont. C.A.)

[234] The fact that all the elements of the claim do not presently exist does not deprive a contingent claim of its essential element of being a claim that can be quantified and the amount of which can be compromised.

[235] The holder of a guarantee that has not been called cannot seek to avoid the compromise of his or her claim by saying "you cannot compromise the guarantee I hold as I have not demanded on it yet". Likewise, neither can the Province allege that the claims for the costs of remediation of the properties which it has seized without compensation cannot be compromised simply because it chose not to actually ask for money in a situation where it is reasonable to conclude that this is the only way to go.

[236] Under such circumstances, a conditional creditor cannot have the luxury of electing whether or not its claim is subject to compromise under the *CCAA*. That would defeat its basic objectives and key purposes.

6) The *EPA* and the Applicable Case Law

[237] In the present case, the EPA Orders were issued pursuant to s. 99 of the *EPA*, which provides that the Minister may make an order "requiring a person, at that person's own expense" to do any of the listed category of actions.

[238] The jurisdiction to make such order is specifically couched in terms of the ability to cause a person to incur an expense. From that standpoint, such an order is, by its very nature, financial or monetary.

[239] Furthermore, s. 102(2) of the *EPA* permits the Minister to take action to carry out the terms of the order if the person to whom it is directed fails to do so. It provides that the expenses incurred by the Minister in doing so "are recoverable by the minister from the person to whom the order was directed as a debt owed to the Crown".

[240] Contrary to the situation that prevailed in some decisions invoked by the Province[40], the *EPA* thus contains a "debt-creating provision" in the event that a person targeted by an environmental remediation order fails to comply with it.

[241] As the *EPA* provides that the regulatory agency may perform the task itself and assert a claim against the debtor in respect of the costs of the performance of the obligations, the mechanism of a monetary judgment is then clearly contemplated as a means of enforcing environmental compliance. This is explicitly the case in subsection 102(4) of the *EPA*.

[242] Even if steps had not been taken by the Province to perform the work itself (and here, some have definitely been), this would signify nothing more than the difference between an accrued claim and a contingent one. Indeed, on the facts of this case, a money claim is the only mechanism for enforcement realistically open to the Province.

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[40] See, for instance, *Re Lamford Forest Products Ltd.*, (1991) 10 C.B.R. (3d) 137 (B.C.S.C) ("*Lamford*").

In such a context, it is difficult to sustain, as the Province argues, a demarcation between enforcement of the law and pursuit of a monetary judgment.

[243] There is little doubt that if the Province were to take the steps that clearly lie within its power to take under the *EPA* (i.e. performing the allegedly necessary remediation and making a claim for the costs so incurred), the resulting costs would be monetary claims provable in bankruptcy.

[244] The only difference at the moment is that the Province maintains that the last step in the process of quantifying its claims under the EPA Orders can be kept in its pocket and managed at its discretion for the purpose of gaming the *CCAA* and the priority of creditor claims hereunder.

[245] With respect, this is hardly a defensible position.

[246] To this day, although it is aware of the fact that Abitibi cannot comply with the EPA Orders, the Province maintains that it has chosen to compel Abitibi to fulfill the terms of the EPA Orders rather than resort to an exercise of its powers under s. 102 of the *EPA*.

[247] The Province adopts this approach because it needs to argue, for strategic purposes, that it is not a "creditor" of Abitibi, a few weeks after arguing the opposite position in the Data Room Motion.

[248] For the Province, the definitions of claims and provable claims found in the *CCAA* and in the *BIA* are dependent on the existence of a debt or liability owed by the bankrupt or insolvent person to the person with the claim. This was, it argues, the conclusion reached in *Jameson House Properties Ltd. (Re)*[41], where the British Columbia Court of Appeal said that a claim for *CCAA* purposes must consist of "a debt or liability … that must be owed by the [debtor] to the person seeking to prove the claim…"

[249] The Province's argument rests primarily on the distinction made in the *Panamericana*[42] case between a situation "where the government insists that the person fulfill his or her statutory duties or obligations from his own resources" and one where the government avails itself from the debt-creating provision in its environmental legislation to perform the remedial work. Only in the latter situation would the government create a "debt owed to the Crown" and could not be anything else than a creditor.

[250] In *Panamericana*, the Court held that an environmental order imposed by the Alberta Energy Resources Conservation Board on a receiver of a bankrupt company was not a "claim provable". If the liability of the receiver for the abandonment of oil

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41 (2009) 11 W.W.R. 425, at para. 47 (B.C.C.A.).

42 *Panamericana de Biennes Y Servicios (Receiver of)* v. *Northern Badger Oil & Gas Ltd.,* (1991) 81 D.L.R. (4th) 280 (Alta C.A.) ("*Panamericana*"), leave to appeal to the Supreme Court refused.

wells was present, that liability was not owed, however, to a "creditor". It was rather owed to the public at large:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money, nor is that the object of the whole process. Rather it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed. (p. 290)
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> (Our emphasis)

[251] Likewise, in the two cases indexed as *Strathcona (Country)* v*. Fantasy Construction Ltd. (Trustee of)*[43], the Alberta Court of Queen's Bench ruled that an insolvent debtor must comply with its regulatory obligations to the public before paying the creditors. Relying on *Panamericana*, it stated that an obligation of the bankrupt to comply with public safety or environmental standards based on statutory authority must be honoured by the Trustee using estate assets notwithstanding resulting prejudice to creditors of the bankrupt.

[252] The court held, however, that where the regulatory authority has chosen to make itself a creditor by monetizing the regulatory obligation, the authority's status changes from that of an "enforcer" outside the scheme of bankruptcy distribution to a "creditor" within it:

> Clearly, it is essential to this reasoning that the public agency charged with enforcing the general law of Alberta not have taken steps to make itself a creditor. If it has exercised a statutory authority or authority obtained from some other source, such as a Court Order, to do whatever ought to have been done by the party with the obligation and to recover the costs of doing so, it has become a creditor. From then on, the object of the whole process has changed. The public agency is no longer seeking to require the party with the general law obligation to comply. It is seeking to recover money. If the party with the obligation is in bankruptcy, collection of the money, its debt, by the public authority must be subject to the scheme of distribution created by the *BIA*[44].
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> (Our emphasis)

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[43] (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*").

[44] (2005) 261 D.L.R. (4th) 221 (Alta Q.B.), at para. 46.

[253] In a similar fashion, pleads the Province, the Ontario Court of Appeal decided in *Bulora*, thirty years ago, that a court-appointed receiver-manager was required to expend money under its control – money that would otherwise be paid to secured creditors – in order to comply with regulatory obligations[45].

[254] The Court considers that the *Panamericana, Strathcona* and *Bulora* decisions are distinguishable from the present situation based on the relevant facts.

[255] Pivotal in these decisions was the fact that the regulators involved were not acting as creditors, nor seeking the recovery of a debt. They were rather public agencies seeking to enforce the general law of the province involved. None was deriving a direct pecuniary benefit through the compliance of the orders issued. That no steps had been taken (i) to enforce the law at issue, (ii) to make the regulator involved a creditor or (iii) to seek the recovery of money were also key to the findings adopted by the courts.

[256] On top of that, in each of *Panamericana, Strathcona* and *Bulora* (and in *Lamford* too), the debtors were still the owner of the assets covered by the orders to be complied with.

[257] The present situation is unique. It bears no similarity with the facts in any of these decisions. In none of them did the regulator stand to directly benefit financially from the orders issued. Here, to borrow from the wording used in these cases, the Province has even taken steps to make itself a creditor. Indeed, it can reasonably be inferred from the fact pattern at issue that it is, in truth, seeking to recover a benefit for itself, if not simply money.

[258] Given the lack of any presence of Abitibi in the Province and the obvious adequacy of money as a remedy to its alleged claims, the only effective means by which the EPA Orders can, on the balance of probabilities, be effectively enforced is by invoking s. 102(3) and (4) of the *EPA* now or later.

[259] Put otherwise, looking at the true substance over the apparent form, it is not the public "enforcer" taking steps to enforce the general law. It is, to the contrary, the enforcing authority clothed as a creditor.

[260] From that perspective, the situation at hand bears a lot of similarities to *Re Shirley*[46]. In that case, the regulating authority was found to have a provable claim for costs expended and to be expended following a clean-up order ignored by the debtor but upon which the Ontario Minister of Environment had had to begin work partially.

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[45] *Canada Trust Co. v. Bulora Corp.* (1980) 34 C.B.R. (N.S.) 152 (Ont. C.A.) ("*Bulora*"), affirming (1980) 34 C.B.R. (N.S.) 145 (Ont. S.C.); see also, along the same lines, *Re Lamford Forest Products Ltd*., (1991) 10 C.B.R. (3d) 137 (B.C.S.C) ("*Lamford*").

[46] (1995) 36 C.B.R. (3d) 101 (Ont. Ct. J.).

[261] If, like there, the Province can, and no doubt will, "create" a debt next month based on the same jurisdictional cloth as now exists, that future obligation based on presently existing facts is as subject to compromise as the debt "created" today.

[262] In other words, as this review of the case law indicates, only limited cases in limited circumstances[47] have so far ruled that non-monetary statutory obligations are not claims provable in a bankruptcy process or in a *CCAA* restructuring. The cases actually contain strong caveats[48] to this kind of rulings where the duty is based on a statute that includes a "debt-creating" provision and where the regulator has taken steps to engage in the process by which such debt is created.

[263] Both conditions required for this exception to apply are present here, in a context where it is, furthermore, highly likely that the Province will have no other alternative but to pursue the monetary claim process of its *EPA* under the circumstances.

[264] Besides, the core of the *Panamericana* argument is that the receiver, having elected to operate the business, could not shirk its duty to follow a regulatory requirement arising from that very operation under general law. This narrow view, which is the ratio of the case, was relatively uncontroversial (although subsequent amendments to the *BIA* and to the *CCAA* have effectively overruled it by placing limits on a receiver's obligations).

[265] By contrast, Abitibi has not carried on business in NL since the time of filing and the EPA Orders were issued primarily in respect of properties formerly owned by Abitibi and in regard to activities in most cases years in the past.

[266] As a result, viewed as a case that found liability of a court-appointed receiver, *Panamericana* is of little relevance following the amendments to the *BIA* and *CCAA* that limited this liability explicitly. However, in its analysis, the Alberta Court of Appeal went beyond a consideration of the receiver's responsibility as an operator of the business to consider what claims may or may not be provable in bankruptcy. Such analysis was, arguably, an *obiter*; most *CCAA* courts have not followed it in subsequent decisions.

[267] In that regard, the Court notes that the *Panamericana* decision did not consider that the *BIA* (like the *CCAA*) explicitly contemplates the proof of contingent and unliquidated claims which, combined with the "debt creating" provisions of a statute like

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47 See, *Panamericana de Biennes Y Servicios (Receiver of)* v. *Northern Badger Oil & Gas Ltd,* (1991) 81 D.L.R. (4th) 280 (Alta C.A.) ("*Panamericana*"), leave to appeal to the Supreme Court refused; *Strathcona (Country)* v. *Fantasy Construction Ltd. (Trustee of),* (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*"); *Canada Trust Co. v. Bulora Corp.* (1980) 34 C.B.R. (N.S.) 152 (Ont. C.A.) ("*Bulora*"), affirming (1980) 34 C.B. R. (N.S.) 145 (Ont. S.C.); and *Re Lamford Forest Products Ltd*., (1991) 10 C.B.R. (3d) 137 (B.C.S.C) ("*Lamford*").

48 See, *Re Shirley*, (1995) 36 C.B.R. (3d) 101 (Ont. Ct. J.); *Strathcona (Country)* v. *Fantasy Construction Ltd. (Trustee of),* (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*"); and *Re Lamford Forest Products Ltd*., (1991) 10 C.B.R. (3d) 137 (B.C.S.C) ("*Lamford*").

the *EPA*, definitely allows for the Province to be qualified as a contingent creditor with an eminently provable claim.

[268] In addition, in *General Chemical*[49], the Ontario Court of Appeal recently declined to follow the *Panamericana* decision precisely because of the amendments to the *BIA* and the *CCAA* that were subsequent to it:

> "[45] In this court, the MOE repeats its arguments below and raises, as it did there, the case of Panamericana De Bienes Y Servicios (Receiver of) v. Northern Badger Oil and Gas Ltd. 1991 CanLII 2698 (AB C.A.), (1991), 81 D.L.R. (4th) 280 (Alta. C.A.). In that case, the court found that provincial environmental legislation concerning oilwell clean up costs did not conflict with the scheme of distribution under the BIA, and had to be complied with even though that reduced the amounts otherwise available for distribution in the bankruptcy.
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> [46] I agree with the motion judge that the reasoning in that case has been overtaken because of subsequent amendments to the BIA. Section 14.06(7) now expressly provides for priority to be accorded to environmental clean up costs and s. 14.06(8) now ensures that a claim against the debtor for environmental clean up costs is a provable claim. Neither were in effect at the time of Panamericana. To give effect to provincial environmental legislation in the face of these amendments to the BIA would impermissibly affect the scheme of priorities in the federal legislation."
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> (Our emphasis)

[269] In that judgment, the Ontario Court of Appeal expressly approved of the motion judge's finding that "[…] to permit the MOE to effect a delay in distribution would be to give a quasi-priority over other unsecured creditors […]"[50]. The premise of the first instance judge's reasoning was that federal legislation is paramount and that a provincial law may not seek to reorder the scheme of distribution set out in the *BIA*.

[270] It is worth mentioning that, similarly, the constitutional validity of the *CCAA* as a whole is well established[51]. Relying on the paramountcy doctrine, often have the *CCAA* courts emphasized that the operation of the *CCAA* regime cannot be thwarted by the operation of provincial legislation[52].

[271] In sum, on a proper reading of its terms or their reasoning, neither the *EPA* nor the applicable case law are of any help to the Province in the fact pattern at issue.

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49 *General Chemical Canada Ltd.*, *Re*, (2007) 35 C.B.R. (5th) 163 (Ont. C.A.) ("*General Chemical*"), leave to appeal to the Supreme Court refused.

50 *General Chemical Canada Ltd.*, *Re*, (2006) 22 C.B.R. (5th) 298 (Ont. S.C.J.), at para. 37.

51 *Re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659.

52 See, *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp.,* (2008) 92 O.R. (3d) 513, at paras 102 to 104 (Ont. C.A.); *Nortel Networks Corp., Re [Union and Employee Benefit Appeal],* (2009) 59 C.B.R. (5th) 23, at paras 38, 44 and 47 (Ont. C.A.); *Skeena Cellulose Inc., Re,* (2003) 43 C.B.R. (4th) 187, at paras 42 and 50 (B.C.C.A.).

7) The Province's Position

[272] All things considered, the Province's position amounts to an assertion that (i) the financial consequences of regulatory orders, however material, cannot be affected by the *CCAA* in any way, whether the obligations relate to past, present or future actions by a debtor; (ii) the regulatory authority alone gets to decide what is a regulatory order without court intervention; and (iii) generally "immune" regulatory orders can be converted into potentially "compromisable" monetary orders at the whim of the provincial regulator without court oversight or review.

[273] This contention boils down to claiming that a provincial regulator could have the non reviewable right to determine whether obligations it controls or creates will be subject to compromise under the *CCAA* or whether they will enjoy a super-priority beyond the reach of compromise.

[274] The Court disagrees with such a proposition.

[275] The Province's attempt at fashioning a super-priority for the satisfaction of its environmental claims by crafting the EPA Orders and "managing" the timing of the creation of the "Crown debt" under s. 102 of the *EPA* is not only contrary to the principles of the *CCAA*. It is also unjust vis-à-vis Abitibi's other creditors whose claims are effectively stayed and will be compromised.

[276] When paragraph 10.1 of the First Stay Extension Order was added, the intent was not to grant super-priority status to regulatory bodies for pre-filing claims. Rather, this amendment simply permitted regulatory bodies to continue to regulate Abitibi in respect of its conduct after the commencement of the *CCAA* proceedings. From that perspective, this amendment was adhering to the spirit of s. 11.1 of the amended *CCAA*.

[277] This limited amendment to the stay provisions of the Initial Order recognized that a government is not prevented from issuing regulatory orders in good faith in relation to ongoing health, safety, security, public order or environmental concerns. Abitibi is required to address these since it must abide by government regulations in relation to its ongoing business operations while under *CCAA* protection.

[278] Such concerns are distinguished, however, from past environmental liabilities of a monetary nature relating to assets that are, for the most part, no longer under Abitibi's control.

[279] With respect, the Province's proposition would, moreover, render meaningless significant amendments made by Parliament to the *CCAA* and the *BIA* in 1992, 1997 and 2009 so as to strike some balance between bankruptcy and insolvency laws and environmental obligations.

[280] These amendments notably incorporated s. 11.8 in the *CCAA* in 1997. Pursuant to that section, remediation costs for environmental damage enjoy a special status. The Crown benefits from a first rank priority on the contaminated property or contiguous property of a debtor for the costs of remedying any environmental condition or damage provided, of course, the debtor still owns it (s. 11.8(8)). These clean-up costs are also acknowledged as claims under the Act (s. 11.8 (9)).

[281] The lien is attached to the contaminated property and other contiguous real property of the debtor that is related to the activity that caused the contamination. Nonetheless, the lien does not give the Crown any priority over the rest of the creditors on the other assets of the debtor. In that regard, the Crown remains an ordinary unsecured creditor[53].

[282] The Province claims that this s. 11.8 priority exists only if the Crown has incurred the costs. It is therefore not applicable here.

[283] In contrast, for Abitibi, statutory liabilities to remedy environmental damage should be provable claims under the *CCAA*, whether or not the Crown has effectively incurred the costs. For it to be a priority claim under s. 11.8, it should be sufficient that the likelihood of enforcing the remediation by incurring the cost be greater than the likelihood of enforcing it by an execution in nature against the debtor.

[284] In that context, claims eligible to the priority of s. 11.8 would also be subject to any compromise to be reached under the *CCAA*.

[285] It is not necessary to decide this issue here in view of the Court's finding that the EPA Orders are financial in nature and thus, qualify as claims under the *CCAA* no matter what.

[286] In any event, in this case, one reality remains. By expropriating Abitibi, the Province effectively "realized" on any security to which it would have otherwise been potentially entitled under s. 11.8(8) of the *CCAA* should the expropriated lands be contaminated. Nevertheless, by its position, it still seeks to go further and indirectly take for its benefit other property and assets of Abitibi located beyond its borders.

[287] In the Court's opinion, this should not be allowed outside the limited framework of the *CCAA* restructuring process**.**

[288] All in all, this position adopted by the Province not only fails to take into account the true impact of these relevant amendments to the law, it also runs counter to the spirit of the *CCAA* and the well-established principle of compromise of contingent claims.

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[53] *General Chemical Canada Ltd.*, *Re*, (2006) 22 C.B.R. (5th) 298 (Ont. S.C.J.); aff'd. in *General Chemical Canada Ltd.*, *Re*, (2007) 35 C.B.R. (5th) 163 (Ont. C.A.) ("*General Chemical*"), at para. 42, leave to appeal to the Supreme Court refused.

[289] The Province's position rests on the premise that obligations or duties to comply with the general law are not "claims" but rather "obligations" that cannot be "extinguished" upon a debtor's insolvency.

[290] It shall be noted that, contrary to what the Province often said, claims cannot properly be qualified as "extinguished" upon insolvency. They are rather called for, determined and ultimately compromised under a plan of arrangement, only after the latter has been voted upon by the creditors and approved by the Court.

[291] In the Court's view, monetary claims disguised as regulatory orders issued in relation to pre-filing activities on lands which are no longer in control of a debtor should not, in a situation where the costs of the remediation efforts are reducible to money, be permitted to remain uncompromised and in existence post-emergence where to do so could threaten the presentation of a viable compromise or plan of arrangement.

[292] In line with its rehabilitative objectives, the *CCAA* does not contain a provision analogous to section 178 of the *BIA* whereby certain "excepted claims" (such as fines or penalties) could constitute debts that survive bankruptcy (or in the *CCAA*'s case, emergence). In *Air Canada*[54], Cummings J. qualified excepted claims as "exceptions to the normative policy objective of rehabilitation" and concluded that they did not apply to proceedings under the *CCAA*.

[293] If the Court were to accept the Province's position, the remediation obligations would become, in effect, priorities or unaffected obligations to be satisfied in full by Abitibi before the remaining value of its enterprise is allocated among the other creditors and claimants. The net effect of such a determination would be the reallocation of value away from the creditors generally in favour of the Province and the size of such reallocation would be material.

[294] Environmental liabilities of this magnitude would also, if uncompromised upon emergence from the *CCAA* process, act as a sword of Damocles over Abitibi by threatening its continuity post-emergence. In fact, this mere threat could very well preclude obtaining needed exit financing and prevent a plan from being adopted, unless a potentially risky and costly strategy of devising a liquidation plan were employed. This would defeat the very objectives of the restructuring process.

[295] If that were to be the case, the net result would be that the ability of Abitibi to successfully restructure would be challenged on a number of levels. At the very least, the restructuring process would likely become more complicated, including further delays and costs.

[296] The Court considers that this is definitely not the preferred way to go.

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[54] *Air Canada*, *Re*, 2006 CanLII 42583 (Ont. S.C.)**,** at paras 34ff.

FINAL REMARKS

[297] In closing, as the *CCAA* judge presiding over this restructuring, the Court believes that some final remarks are warranted.

[298] For all stakeholders involved, the restructuring of Abitibi is by no means an easy task. The extent of the indebtedness is huge. It is in the range of many billions of dollars.

[299] Term lenders, secured noteholders and bondholders each have concerns. The same goes for numerous trade creditors. Thousands of employees and pensioners may be affected. Dozens of facilities are at stake. Tens of communities are looking forward to a positive outcome. Pension plans, collective agreements and commercial contracts of all sorts must be looked at and, in many cases, reviewed and reconsidered.

[300] To date, the Court record indeed shows that more than 480 entries have been recorded in less than a one-year span. During that period, the Court has rendered in excess of 55 different orders on various issues.

[301] The hard reality of real time litigation in *CCAA* restructurings is that parties do not have the luxury of debating forever their disagreements. This is simply not possible when the debtor is fighting for survival. The preferred route to follow remains, at least in the Court's view, to try to find an acceptable forum where each side is able to fully present their position, and get it ruled upon.

[302] No doubt harsh feelings exist between the Province and Abitibi as a result of the events of certainly the last eighteen months, perhaps even more. So far, it has led them to many battlefields, be it in the NAFTA proceedings, in the Data Room Motion or in the present EPA Motion. All that without taking into account the many discussions that these must have unquestionably provoked.

[303] Both believe, no doubt honestly, that they have legitimate claims to raise one against the other. That may well be. However, they should be careful and, in truth, attentive so that their disagreements do not end up causing much more serious difficulties to many others. Unfortunately, it is clear that their disputes have this very potential.

[304] It is this Court's hope that they will find a way to agree on an appropriate forum in which to arbitrate their differences, ideally sooner rather than later. Delays in this respect do not serve the best interests of either of them. In the global picture, this has moreover the potential of being far more detrimental to a number of other bystanders to their disputes.

[305] To some extent, this judgment forces the Province and Abitibi to at least consider bringing some of their claims within the realm of this restructuring, and not leave them

outside with the very negative consequences this may potentially bring upon the whole process.

[306] The Monitor plainly voiced it. This restructuring may be put in jeopardy if no solution is found along these lines. If that were to be the end result, the whole purpose of the *CCAA* would have been ignored and set aside. With all the efforts deployed so far by so many, that would be most unfortunate.

FOR THESE REASONS, THE COURT:

[307] **DISMISSES** the Amended Motion for a Declaration Regarding Orders Issued Pursuant to the Environmental Protection Act of the Petitioner, Her Majesty the Queen in Right of the Province of Newfoundland and Labrador (the "**Province**");

[308] **DISMISSES** the Intervention of the Intervening Parties, Her Majesty the Queen in right of the Province of British Columbia (the "**HMQBC**") and the Attorney General for British Columbia (the "**AGBC**");

[309] **DECLARES** that the orders issued against the Debtors by the Minister of Environment and Conservation of the Province on November 12, 2009, pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, chap. E-14.02, (the "**EPA Orders**"), are stayed under paragraph 10 of the Initial Order issued by the Court on April 17, 2009, and are not subject to the exception found at paragraph 10.1 of that Initial Order;

[310] **DECLARES** that the Province's filing of any claim based on the EPA Orders is subject to the Claims Procedure Order issued by the Court on August 26, 2009, including the claims process detailed therein;

[311] **RESERVES** to the Province its right, if any, to request an extension of the Claims Bar Date (as defined in the Claims Procedure Order) in that regard and to the Debtors their right, if any, to contest any such extension request;

[312] **WITH COSTS** against the Province in favor of the Debtors, but **WITHOUT COSTS** against the HMQBC and the AGBC.

_____
CLÉMENT GASCON, J.S.C.

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Dates of hearing: February 24, 25 and 26, 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 29

See para. 70

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Century Services Inc. *v.* Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

Répertorié : Century Services Inc. *c.* Canada (Procureur général)

2010 CSC 60

N^o^ du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

[1] Deschamps J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] La juge Deschamps — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

Act, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

[4] On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 $ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

[9] This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d'une priorité en cas d'insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l'insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l'objet d'aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu'elle l'était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l'État en cas d'insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l'État ne bénéficie d'aucune priorité, alors qu'aux États-Unis et en France il jouit au contraire d'une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d'une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l'impôt sur le revenu et des cotisations à l'assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s'applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n'a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

également les biens détenus par un créancier garanti qui, si ce n'était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l'égard des retenues à la source relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC (voir par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J'emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d'un litige portant sur la priorité de rang entre, d'une part, une fiducie réputée établie en vertu de la *LIR* à l'égard des retenues à la source, et, d'autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D'après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l'égard des biens du débiteur pour une valeur égale à la somme due au titre de l'impôt sur le revenu — commençait à s'appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l'emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n'existait pas de biens susceptibles d'être visés par la fiducie réputée de la *LIR* lorsqu'elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu'elle est réputée s'appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l'arrêt *Sparrow Electric* »).

[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed . . . .

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** . . .
>
> . . .
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . . .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

> **18.4** . . .
>
> . . .
>
> (3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :
>
> *a*) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;
>
> *b*) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

[62] Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI.*

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[115] Section 11[1] of the *CCAA* stated:

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

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

1 Section 11 was amended, effective September 18, 2009, and now states:

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] L'article 11[1] de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

11. Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) . . . [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the *CCAA* proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

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

. . .

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

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

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

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

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

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

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

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

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

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

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

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

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

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

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

(3) [Burden of proof on application] The court shall not make the order unless

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

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Appeal allowed with costs, ABELLA J. *dissenting.*

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

Tab 30

See para. 205

Sun Indalex Finance, LLC *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

United Steelworkers *Appellant*

Sun Indalex Finance, LLC *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7 *Appelant*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

Syndicat des Métallos *Appelant*

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services *Respondents*

and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association *Interveners*

Indexed as: Sun Indalex Finance, LLC *v.* United Steelworkers

2013 SCC 6

File No.: 34308.

2012: June 5; 2013: February 1.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Bankruptcy and Insolvency — Priorities — Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Company entering into debtor in possession ("DIP") financing allowing it to continue to operate — CCAA court granting priority to DIP lenders — Proceeds of sale of business insufficient to pay back DIP lenders — Whether pension wind-up deficiencies subject to deemed trust — If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), (4), 75(1)(a), (b) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

c.

Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite) et Surintendant des services financiers *Intimés*

et

Surintendant des services financiers, Institut d'insolvabilité du Canada, Congrès du travail du Canada, Fédération canadienne des retraités, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

Répertorié : Sun Indalex Finance, LLC *c.* Syndicat des Métallos

2013 CSC 6

N° du greffe : 34308.

2012 : 5 juin; 2013 : 1er février.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Rothstein, Cromwell et Moldaver.

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

Pensions — Faillite et insolvabilité — Priorités — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la Loi sur les arrangements avec les créanciers des compagnies (« LACC ») — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Financement obtenu par la société à titre de débiteur-exploitant (« DE ») lui ayant permis de poursuivre ses activités — Tribunal chargé d'appliquer la LACC ayant accordé priorité aux prêteurs DE — Insuffisance du produit de la vente pour rembourser les prêteurs DE — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — Dans l'affirmative, la prépondérance fédérale fait-elle en sorte que la priorité issue de l'application de la LACC a préséance sur la fiducie réputée? — Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8, art. 57(3), (4), 75(1)a), b) — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36.

Pensions — Trusts — Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Whether pension wind-up deficiencies subject to deemed trust — Whether company as plan administrator breached fiduciary duties — Whether pension plan members are entitled to constructive trust.

Civil Procedure — Costs — Appeals — Standard of review — Whether Court of Appeal erred in costs endorsement concerning one party.

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The salaried plan was being wound up when the *CCAA* proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The *CCAA* court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the *CCAA* court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The *CCAA* court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the *CCAA* proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from Indalex's alleged breaches

Pensions — Fiducies — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la LACC — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — La société a-t-elle manqué à ses obligations fiduciaires d'administrateur des régimes? — Les participants des régimes de retraite ont-ils droit à une fiducie par interprétation?

Procédure civile — Dépens — Appels — Norme de contrôle — La décision de la Cour d'appel sur les dépens d'une partie est-elle erronée?

Indalex Limited (« Indalex »), le promoteur et l'administrateur de deux régimes de retraite, l'un pour les salariés, l'autre pour les cadres, est devenue insolvable. Elle a demandé la protection contre ses créanciers sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Le régime des salariés était en cours de liquidation lorsque la procédure fondée sur la *LACC* a été engagée. Le régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé. Les deux régimes accusaient un déficit de liquidation.

Une série de mesures avalisées par le tribunal a permis à la société d'obtenir un financement de débiteur-exploitant (« DE ») et de poursuivre ses activités. Le tribunal chargé de l'application de la *LACC* a accordé aux prêteurs DE, un consortium composé de créanciers qui bénéficiaient d'une garantie de premier rang avant le début de la procédure, une priorité sur tous les autres créanciers. Le remboursement des sommes empruntées était garanti par Indalex É.-U.

Finalement, sur approbation du tribunal appliquant la *LACC*, Indalex a vendu son entreprise, mais l'acquéreur n'a pas repris à son compte les engagements de retraite. Le produit de la vente n'étant pas suffisant pour rembourser les prêteurs DE, Indalex É.-U., à titre de caution, a payé la différence et a acquis de ce fait la créance prioritaire des prêteurs DE. Le tribunal a autorisé le paiement conformément à l'ordre de priorité, mais il a également ordonné la retenue de fonds en réserve, remettant à plus tard l'examen de l'argumentation des participants relative à leur droit au produit de la vente.

Les participants des régimes ont contesté la priorité accordée dans le cadre de la procédure fondée sur la *LACC*. Ils ont fait valoir qu'ils avaient priorité pour le montant du déficit de liquidation en raison de la fiducie réputée créée par le par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), et de la fiducie

of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) *Statutory Deemed Trust*

Per Deschamps and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of

par interprétation résultant de manquements allégués d'Indalex à son obligation fiduciaire d'administrateur des régimes. En première instance, le juge a rejeté les motions des participants, concluant que la fiducie réputée ne s'appliquait pas aux déficits de liquidation. Il a conclu que, pour ce qui était du déficit de liquidation, les participants étaient des créanciers chirographaires. La Cour d'appel a infirmé la décision et statué que les déficits de liquidation des régimes de retraite faisaient l'objet d'une fiducie réputée et d'une fiducie par interprétation qui prenaient rang avant la créance des prêteurs DE bénéficiant d'une priorité et celles des autres créanciers garantis. En outre, elle a rejeté la prétention du Syndicat des Métallos, qui représentait quelques-uns des participants du régime des salariés, à savoir qu'il avait droit au paiement de ses dépens par prélèvement sur la caisse de retraite des salariés.

Arrêt (les juges LeBel et Abella sont dissidents) : Les pourvois interjetés par Sun Indalex Finance, George L. Miller et FTI Consulting sont accueillis.

Arrêt : Le pourvoi interjeté par le Syndicat des Métallos est rejeté.

(1) *La fiducie réputée d'origine législative*

Les juges Deschamps et Moldaver : Il est bien établi que la fiducie réputée créée par le par. 57(4) de la *LRR* s'applique aux cotisations visées à l'al. 75(1)a) de la *LRR*. La seule question est de savoir si cette fiducie réputée d'origine législative s'applique aussi aux paiements au titre du déficit de liquidation exigés par l'al. 75(1)b). Dans le cas des salariés, la réponse est oui, compte tenu du texte, du contexte et de l'objet par. 57(4). Il n'en va pas de même pour le régime des cadres étant donné que cette disposition prévoit que la fiducie réputée en cas de liquidation ne prend naissance qu'à la liquidation du régime.

Le paragraphe 57(4) de la *LRR*, qui crée la fiducie réputée en cas de liquidation, ne comporte aucune limite expresse aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». L'alinéa 75(1)a) prévoit expressément que l'employeur verse « un montant égal au total de tous les paiements » *accumulés*, même s'ils ne sont pas encore dus à la date de la liquidation, tandis que l'al. 75(1)b) parle d'un « montant » calculé à partir de la valeur de l'actif et du passif *accumulés*, lorsque le régime est liquidé. Puisque le montant des paiements (al. 75(1)a)) et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots

s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind up" as required by s. 57(4) of the *PBA*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable

employés au par. 57(4) de la *LRR* : « montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

La date où s'effectue le calcul est sans importance du moment que le passif est évalué à la date de la liquidation. Le fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées à l'al. 75(1)b) de la *LRR*.

L'historique législatif montre que la protection, qui couvrait d'abord (1) uniquement les cotisations dues, s'est étendue (2) aux montants payables calculés comme s'il y avait liquidation du régime, (3) puis aux montants dus ou accumulés à la liquidation, à l'exclusion des paiements au titre du déficit de liquidation (4) et, enfin, à tous les montants dus ou accumulés à la liquidation. L'historique législatif mène donc à la conclusion qu'une interprétation étroite qui dissocierait le paiement requis de l'employeur par l'al. 75(1)b) de la *LRR* de celui exigé à l'al. 75(1)a) irait à l'encontre de la tendance du législateur ontarien à offrir une protection de plus en plus étendue.

La disposition qui crée une fiducie réputée a une vocation réparatrice. Elle vise à protéger les intérêts des participants. Cette fin réparatrice favorise une interprétation qui inclut tous les paiements à la liquidation dans la valeur de la fiducie réputée. En l'espèce, c'est à bon droit que la Cour d'appel a jugé qu'Indalex était réputée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la question de la fiducie réputée d'origine législative.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Étant donné qu'il ne peut y avoir de fiducie réputée au bénéfice du régime des cadres, celui-ci n'ayant pas été liquidé à la date considérée, il s'agit donc essentiellement — pour ce qui concerne le régime des salariés — d'interpréter une disposition de la loi et de déterminer si le déficit de liquidation décrit à l'al. 75(1)b) est « accumul[é] à la date de la liquidation » comme l'exige le par. 57(4) de la *LRR*.

Lorsque le terme « accumulé » [et plus encore son équivalent anglais « *accrued* »] est employé de pair avec une somme, il renvoie généralement à un élément

but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed

dont la valeur est actuellement mesurée ou mesurable, mais qui peut ou non être dû. Dans la présente affaire, au par. 57(4), le terme « accumulées » [« *accrued* »] est utilisé par opposition à « dues ». Suivant le sens ordinaire du mot « accumulé », on ne peut considérer que le déficit l'était à la date de la liquidation. Le montant du déficit de liquidation dépend de droits qui ne prennent naissance qu'à la liquidation et à l'égard desquels les employés ne font des choix qu'après la liquidation. Le déficit de liquidation n'est donc ni déterminé ni déterminable à la date de liquidation prévue.

Le contexte législatif général appuie la thèse que, suivant leur sens ordinaire et grammatical le plus plausible, les mots « accumulées à la date de la liquidation » renvoient aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Qui plus est, il appert de l'évolution et de l'historique des dispositions en cause que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie réputée d'origine législative. Ils confirment en fait l'intention du législateur d'*exclure* du champ d'application de la fiducie réputée les obligations qui naissent seulement *à la* date même de la liquidation.

La loi établit une distinction entre deux types d'obligation de l'employeur qui sont pertinents en l'espèce. Il y a d'une part les cotisations requises pour acquitter le coût du service courant et d'autres paiements qui sont dus ou qui sont accumulés sur une base quotidienne jusqu'à la date considérée. Il s'agit des paiements prévus à l'actuel al. 75(1)a), à savoir ceux qui sont dus ou accumulés, mais qui n'ont pas été versés. D'autre part, il y a les cotisations supplémentaires exigées lorsque le régime est liquidé (le déficit de liquidation). Ces paiements font l'objet de l'al. 75(1)b). Il appert de l'évolution et de l'historique législatifs que les fiducies réputées des par. 57(3) et (4) devaient seulement englober les cotisations du premier type et que le législateur n'a jamais voulu que les obligations ultérieures éventuelles de l'employeur qui naissent une fois le régime liquidé fassent l'objet d'une fiducie réputée ou d'un privilège.

En l'espèce, la fiducie réputée du par. 57(4) ne vise pas le déficit de liquidation. Pareille exclusion est conforme aux objectifs généraux de la loi. Le législateur a créé des fiducies à l'égard des cotisations qui étaient dues ou accumulées à la date de la liquidation afin de protéger, dans une certaine mesure, les droits des bénéficiaires d'un régime de retraite et ceux des employés contre les réclamations des autres créanciers de l'employeur. Or, il y a de bonnes raisons de penser que c'est en raison d'autres objectifs concurrents que le législateur s'est abstenu d'accroître la portée de la fiducie réputée et d'y

trust to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per Deschamps and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust as a Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs

inclure le déficit de liquidation. La protection des régimes de retraite constitue certes un objectif important, mais il n'appartient pas à la Cour de décider de la mesure dans laquelle cet objectif sera poursuivi ou d'autres intérêts en souffriront. Il appartient à l'Assemblée législative de l'Ontario de décider du degré de protection qu'il convient d'accorder aux bénéficiaires d'un régime de retraite sous le régime de la *LRR*.

(2) *Priorité de rang*

Les juges Deschamps et Moldaver : Une fiducie réputée établie par une loi provinciale comme la *LRR* continue de s'appliquer dans les instances régies par la *LACC*, relevant de la compétence fédérale, sous réserve de la doctrine de la prépondérance fédérale. En l'espèce, accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Malgré le désaccord avec la juge Deschamps sur la portée de la fiducie réputée du par. 57(4), si une fiducie est réputée exister en l'espèce, la créance DE prend rang avant elle en application de la doctrine de la prépondérance fédérale.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la priorité de rang déterminée par application du principe de la prépondérance fédérale.

(3) *La fiducie par interprétation comme réparation du manquement à l'obligation fiduciaire*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il ne saurait y avoir conflit d'intérêts uniquement parce que l'employeur, dans l'exercice de son pouvoir de gérer la société au mieux des intérêts de celle-ci, prend une mesure susceptible d'avoir une incidence sur les bénéficiaires du régime de retraite qu'il administre. Telle est la conclusion qui découle nécessairement du contexte législatif. L'existence de conflits apparents qui sont inhérents à la double fonction d'employeur et d'administrateur de régime exercée par une même personne ne peut constituer un manquement à l'obligation fiduciaire, car ces conflits sont expressément autorisés par la loi, laquelle permet à une personne

when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings resulted in any such asset. Furthermore, to impose a constructive trust in

d'exercer les deux fonctions. Il y a en fait conflit d'intérêts lorsqu'il existe un risque important que les obligations de l'employeur-administrateur envers la société nuisent de façon appréciable à la défense des intérêts des bénéficiaires d'un régime.

À elle seule, la demande initiale de protection de la société contre ses créanciers ne plaçait pas Indalex en situation de conflit d'intérêts ou d'obligations. De même, l'omission de donner avis de la demande initiale présentée sur le fondement de la *LACC* ne constituait pas un manquement à l'obligation fiduciaire d'éviter tout conflit d'intérêts. La décision d'Indalex d'agir à titre d'employeur-administrateur ne peut conférer aux participants plus d'avantages que si l'administration de leurs régimes avait été confiée à un tiers indépendant.

C'est lors de la demande et de l'obtention des ordonnances DE sans préavis aux bénéficiaires des régimes, ainsi que de la demande et de l'obtention de l'approbation de la vente que les intérêts commerciaux d'Indalex sont entrés en conflit avec ses obligations d'administrateur des régimes de retraite. Cependant, la difficulté résidait en l'espèce non pas dans l'existence du conflit, mais bien dans l'omission d'Indalex de prendre quelque mesure afin que les bénéficiaires des régimes aient la possibilité de veiller à la protection de leurs intérêts dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. En résumé, le manquement ne tenait pas à l'existence du conflit, mais plutôt à l'omission de prendre les mesures qu'elle commandait.

L'employeur-administrateur qui se trouve en situation de conflit doit en informer le juge saisi sur le fondement de la *LACC*. Il ne suffit pas d'inscrire les bénéficiaires sur la liste des créanciers; le juge doit être informé que le débiteur, en sa qualité d'administrateur de régime, est en conflit d'intérêts ou susceptible de l'être. En conséquence, Indalex a manqué à son obligation fiduciaire en omettant de faire ce qu'il fallait pour que les bénéficiaires des régimes puissent être dûment représentés dans le cadre de cette procédure comme si l'administrateur des régimes avait été indépendant, en particulier lorsqu'elle a demandé l'approbation du financement DE et de la vente, puis présenté une motion en vue de faire faillite.

Indépendamment de ce manquement, l'imposition d'une fiducie par interprétation ne constitue une réparation appropriée que si un actif déterminable résulte des actes de l'auteur du manquement et qu'il serait injuste que ce dernier ou, parfois, un tiers, conserve cet actif. Aucun élément de preuve n'appuie la prétention qu'un tel actif a résulté de l'omission d'Indalex de pallier véritablement les conflits d'intérêts auxquels a donné lieu

response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per Deschamps and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

la procédure fondée sur la *LACC*. Qui plus est, imposer une fiducie par interprétation par suite du manquement à l'obligation fiduciaire de veiller à ce que les bénéficiaires des régimes jouissent de garanties procédurales, alors qu'ils en ont joui dans les faits, se révèle inéquitable au vu de l'ensemble des circonstances.

Les juges Deschamps et Moldaver : L'employeur constitué en société qui décide d'agir en qualité d'administrateur d'un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d'une société ont aussi une obligation fiduciaire envers la société, l'employeur doit être prêt à résoudre les conflits lorsqu'ils surgissent. L'employeur qui administre un régime de retraite n'est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu'il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d'une décision, et non sa nature qui doivent être prises en compte.

En l'espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d'administratrice des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Plus précisément, en demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants.

En ce qui concerne la fiducie par interprétation, il est bien établi en droit qu'une réparation de la nature d'un droit de propriété n'est généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui peut être rattaché à un tel bien. Il y a accord avec le juge Cromwell sur le fait que cette condition n'était pas remplie en l'espèce et il a été souscrit à ses motifs sur cette question. En outre, il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité.

Per LeBel and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be

Les juges LeBel et Abella (dissidents) : Une relation fiduciaire s'entend de la relation factuelle et juridique entre un bénéficiaire vulnérable et un fiduciaire qui détient et peut exercer un pouvoir sur le bénéficiaire dans les situations prévues par la loi. Par conséquent, avant d'analyser les obligations fiduciaires de l'employeur à titre d'administrateur d'un régime de retraite visé par la *LRR*, il faut examiner la situation et les caractéristiques des bénéficiaires du régime. En l'espèce, les bénéficiaires se trouvaient dans une position de grande vulnérabilité par rapport à Indalex.

Rien dans la *LRR* ne permet de conclure que l'employeur, en sa qualité d'administrateur, serait assujetti à une norme moindre ou assumerait des fonctions et des obligations moins strictes qu'un administrateur indépendant. L'employeur n'est pas tenu d'assumer le fardeau de l'administration des régimes de retraite qu'il a convenu d'établir ou qui sont le fruit de décisions antérieures. Par contre, s'il choisit de l'assumer, une relation fiduciaire prend naissance et l'on s'attend à ce que l'employeur soit capable d'éviter ou de régler les conflits d'intérêts susceptibles d'intervenir.

Indalex se trouvait en situation de conflit d'intérêts dès qu'elle a envisagé de demander la protection de la *LACC* et de proposer un arrangement à ses créanciers. Du point de vue de l'entreprise, on ne pourrait guère trouver à redire à cette décision. Il s'agissait d'une décision d'affaires. Cependant, Indalex jouait en même temps le rôle de fiduciaire à l'égard des participants aux régimes et des retraités, et c'est là où le bât blesse. La solution consistait non pas à mettre en veilleuse sa fonction d'administrateur avec les obligations fiduciaires en découlant, mais à y renoncer et à la transférer avec diligence à un administrateur indépendant.

En l'occurrence, l'employeur a non seulement manqué à ses obligations envers les bénéficiaires, mais adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation.

(4) *Dépens dans le pourvoi du Syndicat des Métallos*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il n'y a en l'espèce aucune raison de revenir sur la décision de la Cour d'appel relative aux dépens en ce qui concerne le Syndicat des Métallos. L'instance engagée portait sur des points de droit nouveaux, son issue était incertaine et les demandeurs couraient le risque d'être déboutés. La Cour d'appel a opiné essentiellement que, représentant seulement 7 des 169 participants du régime des salariés, le syndicat ne devait pas être en

able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per Deschamps and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per LeBel and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

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mesure, dans les faits, d'imposer à tous les participants du régime, dont la plupart n'en étaient pas membres, les risques inhérents au litige sans les consulter. Il n'y a aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du pourvoi devant notre Cour.

Les juges Deschamps et Moldaver : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

Les juges LeBel et Abella : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

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v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194; *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII); *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Donkin v. Bugoy*, [1985] 2 S.C.R. 85; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303.

By LeBel J. (dissenting)

Galambos v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

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APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Appeal dismissed.

Benjamin Zarnett, *Frederick L. Myers*, *Brian F. Empey* and *Peter Kolla*, for the appellant Sun Indalex Finance, LLC.

Harvey G. Chaiton and *George Benchetrit*, for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors.

David R. Byers, *Ashley John Taylor* and *Nicholas Peter McHaffie*, for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited.

Darrell L. Brown, for the appellant/respondent the United Steelworkers.

Andrew J. Hatnay and *Demetrios Yiokaris*, for the respondents Keith Carruthers, et al.

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POURVOIS contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Gillese et Juriansz), 2011 ONCA 265, 104 O.R. (3d) 641, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 75 C.B.R. (5th) 19, 89 C.C.P.B. 39, 17 P.P.S.A.C. (3d) 194, [2011] O.J. No. 1621 (QL), 2011 CarswellOnt 2458, qui a infirmé une décision du juge Campbell, 2010 ONSC 1114, 79 C.C.P.B. 301, [2010] O.J. No. 974 (QL), 2010 CarswellOnt 893. Pourvois accueillis, les juges LeBel et Abella sont dissidents.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Gillese et Juriansz), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Pourvoi rejeté.

Benjamin Zarnett, *Frederick L. Myers*, *Brian F. Empey* et *Peter Kolla*, pour l'appelante Sun Indalex Finance, LLC.

Harvey G. Chaiton et *George Benchetrit*, pour l'appelant George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7.

David R. Byers, *Ashley John Taylor* et *Nicholas Peter McHaffie*, pour l'appelante FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited.

Darrell L. Brown, pour l'appelant/intimé le Syndicat des Métallos.

Andrew J. Hatnay et *Demetrios Yiokaris*, pour les intimés Keith Carruthers, et autres.

Hugh O'Reilly and *Amanda Darrach*, for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership).

Mark Bailey, *Leonard Marsello* and *William MacLarkey*, for the respondent/intervener the Superintendent of Financial Services.

Robert I. Thornton and *D. J. Miller*, for the intervener the Insolvency Institute of Canada.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Kenneth T. Rosenberg, *Andrew K. Lokan* and *Massimo Starnino*, for the intervener the Canadian Federation of Pensioners.

Éric Vallières, *Alexandre Forest* and *Yoine Goldstein*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Mahmud Jamal, *Jeremy Dacks* and *Tony Devir*, for the intervener the Canadian Bankers Association.

The judgment of Deschamps and Moldaver JJ. was delivered by

[1] DESCHAMPS J. — Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy; and FTI Consulting Canada ULC.

Hugh O'Reilly et *Amanda Darrach*, pour l'intimée Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite).

Mark Bailey, *Leonard Marsello* et *William MacLarkey*, pour l'intimé/intervenant le Surintendant des services financiers.

Robert I. Thornton et *D. J. Miller*, pour l'intervenant l'Institut d'insolvabilité du Canada.

Steven Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Kenneth T. Rosenberg, *Andrew K. Lokan* et *Massimo Starnino*, pour l'intervenante la Fédération canadienne des retraités.

Éric Vallières, *Alexandre Forest* et *Yoine Goldstein*, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Mahmud Jamal, *Jeremy Dacks* et *Tony Devir*, pour l'intervenante l'Association des banquiers canadiens.

Version française du jugement des juges Deschamps et Moldaver rendu par

[1] LA JUGE DESCHAMPS — L'insolvabilité peut entraîner des conséquences catastrophiques. Les créanciers ordinaires sont souvent laissés impayés. En situation d'insolvabilité, les prestations déterminées promises aux employés pendant leur emploi sont mises en péril. Les présents pourvois illustrent ce qui peut se produire lorsque ce péril se matérialise. Bien que l'employeur en l'espèce ait manqué à son obligation fiduciaire envers les participants aux régimes de retraite, le préjudice qu'ils subissent ne résulte pas de son manquement, mais de son insolvabilité. Pour les motifs qui suivent, je suis d'avis d'accueillir les appels de Sun Indalex Finance, LLC; George L. Miller, syndic de faillite d'Indalex É.-U.; et FTI Consulting Canada ULC.

[2] To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

[2] Pour améliorer les chances des retraités de recevoir toutes les prestations auxquelles ils ont droit après la liquidation d'un régime de retraite, le législateur ontarien a pourvu à la protection des cotisations accumulées, mais qui ne sont pas encore dues, à la date de la liquidation, au moyen d'une fiducie réputée grevant certains biens des promoteurs des régimes et qui a préséance sur toutes les autres priorités établies par une loi provinciale (par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), et par. 30(7) de la *Loi sur les sûretés mobilières*, L.R.O. 1990, ch. P.10 (« *LSM* »)). Les parties ne s'entendent pas sur la portée de la fiducie réputée. Les dispositions pertinentes et le contexte mènent selon moi à la conclusion qu'elle englobe les cotisations que doit verser l'employeur afin que la caisse de retraite puisse couvrir le passif du régime à la liquidation. En l'espèce, toutefois, la sûreté accordée au créancier ayant prêté des fonds à l'employeur, Indalex Limited (« Indalex »), pendant l'instance en matière d'insolvabilité a priorité sur la fiducie réputée. En outre, bien que l'employeur ait pu se placer en conflit d'intérêts en tant qu'administrateur du régime, en ne donnant pas dûment avis aux participants d'une motion en vue de financer l'exploitation de l'entreprise pendant la restructuration, il n'est pas réaliste de penser que le tribunal chargé d'appliquer la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), aurait établi un ordre de priorité différent si les participants avaient été avisés et si le tribunal avait conclu qu'ils étaient des créanciers garantis. Par conséquent, il n'y a pas lieu d'accorder une réparation en equity, telle que la fiducie par interprétation imposée par la Cour d'appel.

I. Facts

[3] Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

I. Les faits

[3] Indalex est une filiale canadienne en propriété exclusive de la société américaine Indalex Holding Corp. (« Indalex É.-U. »). Indalex et ses sociétés affiliées formaient un groupe (le « Groupe Indalex ») qui fabriquait des extrusions d'aluminium. Les activités des sociétés aux États-Unis et au Canada étaient étroitement liées.

[4] In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

[5] At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

[6] Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

[7] From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies

[4] En 2009, le prix élevé des produits de base et les effets de la récession sur le marché des utilisateurs finaux des extrusions d'aluminium ont entraîné l'insolvabilité du Groupe Indalex. Le 20 mars 2009, Indalex É.-U. s'est placée sous la protection du chapitre 11, au Delaware. Le 3 avril 2009, Indalex a demandé une suspension sous le régime de la *LACC*. Le même jour, le juge Morawetz a rendu une ordonnance initiale lui accordant cette suspension et il a désigné FTI Consulting Canada ULC (le « contrôleur ») comme contrôleur.

[5] Indalex administrait alors deux régimes de retraite enregistrés, l'un à l'intention des salariés (le « régime des salariés »), et l'autre à l'intention des cadres (le « régime des cadres »). Le régime des salariés comptait sept participants dont l'agent négociateur était le Syndicat des Métallos (le « Syndicat »). Ce régime était en cours de liquidation lorsque les procédures sous le régime de la *LACC* ont été engagées. La date de prise d'effet de la liquidation était le 31 décembre 2006. Le régime des cadres n'acceptait plus de participant, mais il n'était pas liquidé. En tout, les déficits des caisses de retraite touchent 49 personnes (les participants au régime des salariés et au régime des cadres sont collectivement appelés les « participants »).

[6] L'ordonnance initiale prononcée par le juge Morawetz, le 3 avril 2009, a accordé à Indalex la protection de la *LACC*. Les deux régimes de retraite accusaient un déficit de capitalisation au moment où Indalex a demandé la suspension des procédures en vertu de la *LACC*. Le déficit de liquidation du régime des salariés, au 31 décembre 2008, était estimé à 1,8 million de dollars. Quant au régime des cadres, sa sous-capitalisation suivant une approche de liquidation était estimée à 3 millions de dollars au 1er janvier 2008.

[7] Dès le début de la procédure d'insolvabilité, la stratégie de réorganisation poursuivie par le Groupe Indalex consistait à vendre Indalex et Indalex É.-U. comme entreprises en exploitation pendant qu'elles jouissaient de la protection de la *LACC* et du chapitre 11. À cette fin, Indalex et Indalex É.-U. voulaient conclure un accord de financement de débiteur-exploitant (« DE »)

could draw from joint credit facilities and would guarantee each other's liabilities.

[8] Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

[9] The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale could be completed.

[10] The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for

conjoint aux termes duquel elles pourraient bénéficier de facilités de crédit communes et chaque société garantirait les obligations de l'autre.

[8] Les problèmes financiers d'Indalex menaçaient les intérêts de tous les participants. Si la réorganisation échouait et si Indalex était liquidée en application de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), ils ne recouvreraient aucune de leurs créances sur Indalex au titre de la sous-capitalisation des régimes de retraite, parce que la législation fédérale ne permettrait pas que la priorité de rang établie par la loi provinciale soit reconnue : *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453. La *LACC* ne rendait pas la priorité de rang des participants inopérante, mais leur position était incertaine.

[9] Le Groupe Indalex a demandé des offres à divers prêteurs DE et a fini par conclure une entente avec un consortium composé des créanciers qui bénéficiaient d'une garantie de premier rang avant le début de la procédure. Le 8 avril 2009, le tribunal chargé d'appliquer la *LACC* a rendu une ordonnance modifiée et reformulée (l'« ordonnance initiale modifiée ») autorisant Indalex à emprunter 24,4 millions de dollars américains aux prêteurs DE et à leur octroyer une priorité pour le même montant sur tous les autres créanciers (la « charge DE »). Dans les motifs qu'il a déposés au soutien de l'ordonnance, le juge Morawetz a conclu qu'Indalex n'aurait pas pu trouver de solution qui assurait la continuité de l'exploitation sans ce financement DE. Celui-ci était nécessaire pour financer les activités de l'entreprise jusqu'à sa vente.

[10] Les participants n'étaient pas parties à la procédure initiale. La suspension initiale avait été accordée *ex parte*. Le juge chargé de l'application de la *LACC* avait ordonné à Indalex de faire signifier une copie de l'ordonnance de suspension à chaque créancier ayant une créance minimale de 5 000 $ dans les 10 jours suivant l'ordonnance initiale du 3 avril. Le 8 avril, lors de l'audition de la motion visant la modification de l'ordonnance initiale, aucun des participants au régime des cadres n'avait reçu signification de cette ordonnance ni de l'avis de motion visant sa modification. Le Syndicat

service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

[11] On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

[12] On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

[13] Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

a reçu un préavis écourté, mais a décidé de ne pas se présenter. Le juge Morawetz a autorisé Indalex à procéder même si le délai de signification avait été écourté. Les participants ont reçu avis de toutes les procédures subséquentes. Aucun des participants n'a interjeté appel de l'ordonnance initiale modifiée pour contester la charge DE.

[11] Le 12 juin 2009, Indalex a demandé l'autorisation de porter l'emprunt DE à 29,5 millions de dollars américains. À l'audience, les participants au régime des cadres se sont d'abord opposés à la motion en demandant que leurs droits soient réservés. Après confirmation que la motion avait pour unique but d'augmenter le montant de la charge DE (sans modifier les modalités du prêt), ils ont retiré leur opposition et le tribunal a accueilli la motion.

[12] Le 22 avril 2009, le tribunal a prorogé la suspension et approuvé un processus de mise en vente de l'actif d'Indalex. Les participants ne se sont pas opposés à la demande d'approbation du processus de mise en vente. Conformément au processus approuvé de vente par soumission, le Groupe Indalex a sollicité un vaste éventail d'acheteurs potentiels.

[13] Indalex a reçu une soumission de SAPA Holding AB (« SAPA »). Cette soumission s'élevait à environ 30 millions de dollars américains et SAPA ne prenait pas en charge les déficits de liquidation des régimes de retraite. Le contrôleur estimait la valeur de liquidation de l'actif d'Indalex à 44,7 millions de dollars américains. Indalex a demandé une ordonnance approuvant un processus de soumission pour adjudication sur offres concurrentes et déclarant que la soumission de SAPA était réputée acceptable. Les participants au régime des cadres ont contesté cette demande parce qu'ils s'inquiétaient du fait que le passif du régime de retraite ne serait pas pris en charge. Le 2 juillet 2009, le juge Morawetz a néanmoins rendu une ordonnance approuvant le processus de mise en vente par soumission, en soulignant que les participants au régime des cadres pourraient faire valoir leurs objections au moment de l'homologation de la soumission définitive.

[14] The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

[14] Le processus de mise en vente par soumission n'a pas permis d'obtenir des soumissions concurrentes. Le 20 juillet 2009, Indalex et Indalex É.-U. ont chacune demandé au tribunal dont elles relevaient d'approuver la vente d'essentiellement tous leurs éléments d'actif aux conditions stipulées dans l'offre de SAPA. Indalex a également demandé l'approbation d'une distribution provisoire du produit de la vente aux prêteurs DE. Les participants ont contesté la motion d'Indalex. Ils ont fait valoir, premièrement, que le produit estimatif d'une liquidation forcée serait supérieur à l'offre de SAPA et, deuxièmement, que leur créance avait priorité sur celles des prêteurs DE, parce que le passif non capitalisé au titre des pensions était protégé par une fiducie réputée en vertu de la *LRR*. Ils ont aussi soutenu qu'Indalex avait manqué à ses obligations fiduciaires en ne s'acquittant pas des obligations qui lui incombaient en qualité d'administrateur des régimes de retraite du début à la fin des procédures en matière d'insolvabilité.

[15] The court dismissed the Plan Members' first objection, holding that there was no evidence supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

[15] Le tribunal a écarté la première objection des participants, estimant qu'aucun élément de preuve n'étayait leur prétention que la liquidation forcée serait plus avantageuse pour les fournisseurs, les clients et les 950 employés. Il a approuvé la vente le 20 juillet 2009. Cette ordonnance donnait instruction au contrôleur de procéder à une distribution aux prêteurs DE. Au sujet de la deuxième objection, toutefois, le juge Campbell a ordonné au contrôleur de retenir un fonds de réserve dont le contrôleur déterminerait lui-même le montant, réservant pour plus tard l'examen de l'argumentation des participants fondée sur leur droit au produit de la vente.

[16] The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US$17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee

[16] La vente à SAPA s'est conclue le 31 juillet 2009, et le contrôleur a recueilli 30,9 millions de dollars comme produit de la vente. Il a distribué 17 millions de dollars américains aux prêteurs DE, acquitté certains frais, retenu des fonds pour couvrir diverses dépenses et réservé 6,75 millions de dollars en attendant la décision relative aux droits des participants. À la date de la vente, Indalex devait 27 millions de dollars américains aux prêteurs DE, de sorte qu'une créance de 10 millions de dollars américains subsistait après le versement des

contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

[17] Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

[18] In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the *PBA* and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

[19] On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

[20] On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did

17 millions. Se prévalant de la garantie consentie dans l'accord de financement DE, les prêteurs DE ont demandé à Indalex É.-U. de payer la différence, ce qu'elle a fait. Comme la garantie prévoyait la subrogation d'Indalex É.-U. aux droits de priorité des prêteurs DE, Indalex É.-U. est devenue créancière de premier rang d'Indalex pour la somme de 10 millions de dollars américains.

[17] Le conseil d'administration d'Indalex a démissionné après la vente de l'actif de la société. Indalex É.-U., qui faisait partie du Groupe Indalex, a repris la gestion d'Indalex, dont l'actif se limitait au produit de la vente détenu par le contrôleur. Une convention unanime d'actionnaires nommant M. Keith Cooper comme gestionnaire des affaires d'Indalex a été signée le 12 août 2009. M. Cooper était un employé de FTI Consulting Inc.

[18] Les participants ont exercé le droit que leur avait réservé le tribunal le 20 juillet 2009 et ont présenté des motions, le 28 août 2009, en vue d'obtenir un jugement déclaratoire portant que le produit de la vente était grevé d'une fiducie réputée d'un montant équivalent au passif non capitalisé au titre des pensions. Ils ont soutenu que les par. 57(4) de la *LRR* et 30(7) de la *LSM* leur donnaient préséance sur les créanciers garantis. Indalex a présenté une motion pour faire cession de ses biens en faillite afin de bénéficier de la priorité de rang qu'elle invoquait pour contester les motions des participants.

[19] Le 14 octobre 2009, avant le prononcé du jugement, Indalex É.-U. a transformé l'instance en réorganisation fondée sur le chapitre 11 en instance en liquidation fondée sur le chapitre 7. Le 5 novembre 2009, le surintendant des services financiers (le « surintendant ») a nommé le cabinet d'actuaires Morneau Sobeco, société en commandite (« Morneau »), pour remplacer Indalex comme administrateur des régimes.

[20] Le 18 février 2010, le juge Campbell a rejeté les motions des participants, concluant que la fiducie réputée ne s'appliquait pas aux déficits de liquidation parce que les paiements afférents n'étaient pas [TRADUCTION] « échus » ou « à échoir » à la date de la liquidation. Selon lui, le régime de

not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301). The Plan Members appealed the dismissal of their motions.

[21] The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641).

[22] The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

[23] The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165).

retraite des cadres n'étant pas encore liquidé, on ne pouvait parler de déficit de liquidation. Il était donc inutile de statuer sur la motion d'Indalex visant à faire cession de ses biens (2010 ONSC 1114, 79 C.C.P.B. 301). Les participants ont interjeté appel du rejet de leurs motions.

[21] La Cour d'appel de l'Ontario a accueilli les appels des participants, estimant que la fiducie réputée créée au par. 57(4) de la *LRR* s'appliquait à toutes les sommes dues au titre des déficits de liquidation des régimes. Signalant que, selon le sens ordinaire de cette disposition, aucune fiducie réputée ne s'appliquerait au régime des cadres, elle a néanmoins refusé de trancher la question parce que les participants à ce régime pouvaient faire valoir une réclamation contre Indalex pour manquement à son obligation fiduciaire de protéger adéquatement leurs intérêts (2011 ONCA 265, 104 O.R. (3d) 641).

[22] La Cour d'appel a jugé qu'une fiducie par interprétation était une réparation appropriée pour le manquement d'Indalex à ses obligations fiduciaires. Selon elle, cette réparation ne causait pas préjudice aux prêteurs DE et n'avait d'effet que sur Indalex É.-U. Elle a donc imposé une fiducie par interprétation grevant le fonds de réserve au profit des participants. Au sujet de la distribution, elle a aussi jugé que la fiducie réputée avait priorité sur la charge DE parce que la question de la prépondérance fédérale n'avait pas été invoquée lorsque l'ordonnance initiale modifiée avait été rendue et qu'Indalex avait déclaré qu'elle allait se conformer à toutes les exigences d'une fiducie réputée. Elle a conclu que rien au dossier n'indiquait que le fait de ne pas appliquer la doctrine de la prépondérance fédérale compromettrait la capacité de restructuration d'Indalex.

[23] La Cour d'appel a ordonné au contrôleur de combler le déficit de chacun des deux régimes par prélèvement sur le fonds de réserve. Dans sa décision relative à l'adjudication des dépens, elle a également approuvé le paiement des dépens des participants au régime des cadres sur leur caisse de retraite, mais elle a refusé d'ordonner que les dépens du Syndicat soient acquittés sur la caisse de retraite du régime des salariés (2011 ONCA 578, 81 C.B.R. (5th) 165).

[24] The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

[25] The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?

2. If so, does the deemed trust supersede the DIP charge?

3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?

4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

A. *Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Wind-up Deficiencies?*

[26] The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

[24] Le contrôleur, ainsi que Sun Indalex, créancière garantie d'Indalex É.-U., et George L. Miller, syndic de faillite d'Indalex É.-U., interjettent tous trois appel de l'ordonnance de la Cour d'appel. Le surintendant et Morneau appuient la position des participants en tant qu'intimés au pourvoi. D'autres intéressés prennent également part aux pourvois devant notre Cour. Le Syndicat se pourvoit en outre contre l'adjudication des dépens, mais je n'aborderai pas cette question, car je partage l'opinion du juge Cromwell à ce sujet.

II. Les questions en litige

[25] Les pourvois soulèvent quatre questions :

1. La fiducie réputée établie par le par. 57(4) de la *LRR* s'applique-t-elle aux déficits de liquidation?

2. Le cas échéant, cette fiducie réputée a-t-elle préséance sur la charge DE?

3. Indalex avait-elle des obligations fiduciaires envers les participants en ce qui concerne les décisions prises dans le contexte des procédures en matière d'insolvabilité?

4. La Cour d'appel a-t-elle exercé son pouvoir discrétionnaire correctement en imposant une fiducie par interprétation à titre de réparation pour les manquements aux obligations fiduciaires?

III. Analyse

A. *La fiducie réputée établie par le par. 57(4) de la LRR s'applique-t-elle aux déficits de liquidation?*

[26] Il faut d'abord déterminer si la fiducie réputée établie au par. 57(4) de la *LRR* s'applique aux déficits de liquidation. Il s'agit d'une question d'interprétation législative qui exige l'examen du texte et du contexte des dispositions pertinentes de la *LRR*. Le paragraphe 57(4) de la *LRR* accorde aux participants à un régime de retraite une protection applicable aux cotisations de leur employeur en cas de liquidation du régime :

57. . . .

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

[27] The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

[28] The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions — the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

[29] The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be

57. . . .

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

[27] Selon l'interprétation la plus évidente, toutes les cotisations accumulées, mais non encore dues, lorsqu'un régime est liquidé sont protégées. Ce libellé semble inclure les cotisations qu'un employeur est tenu de verser lorsque la caisse de retraite est déficitaire au moment de la liquidation. Pour contester cette interprétation plutôt simple, qui concorde à la fois avec l'élargissement constant de la protection accordée au fil du temps et avec l'objectif réparateur de cette disposition, on invoque une définition étroite du mot « accumulé ». À mon avis, cet argument ne justifie pas la restriction de la protection accordée aux participants par le législateur ontarien.

[28] La *LRR* énonce les règles de fonctionnement des régimes de retraite contributifs capitalisés à prestations déterminées en Ontario. Pendant toute la durée d'un régime, l'employeur doit verser à la caisse de retraite toutes les cotisations qu'il retient sur la rémunération des employés. Tant que le régime demeure en vigueur, il est en outre tenu à deux types de paiements. L'un se rapporte aux cotisations pour service courant — les cotisations que l'employeur doit verser régulièrement à la caisse de retraite suivant les modalités du régime — et l'autre, au maintien d'une caisse de retraite suffisante pour couvrir le passif au titre des pensions. Le droit des employés au versement des cotisations pendant que le régime est en vigueur est protégé par la fiducie réputée instituée au par. 57(3) de la *LRR*.

[29] La *LRR* établit également un régime complet régissant la liquidation d'un régime de retraite. L'alinéa 75(1)a) oblige l'employeur à « verse[r] » un montant égal au total de tous les « paiements » dus ou accumulés qui n'ont pas été versés dans la caisse de retraite, et l'al. 75(1)b) établit la formule servant à calculer le montant du paiement

paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

[30] It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

[31] It is readily apparent that the wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

75. (1) Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares

à effectuer pour que la caisse de retraite puisse couvrir la totalité du passif à la liquidation. Dans les six mois suivant la date de prise d'effet de la liquidation, l'administrateur du régime doit déposer un rapport de liquidation faisant état de l'actif et du passif du régime à la date de la liquidation. Si le rapport révèle l'existence d'un déficit actuariel, l'employeur doit effectuer des paiements au titre du déficit de liquidation. Par conséquent, les al. 75(1)a) et b) établissent le montant des cotisations dues lors de la liquidation d'un régime.

[30] Il est bien établi que la fiducie réputée en cas de liquidation s'applique aux cotisations visées à l'al. 75(1)a). La seule question à trancher est de savoir si elle s'applique aussi aux paiements au titre du déficit exigés par l'al. 75(1)b). J'y répondrais par l'affirmative, compte tenu du texte, du contexte et de l'objet de cette disposition.

[31] Il est évident que le par. 57(4) de la *LRR* qui crée la fiducie réputée en cas de liquidation ne comporte aucune limite expresse aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues » et je ne vois rien qui justifie d'exclure les cotisations prévues à l'al. 75(1)b). L'alinéa 75(1)a) prévoit expressément que l'employeur verse « un montant égal au total de tous les paiements » *accumulés*, même s'ils ne sont pas encore dus à la date de la liquidation, tandis que l'al. 75(1)b) parle d'un « montant » calculé à partir de la valeur de l'actif et du passif *accumulés*, lorsque le régime est liquidé. Voici le texte du par. 75(1) :

75. (1) Si un régime de retraite est liquidé, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le

that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

[32] Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: ". . . amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

[33] The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

[32] Puisque le montant des paiements (al. 75(1)a)) et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots employés au par. 57(4) de la *LRR* : « . . . montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Comme je l'ai mentionné, ce raisonnement est contesté en ce qui concerne l'al. 75(1)b), mais non l'al. 75(1)a).

[33] L'appelante Sun Indalex avance que, puisque le montant définitif du déficit n'est établi que longtemps après la date de prise d'effet de la liquidation, on ne peut parler de passif accumulé relativement à cette obligation de l'employeur. Le contrôleur souligne en outre que les paiements qu'un employeur doit effectuer pour honorer ses obligations à la liquidation peuvent changer au cours des cinq ans sur lesquels ils peuvent s'échelonner aux termes de l'art. 31 du règlement général pris en application de la *LRR*, R.R.O. 1990, règl. 909. Pour illustrer leur argument, ces parties donnent l'exemple de ce qui s'est produit dans le cas du régime des salariés. En 2007-8, Indalex a comblé la majeure partie du déficit du régime des salariés, qui était estimé à 1,6 million de dollars en 2006. Toutefois, à la fin de 2008, la diminution de la valeur de l'actif de la caisse de retraite avait fait remonter le déficit de liquidation à 1,8 million de dollars. Selon cet argument, il ne peut s'agir d'un montant accumulé à la date de la liquidation, parce qu'il ne pouvait pas être établi avec certitude.

[34] Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete — have accrued — before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

[34] Contrairement à mon collègue le juge Cromwell, j'estime que cet argument n'est pas convaincant. Je souscris plutôt à l'opinion de la Cour d'appel sur ce point. La fiducie réputée s'applique aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Puisque les employés cessent d'accumuler des droits lorsque le régime est liquidé, les droits qui servent au calcul des cotisations ont tous été accumulés avant la date de la liquidation. Par conséquent, le passif correspondant aux obligations de l'employeur existe en entier — est accumulé — avant la liquidation. La différence entre le raisonnement que j'applique et celui du juge Cromwell réside dans le fait que le sien exige que le calcul puisse s'établir avant la date de la liquidation, tandis que je suis d'avis que la date où s'effectue le calcul est sans importance du moment que le passif est évalué à la date de la liquidation. Ni la date à laquelle le passif est *déclaré* ni l'*option* de l'employeur d'étaler ses cotisations comme le permet le règlement ne changent la nature juridique des cotisations.

[35] In *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

[35] Dans *Hydro-Electric Power Commission of Ontario c. Albright* (1922), 64 R.C.S. 306, le juge Duff a examiné le sens du mot « *accrued* », l'équivalent anglais du mot « accumulé », pour interpréter la portée d'un covenant et il a tiré la conclusion suivante :

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*. [Emphasis added; pp. 312-13.]

> [TRADUCTION] . . . suivant l'usage établi, le mot « accumulé », appliqué à un droit ou une obligation, signifie simplement entièrement constitué — et il peut avoir ce sens bien que le contexte indique que l'exercice de ce droit entièrement constitué ou l'exécution forcée de cette obligation entièrement constituée ne seront possibles que dans l'avenir — une dette, par exemple, qui est *debitum in praesenti solvendum in futuro*. [Je souligne; p. 312-313.]

[36] Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely

[36] Ainsi, une cotisation est « accumulée » lorsque le passif est entièrement constitué, même si le paiement lui-même ne devient exigible que plus tard. Cela signifie en l'espèce que le passif au titre des cotisations à la caisse destinée au paiement des prestations de retraite visées à l'al. 75(1)b) est entièrement constitué lorsque la liquidation

constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

[37] The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

[38] The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

[39] The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

a lieu, parce qu'aucun droit au titre de la pension ne prend naissance après cette date. Autrement dit, aucun passif ne s'accumule pendant ni après la liquidation. Même la portion des cotisations afférente aux options que les participants peuvent exercer lorsqu'il y a liquidation est « accumulé[e] à la date de la liquidation » parce qu'elle est fondée sur des droits que les employés ont acquis avant la date de la liquidation.

[37] Le fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable (*Canadian Pacific Ltd. c. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.), p. 621). L'emploi du mot « accumulé » ne limite pas le passif aux seuls montants qui peuvent être établis avec précision. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées à l'al. 75(1)b) de la *LRR*.

[38] L'historique législatif étaye ma conclusion que la disposition établissant une fiducie réputée en cas de liquidation s'applique aux cotisations au titre du déficit de liquidation. Le législateur ontarien a systématiquement élargi la protection applicable aux cotisations aux régimes de retraite. Je ne puis donc retenir une interprétation qui ferait régresser la protection accordée aux employés. Mon collègue le juge Cromwell ayant cité les dispositions législatives pertinentes, je ne les reproduirai pas ici.

[39] La loi initiale obligeait seulement l'employeur à effectuer les paiements nécessaires pour établir la solvabilité selon la norme applicable (*The Pension Benefits Act, 1965*, S.O. 1965, ch. 96, par. 22(2)), mais le législateur a par la suite protégé les employés au moyen d'une fiducie réputée grevant les biens de l'employeur d'un montant égal aux sommes retenues en tant que cotisations des employés et aux sommes dues par l'employeur (al. 23*a*, ajouté par *The Pension Benefits Amendment Act, 1973*, S.O. 1973, ch. 113, art. 6). Dans une version subséquente, ce ne furent pas que les cotisations exigibles, mais également celles qui étaient accumulées qui ont été protégées, et le calcul s'en effectuait comme s'il y avait liquidation (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, ch. 80).

[40] Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind-up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

[41] Whereas it is clear from the 1983 amendments that the deemed trust provided for in s. 23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

[42] The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions

[40] Alors que *toutes* les cotisations de l'employeur étaient au départ régies par une seule disposition, le législateur a édicté, en 1980, une disposition distincte imposant expressément à l'employeur une obligation de capitalisation du déficit de liquidation. Il ressortait alors du libellé employé que le montant relatif au déficit à la liquidation était exclu de la protection conférée par la fiducie réputée (*The Pension Benefits Amendment Act, 1980*). En 1983, le législateur a établi une distinction entre la fiducie réputée applicable aux cotisations de l'employeur lorsque le régime est en vigueur et celle applicable à certains paiements en cas de liquidation du régime (al. 23(4)a) et 23(4)b), ajoutés par la *Pension Benefits Amendment Act, 1983*, S.O. 1983, ch. 2, art. 3). Dans cette version, les paiements au titre du déficit de liquidation étaient toujours exclus de la fiducie réputée. En 1987, toutefois, le législateur a modifié encore une fois la protection, et c'est cette version qui régit, pour l'essentiel, la présente espèce. La *Loi de 1987 sur les régimes de retraite*, L.O. 1987, ch. 35, crée toujours une fiducie réputée distincte en cas de liquidation, mais cette fiducie n'exclut plus les paiements au titre du déficit parce que la limitation imposée jusqu'alors concernant les paiements dus ou accumulés pendant l'existence du régime a été abolie. Mes commentaires selon lesquels le libellé des anciennes versions excluait les paiements au titre du déficit de liquidation ne s'appliquent donc pas à la loi de 1987, parce que celle-ci est substantiellement différente.

[41] Alors qu'il ressort clairement des modifications faites en 1983 que la fiducie réputée créée par l'al. 23(4)b) ne visait que les coûts afférents au service courant et les paiements spéciaux, cela n'est pas aussi clair dans les versions subséquentes de la *LRR*. Pour donner un sens aux modifications apportées en 1987, il faut conclure que leur libellé renvoie à une fiducie réputée couvrant *toutes* les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

[42] La responsabilité de l'employeur à la liquidation est maintenant établie dans un article unique qui fait élégamment écho à celui qui crée la fiducie réputée à la liquidation. L'historique législatif montre que la protection, qui couvrait d'abord (1)

that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

[43] Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

[44] Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

[45] In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

[46] The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that

uniquement les cotisations dues, s'est étendue (2) aux montants payables calculés comme s'il y avait liquidation du régime, (3) puis aux montants dus ou accumulés à la liquidation, à l'exclusion des paiements au titre du déficit de liquidation (4) et, enfin, à tous les montants dus ou accumulés à la liquidation.

[43] Selon moi, l'historique législatif mène donc à la conclusion qu'une interprétation étroite qui dissocierait le paiement requis de l'employeur par l'al. 75(1)b) de la *LRR* de celui exigé à l'al. 75(1)a) irait à l'encontre de la tendance du législateur ontarien à offrir une protection de plus en plus étendue. Puisque la disposition régissant les paiements à la liquidation décrit les montants qui sont alors dus, je ne vois aucune raison historique, juridique ou logique de conclure que la disposition établissant une fiducie réputée en cas de liquidation ne les englobe pas tous.

[44] J'estime donc que le texte et le contexte du par. 57(4) se prêtent facilement à une interprétation qui englobe les paiements au titre du déficit de liquidation, et l'objet de cette disposition me conforte dans cette opinion. La disposition qui crée une fiducie réputée a une vocation réparatrice. Elle vise à protéger les intérêts des participants. Cet objet milite contre l'adoption de la portée limitée que proposent Indalex et certains des intervenants. En présence de priorités concurrentes entre créanciers, cette fin réparatrice favorise une interprétation qui inclut tous les paiements à la liquidation dans la valeur de la fiducie réputée pour que les participants bénéficient d'une vaste protection.

[45] En résumé, le texte, l'historique législatif et l'objet des dispositions pertinentes concordent tous avec l'inclusion du déficit de liquidation dans la protection offerte aux participants à l'égard des cotisations de l'employeur à la liquidation des régimes. Je suis donc d'avis que la Cour d'appel a jugé à bon droit qu'Indalex était réputée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés dont la liquidation avait pris effet le 31 décembre 2006.

[46] Il n'en va pas de même pour le régime des cadres. Contrairement au par. 57(3), selon lequel

the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.

[47] The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d) *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. *Does the Deemed Trust Supersede the DIP Charge?*

[48] The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a

la fiducie réputée protégeant les cotisations de l'employeur existe pendant que le régime est en vigueur, le par. 57(4) prévoit que la fiducie réputée en cas de liquidation ne prend naissance qu'à la liquidation du régime. C'est ce que le législateur ontarien a décidé, et je n'interviendrai pas dans cette décision. Les droits résultant de la fiducie réputée ne prennent donc naissance que lorsque se réalise la condition préalable, c'est-à-dire lors de la liquidation du régime, et cela, même s'il est certain que le régime sera liquidé plus tard. Au moment de la vente, le régime des cadres était en voie de liquidation, mais non liquidé. La disposition relative à la fiducie réputée ne s'applique donc pas aux cotisations de l'employeur au titre du déficit de liquidation de ce régime.

[47] La Cour d'appel, ne s'est pas prononcée sur l'existence d'une fiducie réputée à l'égard du régime des cadres, affirmant qu'il n'était pas nécessaire de trancher cette question. Elle a cependant exprimé des réserves au sujet d'un raisonnement qui empêcherait les participants au régime des cadres de bénéficier d'une fiducie réputée, ce qui ferait en sorte qu'une société placée sous la protection de la *LACC* pourrait éviter la priorité établie par la *LRR* à l'égard de la fiducie réputée en s'abstenant simplement de liquider un régime de retraite sous-capitalisé. Indalex aurait ainsi pu tabler sur sa propre inaction pour échapper aux conséquences d'une liquidation. Je ne suis pas convaincue que la crainte exprimée par la Cour d'appel ait une incidence sur la question de savoir si une fiducie réputée existe, et je doute que le simple refus de liquider un régime de retraite puisse permettre à un employeur d'échapper aux conséquences d'une telle sûreté. Le surintendant peut intervenir de diverses façons, notamment en ordonnant la liquidation du régime en application du par. 69(1) de la *LRR* dans diverses circonstances (voir l'al. 69(1)d) de la *LRR*). Le surintendant n'a pas choisi, en l'espèce, d'ordonner la liquidation.

B. *La fiducie réputée a-t-elle préséance sur la charge DE?*

[48] La conclusion qu'une fiducie réputée protège les droits des participants au régime des salariés à l'égard de toutes les cotisations que l'employeur

deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

30. . . .

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

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

[49] The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

[50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

doit verser au régime de retraite des salariés à la liquidation ne signifie pas qu'une partie des sommes retenues par le contrôleur sur le produit de la vente doit être versée à la caisse de retraite des salariés. Ce sera le cas seulement si la priorité de rang accordée par la province aux participants au régime des salariés, au par. 30(7) de la *LSM*, fait en sorte que leur réclamation a préséance sur la charge DE. Le paragraphe 30(7) prévoit ce qui suit :

30. . . .

(7) La sûreté sur un compte ou un stock et le produit de ceux-ci est subordonnée à l'intérêt du bénéficiaire d'une fiducie réputée telle aux termes de la *Loi sur les normes d'emploi* ou de la *Loi sur les régimes de retraite*.

Le paragraphe 30(7) a pour effet de permettre aux participants au régime des salariés de recouvrer leur créance sur le fonds de réserve, dans la mesure où il se rapporte à un compte ou un stock ou au produit de ceux-ci en Ontario, par préséance sur tous les autres créanciers garantis.

[49] Les appelants avancent que toute fiducie réputée d'origine provinciale est subordonnée à la charge DE autorisée par l'ordonnance fondée sur la *LACC*. Ils invoquent deux arguments principaux à cet égard. Premièrement, la fiducie réputée créée par la *LRR* ne s'appliquerait pas dans une instance relevant de la *LACC* parce que les priorités applicables sont celles qui sont établies par le régime fédéral en matière d'insolvabilité et que les fiducies réputées d'origine provinciale n'en font pas partie. Deuxièmement, ils plaident que, selon la doctrine de la prépondérance fédérale, la charge DE a préséance sur la fiducie réputée créée par la *LRR*.

[50] Le premier argument des appelants élargirait la portée de l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, de façon que les priorités fédérales en matière de faillite s'appliquent aux instances fondées sur la *LACC*, ce qui ferait que les créances seraient traitées de façon identique sous le régime de la *LACC* et de la *LFI*. Dans *Century Services*, la Cour a indiqué qu'il existe des points de convergence entre les deux régimes :

Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

[51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

[52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. [par. 23]

[51] Pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère des droits analogues aux créanciers. Il ne s'ensuit toutefois pas pour autant que les tribunaux peuvent à leur gré inclure par interprétation dans la *LACC* les priorités applicables en matière de faillite. Les priorités dont bénéficient les créanciers sont définies par la législation provinciale, à moins que ces droits soient écartés par une loi fédérale. Le législateur fédéral n'a pas expressément édicté que toutes les priorités établies en matière de faillite s'appliquent aux instances relevant de la *LACC* ou aux propositions régies par la *LFI*. Bien que les créanciers d'une société tentant de se réorganiser puissent, dans leurs négociations, tenir compte des droits qu'ils pourraient exercer en cas de faillite, ces droits ne constituent rien de plus qu'une considération tant que la faillite n'est pas survenue. Au début des procédures en matière d'insolvabilité, Indalex a choisi un processus régi par la *LACC*, ne laissant aucun doute sur le fait que, bien qu'elle cherchât à protéger les emplois, elle ne demeurerait pas leur employeur. Nous ne sommes pas en présence d'un cas où l'échec d'un arrangement a entraîné la liquidation d'une société sous le régime de la *LFI*. Indalex a atteint l'objectif qu'elle poursuivait. Elle a choisi de vendre son actif sous le régime de la *LACC*, et non sous celui de la *LFI*.

[52] La fiducie réputée créée par la *LRR* continue de s'appliquer dans les instances relevant de la *LACC*, sous réserve de la doctrine de la prépondérance fédérale (*Crystalline Investments Ltd. c. Domgroup Ltd.*, 2004 CSC 3, [2004] 1 R.C.S. 60, par. 43). La Cour d'appel a donc jugé à bon droit que, à l'issue d'un processus de liquidation relevant de la *LACC*, les priorités peuvent être établies selon le régime prévu dans la *LSM*, plutôt que selon le régime fédéral établi dans la *LFI*.

[53] The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

[54] There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

[55] With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 32 and 69). Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a

[53] Selon le deuxième argument des appelants, une ordonnance accordant priorité aux participants en raison de la fiducie réputée créée par le législateur ontarien serait inconstitutionnelle, parce qu'elle entrerait en conflit avec l'ordonnance fondée sur la *LACC* qui donne priorité à la charge DE. La doctrine de la prépondérance fédérale résoudrait ce conflit, en rendant la loi provinciale inopérante dans la mesure de son incompatibilité avec la loi fédérale.

[54] Pour statuer sur l'applicabilité de la doctrine de la prépondérance fédérale dans le présent contexte, il faut d'abord trancher une question préliminaire. Cette question découle de la conclusion de la Cour d'appel selon laquelle, bien que le tribunal fût habilité à autoriser une charge DE ayant priorité de rang sur la fiducie réputée, l'ordonnance du tribunal en l'espèce n'avait pas eu cet effet parce que la doctrine de la prépondérance fédérale n'avait pas été invoquée. Il s'ensuivait que la priorité de rang de la fiducie réputée sur les créanciers garantis établie au par. 30(7) de la *LSM* demeurait applicable et que la créance des participants avait préséance sur celle des prêteurs DE découlant de l'ordonnance rendue sous le régime de la *LACC*.

[55] Avec égards, je ne puis souscrire à cette conception de la doctrine de la prépondérance fédérale. Cette doctrine résout les conflits d'application entre des lois provinciales et fédérales validement adoptées qui empiètent l'une sur l'autre (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 32 et 69). La prépondérance est une question de droit, si bien que, sous réserve de l'application des règles régissant l'admissibilité de nouveaux éléments de preuve, elle peut être soulevée même si elle n'a pas été invoquée dans une procédure initiale.

[56] La partie qui invoque la prépondérance fédérale doit « démontrer une incompatibilité réelle entre les législations provinciale et fédérale, en établissant, soit qu'il est impossible de se conformer aux deux législations, soit que l'application de la loi provinciale empêcherait la réalisation du but de la législation fédérale » (*Banque canadienne de l'Ouest*, par. 75). Notre Cour a déjà appliqué la doctrine de la prépondérance au domaine de la

provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

[57] None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[58] In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;

faillite et de l'insolvabilité, et elle a conclu que des mesures législatives provinciales, comme la création d'une fiducie réputée, ne peuvent porter atteinte à des priorités établies par le législateur fédéral (*Husky Oil*).

[57] Ni la validité de la disposition fédérale habilitant le tribunal chargé d'appliquer la *LACC* à rendre une ordonnance autorisant une charge DE, ni celle de la disposition provinciale créant la priorité de rang de la fiducie réputée ne sont contestées. Toutefois, lorsqu'elle examine la validité de l'atteinte portée à une priorité d'origine provinciale par le tribunal chargé d'appliquer la *LACC* dans l'exercice de son pouvoir discrétionnaire d'évaluer une réclamation, la cour siégeant en révision ne doit pas perdre de vue la règle d'interprétation formulée dans *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307 (p. 356), et reproduite dans *Banque canadienne de l'Ouest* (par. 75) :

> Chaque fois qu'on peut légitimement interpréter une loi fédérale de manière qu'elle n'entre pas en conflit avec une loi provinciale, il faut appliquer cette interprétation de préférence à toute autre qui entraînerait un conflit.

[58] En l'espèce, le juge qui a autorisé la charge DE sous le régime de la *LACC* n'a pas pris en compte le fait que les participants au régime des salariés avaient une créance protégée par une fiducie réputée, et il n'a pas non plus mentionné expressément que les créanciers ordinaires, tels les participants au régime des cadres, n'avaient pas reçu avis de la motion en autorisation du prêt DE. Il a toutefois examiné des facteurs se rapportant à la fin réparatrice de la *LACC* et conclu qu'Indalex avait effectivement démontré que la réalisation des objets de la *LACC* serait compromise en l'absence de la charge DE. Je crois utile de citer les motifs qu'il a exprimés à l'appui de sa décision d'autoriser la charge DE le 17 avril 2009 ((2009), 52 C.B.R. (5th) 61) :

> [TRADUCTION]
>
> a) les requérantes ont besoin de fonds supplémentaires pour soutenir l'exploitation pendant leur période de restructuration sur la base de la continuité;

(b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;

(c) there is no other alternative available to the Applicants for a going concern solution;

(d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;

(e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order . . . ; and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the

b) la marge de manœuvre que le financement DE procurerait aux requérantes aurait l'avantage de leur permettre de trouver une solution préservant la continuité de leur exploitation;

c) les requérantes ne disposent d'aucune autre solution permettant la continuité de l'exploitation;

d) vu le degré d'intégration de l'exploitation d'Indalex Canada et d'Indalex É.-U., une solution indépendante est irréaliste;

e) vu les biens fournis en garantie par Indalex É.-U., le contrôleur juge peu probable qu'il faille réaliser la garantie postérieure au début de l'instance consentie à l'égard des avances supplémentaires aux É.-U. et il est convaincu que les avantages pour les intéressés dépassent de beaucoup le risque associé à cet aspect de la garantie;

f) les avantages du financement DE pour les intéressés et les créanciers l'emportent sur tout préjudice que pourrait causer aux créanciers non garantis l'octroi d'un financement garanti par une superpriorité grevant l'actif des requérantes;

g) l'avocat du contrôleur a examiné la garantie antérieure au début de l'instance, et il appert que la garantie postérieure au début de l'instance ne placera pas les créanciers non garantis des débiteurs canadiens dans une situation pire que celle où ils se trouvaient avant l'introduction de l'instance fondée sur la *LACC*, en raison des restrictions applicables à la garantie canadienne établies dans le projet d'ordonnance initiale modifiée et reformulée . . .

h) la prépondérance des inconvénients favorise l'approbation du financement DE. [par. 9]

[59] Étant donné qu'il n'existait aucune autre solution pour préserver la continuité de l'exploitation, il est difficile d'accepter l'insinuation sans nuance de la Cour d'appel que les prêteurs DE auraient accepté que leur réclamation soit subordonnée à celles fondées sur la fiducie réputée. Rien dans la preuve présentée n'accrédite un tel scénario. Non seulement les conclusions de fait du juge chargé d'appliquer la *LACC* le contredisent, mais il a été démontré maintes et maintes fois que [TRADUCTION] « la priorité accordée au financement DE constitue un élément clé de la capacité du débiteur de tenter de conclure un arrangement » (J. P. Sarra, *Rescue! The Companies' Creditors*

lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7-8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

[61] The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve

Arrangement Act (2007), p. 97). La dure réalité est que l'octroi de prêts est régi par les impératifs commerciaux des prêteurs, et non par les intérêts des participants ou par les considérations de politique générale qui ont incité les législateurs provinciaux à protéger les bénéficiaires de caisses de retraite. Les motifs exposés par le juge Morawetz lorsque, le 12 juin 2009, les participants au régime des cadres ont demandé pour la première fois que leurs droits soient réservés sont révélateurs. Selon lui, toute incertitude quant à savoir si les prêteurs refuseraient de consentir des avances ou s'ils auraient priorité dans le cas où des avances seraient consenties [TRADUCTION] « n'améliorerait pas la situation ». Il a conclu qu'en l'absence de solution de rechange la réparation demandée était « nécessaire et appropriée » (2009 CanLII 37906, par. 7-8).

[60] En l'occurrence, le respect du droit provincial implique nécessairement le non-respect de l'ordonnance rendue en vertu du droit fédéral. D'un côté, le par. 30(7) de la *LSM* exige qu'une partie du produit de la vente lié aux biens décrits dans la loi provinciale soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis. D'un autre côté, l'ordonnance initiale modifiée accorde à la charge DE priorité sur [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre » (par. 45). Accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

C. *Indalex avait-elle des obligations fiduciaires envers les participants?*

[61] Le fait que la charge DE ait préséance sur la fiducie réputée ou que les intérêts des participants au régime des cadres ne soient pas protégés par la fiducie réputée ne signifient pas que les participants n'ont pas le droit de recevoir un montant prélevé

fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

[62] The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

[63] However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

[64] Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator

sur le fonds de réserve. Il faut encore examiner s'il est possible et s'il y a lieu d'imposer une réparation en equity — pouvant avoir préséance sur toutes les priorités — pour manquement par Indalex à une obligation fiduciaire.

[62] La première étape de l'analyse relative à une obligation fiduciaire consiste à déterminer si de telles obligations existent et dans quel contexte elles s'appliquent. La Cour a reconnu que, dans certaines circonstances, l'administrateur d'un régime de retraite a des obligations fiduciaires envers les participants en vertu tant de la common law que de la législation (*Burke c. Cie de la Baie d'Hudson*, 2010 CSC 34, [2010] 2 R.C.S. 273, par. 41). Il est clair que la relation entre les participants et Indalex, en sa qualité d'administrateur des régimes, présente les caractéristiques d'une relation fiduciaire. Ni Sun Indalex ni le contrôleur ne le contestent.

[63] Sun Indalex et le contrôleur font cependant valoir que l'employeur n'est tenu à une obligation fiduciaire que lorsqu'il agit en qualité d'administrateur des régimes — lorsqu'il porte son « chapeau » d'administrateur des régimes. Hors du contexte de l'administration des régimes, lorsque le conseil d'administration prend des décisions dans l'intérêt supérieur de la société, il porte uniquement son « chapeau » de gestionnaire de la société. Selon cette optique, les décisions de l'employeur concernant la gestion de l'entreprise ne sont pas assujetties aux obligations fiduciaires de la société envers les participants à son régime de retraite et, par conséquent, ne peuvent entrer en conflit avec les intérêts des participants. Je ne puis accepter cette interprétation lorsqu'il s'agit de déterminer la portée des obligations fiduciaires qui incombent à un employeur en sa qualité d'administrateur d'un régime de retraite.

[64] Seules peuvent administrer un régime de retraite les personnes ou entités qui y sont autorisées par la *LRR* (par. 1(1) et al. 8(1)a)). L'employeur fait partie de ces personnes ou entités. L'employeur constitué en société qui décide d'agir en qualité d'administrateur d'un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d'une société ont aussi une

of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

[65] Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

[66] When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or

obligation fiduciaire envers la société, le fait que l'employeur puisse agir en qualité d'administrateur d'un régime de retraite signifie que l'al. 8(1)a) de la *LRR* repose sur la prémisse que les décisions de gestion de l'entreprise prises par les administrateurs n'engendreront pas toujours un conflit avec les obligations de la société envers les participants au régime de retraite. L'employeur doit toutefois être prêt à résoudre les conflits lorsqu'ils surgissent. Une procédure de réorganisation impose inévitablement un poids à un débiteur, mais ce fardeau ne libère pas l'employeur qui agit en qualité d'administrateur d'un régime de retraite de ses obligations fiduciaires.

[65] Le paragraphe 22(4) de la *LRR* interdit expressément à l'administrateur d'un régime de permettre que son intérêt entre en conflit avec ses obligations à l'égard du régime de retraite. Par conséquent, l'employeur dont le propre intérêt ne coïncide pas avec celui des participants au régime doit se demander si cette divergence d'intérêts peut susciter un conflit et, le cas échéant, ce qu'il faut faire pour le résoudre. Lorsqu'il y a effectivement conflit, la métaphore des deux « chapeaux » n'est selon moi d'aucun secours. La solution ne consiste pas à déterminer si une décision peut être classifiée comme se rattachant à la gestion de la société ou à l'administration du régime de retraite. L'employeur peut très bien prendre une décision judicieuse concernant la gestion de la société et, néanmoins, porter préjudice aux intérêts des participants au régime. L'employeur qui administre un régime de retraite n'est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu'il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d'une décision, et non sa nature qui doivent être prises en compte.

[66] Lorsque les intérêts de la société que l'employeur tente de servir se heurtent à ceux que l'employeur a le devoir de protéger en qualité d'administrateur du régime, il faut trouver une façon de veiller sur les intérêts des participants. Cela peut vouloir dire que la société les tiendra informés, qu'elle trouvera un administrateur substitut pour le régime, qu'elle nommera un avocat

finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

[67] In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

[68] In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4) *PBA*).

[69] Since the Plan Members seek an equitable remedy, it is important to identify the point at

pour représenter les participants ou qu'elle résoudra le conflit par un autre moyen. La solution doit être adaptée au problème, et une solution donnée ne vaudra pas nécessairement pour tous les cas.

[67] En l'espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Indalex avait certaines responsabilités en sa qualité d'administrateur des régimes. Par exemple, le par. 56(1) de la *LRR* l'obligeait à veiller à ce que les cotisations soient payées à leur date d'exigibilité et, si elles ne l'étaient pas, le par. 56(2) exigeait qu'elle en avise le surintendant. Il incombait également à Indalex, aux termes de l'art. 59, d'introduire une instance devant un tribunal compétent pour obtenir le paiement des cotisations dues, mais impayées. Indalex, en tant qu'employeur, a acquitté toutes les cotisations dues. Son insolvabilité compromettait toutefois le paiement des cotisations accumulées à la date de la liquidation. En cas d'insolvabilité, la créance de l'administrateur d'un régime à l'égard des cotisations accumulées constitue une réclamation prouvable.

[68] Dans le contexte de la présente affaire, le fait qu'Indalex pouvait, en sa qualité d'administrateur des régimes de retraite, avoir à se réclamer à elle-même les cotisations accumulées l'amènerait à devoir adopter simultanément des positions opposées quant à savoir si des cotisations s'étaient accumulées à la date de la liquidation et si les déficits de capitalisation étaient protégés par une fiducie réputée. Cet exemple démontre qu'il existait manifestement un conflit entre les intérêts d'Indalex et ceux des participants. Indalex aurait dû prendre des mesures pour assurer la protection des intérêts des participants dès qu'elle a constaté, ou qu'elle aurait dû constater, l'existence d'un conflit potentiel. Elle ne l'a pas fait. Elle a, au contraire, contesté la position défendue par les participants. Elle a donc, à tout le moins, manqué à son obligation d'éviter les conflits d'intérêts (par. 22(4) *LRR*).

[69] Comme les participants demandent une réparation en equity, il importe d'établir à quel moment

which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

[70] As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

[71] First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the

Indalex aurait dû prendre des mesures pour veiller à ce que leurs intérêts soient protégés. Soulignons au préalable que l'analyse d'un conflit d'intérêts doit s'appuyer sur un contexte factuel et qu'il n'est ni nécessaire ni utile de tenter de décrire toutes les situations dans lesquelles un conflit est susceptible de surgir.

[70] L'insolvabilité, comme je l'ai déjà mentionné, met en péril les cotisations de l'employeur. Cela ne signifie pas pour autant que la seule décision d'engager une procédure en matière d'insolvabilité constitue un manquement à une obligation fiduciaire. Le président d'Indalex à l'époque, M. Timothy R. J. Stubbs, a expliqué pourquoi une procédure en matière d'insolvabilité avait été engagée, le 3 avril 2009, dans une situation d'urgence. La dette d'Indalex envers son prêteur était en souffrance, la société s'exposait à des poursuites pour factures impayées, elle avait reçu un avis de résiliation de son assureur qui prenait effet le 6 avril et ses fournisseurs ne lui faisaient plus crédit. Indalex devait donc agir de toute urgence, avant qu'un créancier n'entame une procédure de mise en faillite, ce qui aurait compromis la poursuite de l'exploitation de l'entreprise et le maintien des emplois. Plusieurs raisons m'amènent à conclure que la suspension demandée en l'espèce n'a pas en elle-même placé Indalex en conflit d'intérêts.

[71] Premièrement, la suspension ne fait que figer les droits des parties. La plupart du temps, elle s'obtient *ex parte*. C'est notamment pour éviter que les créanciers se ruent devant les tribunaux pour tenter d'obtenir des avantages que les procédures en matière d'insolvabilité ne leur procureraient pas qu'on s'abstient de donner avis de la motion initiale en suspension. Il semble plus équitable d'appliquer un processus unique au plus grand nombre possible de créanciers. Dans ce contexte, les participants sont sur le même pied que les autres créanciers, et ils ne bénéficient d'aucun droit spécial de recevoir un avis. Deuxièmement, l'une des conclusions de l'ordonnance demandée par Indalex exigeait que, sous réserve de quelques exceptions, tous les créanciers reçoivent signification de l'ordonnance dans un délai de 10 jours. L'avis permettait à tout intéressé de demander une modification de l'ordonnance.

merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

[72] Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

[73] In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty

Troisièmement, Indalex était autorisée à verser toutes les prestations de retraite. Même si l'ordonnance excluait les paiements spéciaux de solvabilité, elle ne réglait pas les droits concurrents des créanciers, et la suspension permettait aux participants de présenter leurs arguments au sujet de la fiducie réputée, alors qu'ils en auraient tout simplement perdu le bénéfice dans le contexte d'une faillite, qui était la solution de rechange.

[72] Bien que la suspension en elle-même n'ait pas placé Indalex en situation de conflit d'intérêts, les procédures qui ont suivi ont eu des conséquences négatives. Le 8 avril 2009, Indalex a déposé une motion en modification et reformulation de l'ordonnance initiale pour demander un financement DE. Cette motion avait été prévue. M. Stubbs avait mentionné dans son affidavit à l'appui de la demande d'ordonnance initiale que les prêteurs avaient consenti au financement, mais qu'Indalex devrait être autorisée à obtenir le financement pour poursuivre ses activités. Toutefois, le 8 avril, l'ordonnance initiale n'avait pas encore été signifiée aux participants. Un court préavis avait été donné au Syndicat, plutôt qu'à chacun des participants, mais le Syndicat n'a pas comparu. Les participants n'étaient tout simplement pas représentés lors de l'examen de la motion en modification de l'ordonnance initiale de suspension et en autorisation d'accorder la charge DE.

[73] En demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. Il s'agit d'un cas où les administrateurs d'Indalex ont permis que les intérêts de la société l'emportent sur ceux des participants. Ce faisant, ils ont peut-être rempli leurs obligations fiduciaires envers Indalex, mais ils ont fait en sorte qu'Indalex a manqué à ses obligations en tant qu'administrateur des régimes. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus

meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

[74] The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

[75] The Monitor and George L. Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order.

particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants. Étant donné qu'Indalex soutenait la motion visant l'octroi d'une priorité à son prêteur, elle ne pouvait pas simultanément défendre l'existence d'une priorité fondée sur la fiducie réputée.

[74] La Cour d'appel a constaté d'autres manquements. Je partage l'opinion du juge Cromwell qu'aucune des procédures subséquentes n'a porté atteinte aux droits des participants. La suite des événements, notamment la deuxième motion en approbation du financement DE et le processus de vente, était prévisible et, à cet égard, typique des réorganisations. Dans tous les cas, des avis ont été donnés. Les participants ont été représentés par des avocats compétents. Fait plus important, le tribunal a ordonné que des fonds soient réservés et qu'une audience soit tenue pour que les questions en litige soient pleinement débattues.

[75] Le contrôleur et George L. Miller, le syndic de faillite d'Indalex É.-U., soutiennent que les participants auraient dû interjeter appel de l'ordonnance initiale modifiée autorisant la charge DE et qu'ils ne devaient pas être admis à prétendre plus tard que leur créance avait priorité sur celle des prêteurs DE. Ils plaident que la règle interdisant les contestations indirectes empêche les participants de contester l'ordonnance autorisant le financement DE. Cet argument n'est pas convaincant. Les participants n'ont pas reçu avis de la motion demandant au tribunal d'autoriser le financement DE. L'avocat des participants au régime des cadres a défendu leur position dès qu'il a pu le faire et l'a réitérée chaque fois qu'il en a eu l'occasion. À l'audition de la motion visant l'augmentation du prêt DE, il n'a retiré leur opposition que lorsqu'on lui a dit que son seul objet était d'augmenter le montant du prêt autorisé. Le juge chargé d'appliquer la *LACC* a fixé une date d'audience expressément pour la présentation des arguments qu'Indalex aurait pu faire valoir, en qualité d'administrateur des régimes, lorsqu'elle a demandé la modification de l'ordonnance initiale.

It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. *Would an Equitable Remedy Be Appropriate in the Circumstances?*

[76] The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

[77] Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

[78] This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

[79] Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held

La règle interdisant les contestations indirectes ne peut donc être invoquée maintenant pour empêcher les participants de défendre leurs intérêts.

D. *Y a-t-il lieu d'accorder une réparation en equity en l'espèce?*

[76] La définition d'un « créancier garanti » à l'art. 2 de la *LACC* inclut la fiducie relative aux biens du débiteur. L'ordonnance initiale modifiée donne à la créance des prêteurs DE priorité sur toute fiducie [TRADUCTION] « d'origine législative ou autre » (par. 45). Indalex É.-U. a été subrogée aux prêteurs DE en conséquence de la garantie consentie dans la convention de prêt DE.

[77] L'avocat des participants au régime des cadres soutient que, selon le principe de la subordination reconnue en equity, la créance d'Indalex É.-U. fondée sur la subrogation est subordonnée à celle des participants. Dans *Société d'assurance-dépôt du Canada c. Banque Commerciale du Canada*, [1992] 3 R.C.S. 558, notre Cour a examiné le principe de la subordination reconnue en equity. Elle ne l'a toutefois pas entériné, reportant l'examen de cette question à un autre moment (p. 609). Je n'ai pas non plus besoin de l'entériner ici. Il suffit de mentionner que la preuve ne révèle aucune inconduite ni injustice de la part des prêteurs, et qu'aucune partie ne conteste la validité du paiement, par Indalex É.-U., des 10 millions de dollars américains manquants.

[78] Reste donc la fiducie par interprétation imposée par la Cour d'appel. Il est bien établi en droit qu'une réparation de la nature d'un droit de propriété n'est généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui peut être rattaché à un tel bien. Je partage l'avis de mon collègue le juge Cromwell que cette condition n'est pas remplie en l'espèce et je souscris à ses motifs sur ce point.

[79] En outre, je considère qu'il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité. Le manquement à l'obligation fiduciaire constaté en l'espèce consiste essentiellement en l'absence d'avis. Puisque les participants ont été autorisés à présenter leurs arguments lors d'une

to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

[80] It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

[81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

audience spécialement tenue pour statuer sur leurs droits, le tribunal chargé d'appliquer la *LACC* était pleinement en mesure d'évaluer la position des parties.

[80] De plus, je vois difficilement comment les participants auraient pu améliorer leur position même s'ils avaient reçu avis de la motion en modification de l'ordonnance initiale. Le juge chargé d'appliquer la *LACC* a clairement indiqué que la seule solution permettant la vente de l'actif en tant qu'entreprise en exploitation était le financement DE — et la logique appuie cette conclusion. Les participants n'ont présenté aucune preuve contraire. Leur argumentation est uniquement fondée sur des conjectures. Ils invoquent d'autres affaires où des participants à des régimes ont reçu un avis et ont pu défendre pleinement leur position. Or, dans aucun des exemples qu'ils citent, les intéressés n'ont pu obtenir d'avantages additionnels. Qui plus est, les participants en l'espèce ont pu faire valoir pleinement leur position. Par conséquent, bien qu'Indalex ait manqué à son obligation fiduciaire d'informer les participants de la motion en modification de l'ordonnance initiale, leur créance demeure subordonnée à celle d'Indalex É.-U.

IV. Conclusion

[81] Il existe des raisons valables d'accorder une protection spéciale aux participants à un régime de retraite lors de procédures en matière d'insolvabilité. Le législateur a envisagé la possibilité de leur accorder cette protection lorsqu'il a édicté les modifications les plus récentes à la *LACC*, mais il a décidé de s'en abstenir (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)*, L.C. 2007, ch. 36, entrée en vigueur le 18 septembre 2009, TR/2009-68; voir aussi le projet de loi C-501, *Loi modifiant la Loi sur la faillite et l'insolvabilité et d'autres lois (protection des prestations)*, 3e sess., 40e lég., 24 mars 2010 (modifié par la suite par le Comité permanent de l'industrie, des sciences et de la technologie, 1er mars 2011)). Un rapport du Comité sénatorial permanent des banques et du commerce a expliqué ainsi le choix fait par le législateur :

Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency – at its essence – is characterized by insufficient assets to satisfy everyone, and choices must be made.

The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

(*Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

[82] In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

[83] In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

[84] I would therefore allow the main appeals without costs in this Court, set aside the orders

Conscients de la vulnérabilité des actuels retraités, nous n'estimons toutefois pas qu'il faudrait modifier pour le moment les dispositions de la LFI concernant les créances liées à des retraites. Actuellement les retraités peuvent recevoir des prestations des Régimes de pensions du Canada et de rentes du Québec, de la Sécurité de la vieillesse et du Supplément de revenu garanti et disposent souvent d'économies personnelles et de REER pouvant leur assurer un revenu à la retraite. Il faut trouver un juste équilibre entre, d'une part, le souhait exprimé par certains de nos témoins de mieux protéger les retraités et les actuels cotisants à un régime de retraite professionnel et, d'autre part, les intérêts des autres. Nous le répétons, l'insolvabilité se caractérise de par sa nature même par des actifs insuffisants pour répondre aux besoins de chacun, et il faut faire des choix.

Le Comité estime que, si l'on accordait la protection qu'ont demandée certains témoins, cela serait tellement injuste pour les autres intervenants qu'il ne peut le recommander. Par exemple, nous estimons qu'une superpriorité ou un fonds pourraient indûment réduire les fonds à répartir entre les créanciers. La disponibilité et le coût du crédit pourraient être touchés, de même que, par ricochet, tous les demandeurs de crédit au Canada.

(*Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 109-110; voir aussi p. 98.)

[82] Dans une procédure en matière d'insolvabilité, le tribunal chargé d'appliquer la *LACC* doit prendre en compte les obligations fiduciaires de l'employeur envers les participants en sa qualité d'administrateur de leurs régimes de retraite. Il doit accorder une réparation lorsque cette mesure est indiquée. Cependant, le tribunal ne doit pas utiliser l'equity pour accomplir ce qu'il aurait souhaité que le législateur fît.

[83] Les participants ayant obtenu gain de cause sur les questions de la fiducie réputée et des obligations fiduciaires, je suis d'avis de ne les condamner aux dépens ni devant la Cour d'appel, ni devant notre Cour.

[84] Je suis donc d'avis d'accueillir les pourvois principaux sans dépens devant notre Cour, d'annuler

made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

CROMWELL J. —

I. Introduction

[85] When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

[86] Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of

les ordonnances rendues par la Cour d'appel, à l'exception de celles figurant aux par. 9 et 10 du jugement de la Cour d'appel concernant l'appel des anciens cadres, et de rétablir les ordonnances du juge Campbell datées du 18 février 2010. Je suis d'avis de rejeter sans dépens le pourvoi du Syndicat des Métallos sur la question des dépens.

Version française des motifs de la juge en chef McLachlin et des juges Rothstein et Cromwell rendus par

LE JUGE CROMWELL —

I. Introduction

[85] L'insolvabilité d'une entreprise met en péril de nombreux intérêts. Le créancier pourrait ne pas recouvrer sont dû, l'investisseur, perdre la somme investie et l'employé, se retrouver sans emploi. Lorsque l'entreprise est le promoteur du régime de retraite de ses employés, les prestations promises par le régime ne sont pas à l'abri du risque couru. Les faits à l'origine des présents pourvois illustrent la concrétisation de ce risque. Régimes de retraite et créanciers se retrouvent dans une situation où, à cause de l'insuffisance de l'actif, les uns sauvent leur mise, les autres non. De manière très générale, le présent pourvoi soulève la question de savoir de quelle manière le droit pondère les intérêts des bénéficiaires d'un régime de retraite et ceux d'autres créanciers.

[86] Devenue insolvable, Indalex Limited, le promoteur et l'administrateur des régimes de retraite des salariés, a demandé la protection contre ses créanciers en application de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Toutes les cotisations pour service courant avaient alors été perçues, mais l'actif des régimes de retraite de la société ne permettait pas de verser aux participants les prestations de retraite promises. La société a pris une série de mesures, avalisées par le tribunal et jugées servir au mieux les intérêts de tous les intéressés, dont l'emprunt d'importantes sommes pour la poursuite de ses activités. Les personnes qui ont alors injecté les sommes nécessaires ont

jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance, LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George L. Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

[87] The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?

B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?

C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?

D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

[88] My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that

obtenu une superpriorité sur toutes les réclamations des autres créanciers. La vente de l'entreprise a permis la préservation de centaines d'emplois, mais le produit touché était inférieur à la dette. Le rang des réclamations des bénéficiaires des régimes de retraite a dès lors fait l'objet d'un litige. L'appelante, Sun Indalex Finance, LLC, a soutenu que sa créance avait préséance sur toutes les autres du fait de la superpriorité obtenue dans le cadre de la procédure fondée sur la *LACC*. Le syndic de faillite des débitrices américaines (George L. Miller) et le contrôleur (FTI Consulting) se sont constitués parties appelantes. Les bénéficiaires des régimes de retraite ont fait valoir qu'ils avaient priorité en raison de la fiducie qui est réputée exister suivant la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* ») et de la fiducie par interprétation qui résultait des manquements allégués de la société à ses obligations fiduciaires.

[87] La Cour d'appel de l'Ontario a donné raison aux bénéficiaires des régimes de retraite, et Sun Indalex, le syndic de faillite et le contrôleur se pourvoient aujourd'hui devant notre Cour. Voici les points de droit précis qui sont en litige :

A. La Cour d'appel a-t-elle eu tort de conclure que la fiducie réputée du par. 57(4) de la *LRR* s'appliquait au déficit de liquidation du régime des salariés?

B. A-t-elle eu tort de conclure qu'Indalex avait manqué à ses obligations fiduciaires envers les bénéficiaires en tant qu'administrateur des régimes de retraite et d'imposer une fiducie par interprétation à titre de réparation?

C. A-t-elle eu tort de conclure que la superpriorité accordée dans le cadre de la procédure fondée sur la *LACC* ne conférait pas de préséance par application de la prépondérance fédérale?

D. Sa décision sur les dépens du Syndicat des Métallos (le « Syndicat ») est-elle entachée d'une erreur?

[88] J'estime que la fiducie réputée ne vise pas les fonds en cause et, même si elle les visait, la superpriorité l'emporterait sur elle. Je conclus que la

the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

II. Facts and Proceedings Below

A. *Overview*

[89] These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

[90] Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

[91] In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

[92] Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and

société a manqué à ses obligations d'administrateur des régimes et que les bénéficiaires auraient dû obtenir de meilleures garanties procédurales dans le cadre de la procédure fondée sur la *LACC*. Cependant, j'estime que la Cour d'appel a tort de recourir à la fiducie par interprétation — une réparation en equity — pour écarter la superpriorité accordée par le tribunal saisi sur le fondement de la *LACC*. Je suis donc d'avis d'accueillir les principaux pourvois.

II. Faits et jugements dont appel

A. *Aperçu*

[89] Les présents pourvois ont pour objet les sommes que les participants des régimes de retraite réclament au promoteur et administrateur des régimes, lequel est devenu insolvable.

[90] Indalex Limited est la société mère de trois sociétés canadiennes inactives. Dans les présents motifs, Indalex Limited s'entend de la société à titre individuel, et « Indalex » du groupe de sociétés collectivement, sauf lorsque le contexte commande plus de précision. Indalex Limited est la filiale à cent pour cent de sa société mère américaine, Indalex Holding Corp., qui possédait et exploitait des entreprises connexes aux États-Unis par l'intermédiaire de ses filiales américaines (ci-après, les « débitrices américaines »).

[91] Fin mars et début avril 2009, Indalex et les débitrices américaines sont devenues insolvables et ont demandé la protection contre leurs créanciers en application de la *LACC*, dans le cas d'Indalex, et du *United States Bankruptcy Code*, 11 U.S.C., chap. 11, dans le cas des débitrices américaines. Le litige à l'origine des pourvois porte sur la priorité accordée aux prêteurs dans le cadre de la procédure fondée sur la *LACC* en contrepartie des fonds avancés à Indalex et sur la question de savoir si cette priorité vaut à l'égard des réclamations de deux des régimes de retraite d'Indalex quant aux sommes qui leur sont dues.

[92] Indalex était le promoteur et l'administrateur de deux régimes enregistrés de retraite touchés par cette procédure, l'un pour les salariés, l'autre pour

the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly $2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly $2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

[93] Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (Joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

[94] Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

[95] The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that

les cadres. Au moment où la protection a été demandée sous le régime de la *LACC*, le régime des salariés était en cours de liquidation — celle-ci devant avoir lieu le 31 décembre 2006 —, et on estimait qu'il en résulterait un déficit (fin 2007) d'environ 2,252 millions de dollars. Le régime des cadres, qui n'était pas en voie de liquidation, n'admettait plus de nouveaux participants depuis 2005. On estimait que son déficit de liquidation s'élèverait à environ 2,996 millions de dollars. Au moment d'engager la procédure fondée sur la *LACC*, toutes les cotisations normales pour service courant avaient été versées aux deux régimes.

[93] Peu de temps après qu'Indalex eut obtenu la protection prévue par la *LACC*, le juge saisi l'a autorisée à obtenir un financement à titre de débiteur-exploitant (« DE ») afin qu'elle puisse poursuivre ses activités. Le tribunal a alors accordé aux prêteurs DE, un groupe de banques, une sûreté ayant priorité sur [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre » (ordonnance initiale, par. 35 (d.a. conjoint, vol. I, p. 123-124)). Les débitrices américaines garantissaient le remboursement de ces sommes.

[94] Finalement, sur approbation du tribunal saisi sur le fondement de la *LACC*, Indalex a vendu son entreprise, mais l'acquéreur n'a pas repris à son compte les engagements de retraite. Le contrôleur nommé en vertu de la *LACC* a établi un fonds de réserve pour donner suite aux réclamations formulées dans l'éventualité où il y serait fait droit. Le produit de la vente n'étant pas suffisant pour rembourser les prêteurs DE, les débitrices américaines, qui s'étaient portées cautions, ont payé la différence et acquis de ce fait la créance prioritaire des prêteurs DE.

[95] L'appelante, Sun Indalex, était un créancier garanti d'Indalex et des débitrices américaines avant l'entrée en jeu de la *LACC*. Elle prétend avoir droit à l'attribution du fonds de réserve au motif que, à titre de créancier garanti des débitrices américaines dans le cadre de la procédure de faillite engagée aux États-Unis, n'eût été leur versement, elle aurait pu toucher les 10,75 millions de dollars

they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

[96] The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

[97] The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

B. *Indalex's CCAA Proceedings*

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

[98] As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and

américains payés par elles à titre de cautions. Les bénéficiaires des régimes de retraite intimés prétendent que le fonds de réserve leur revient puisque leur déficit de liquidation est protégé par la fiducie réputée du par. 57(4) de la *LRR*. Cette fiducie réputée est constituée d'« un montant égal aux cotisations de l'employeur qui sont accumulées [en anglais, « *accrued* »] à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements » (par. 57(4)). Ils invoquent également à l'appui de leur prétention l'existence d'une fiducie par interprétation découlant de l'omission d'Indalex de s'acquitter de ses obligations fiduciaires en tant qu'administrateur des régimes.

[96] Les sommes contenues dans le fonds de réserve ne permettent pas de rembourser à la fois Sun Indalex et les régimes de retraite. La principale question que soulèvent les principaux pourvois est donc celle de savoir quel créancier a priorité.

[97] Le juge de première instance a rejeté la thèse de la fiducie réputée avancée par les bénéficiaires des régimes et conclu que, pour ce qui concerne le déficit de liquidation, les bénéficiaires des régimes de retraite sont des créanciers chirographaires prenant rang après les créanciers bénéficiant d'une superpriorité et les créanciers garantis (2010 ONSC 1114, 79 C.C.P.B. 301). La Cour d'appel de l'Ontario a infirmé cette décision et conclu que les déficits des régimes de retraite faisaient l'objet d'une fiducie réputée et d'une fiducie par interprétation qui prenaient rang avant les prêteurs DE et les autres créanciers garantis (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, le syndic de faillite et le contrôleur se pourvoient aujourd'hui en appel.

B. *La procédure engagée par Indalex sous le régime de la LACC*

(1) L'ordonnance initiale (d.a. conjoint, vol. I, p. 112)

[98] Comme je l'indique précédemment, Indalex connaissait des difficultés financières et, le 3 avril 2009, elle a obtenu d'être protégée contre ses créanciers en application de la *LACC*. L'ordonnance (appelée ci-après « ordonnance initiale »)

others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

comportait entre autres des directives pour la signification aux créanciers et aux autres parties (par. 39-41). Elle prévoyait également que toute partie intéressée pouvait demander sa modification, à condition de signifier un avis à toute autre partie susceptible d'être touchée par la mesure (par. 46). Les parties reconnaissent que l'avis relatif à la demande présentée en vue d'obtenir l'ordonnance initiale n'a pas été signifié aux bénéficiaires des régimes de retraite, mais le tribunal saisi sous le régime de la *LACC* a néanmoins approuvé le mode et le délai de signification. Toutes les données sur les déficits des régimes de retraite figuraient dans les documents présentés au tribunal à l'appui de la demande, et l'ordonnance initiale faisait mention du paiement aux régimes des cotisations pour service courant de l'employeur.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

(2) L'ordonnance relative au financement DE (d.a. conjoint, vol. I, p. 129)

[99] On April 8, 2009, in what I will refer to as the DIP order, the *CCAA* judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

[99] Le 8 avril 2009, dans cette ordonnance appelée ci-après « ordonnance DE », le juge saisi en application de la *LACC* — le juge Morawetz — a autorisé Indalex à obtenir un financement DE. Il a notamment ordonné ce qui suit :

– He approved abridged notice: para. 1;

– He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);

– He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;

– He granted the DIP lenders a so-called super priority:

– l'abrègement du délai d'avis (par. 1);

– la faculté d'Indalex de continuer de verser aux régimes de retraite les cotisations pour service courant, à l'exclusion de tout paiement spécial (al. 7a) et 9b));

– la mise à l'abri d'Indalex contre toute procédure, sauf consentement d'Indalex ou du contrôleur ou autorisation du tribunal, jusqu'au 1er mai 2009 (par. 15);

– l'octroi aux prêteurs DE de ce qu'on appelle une superpriorité :

THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise

[TRADUCTION] LA COUR ORDONNE que chacune des charges relatives à l'administration, aux administrateurs et aux prêteurs DE (constituées et définies aux présentes) grève les biens, et que toutes aient priorité sur toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative

(collectively, "Encumbrances") in favour of any Person. [Emphasis added; para. 45.]

– He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than $5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

[100] In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J.), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

[101] The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) The DIP Extension Order (Joint A.R., vol. I, at p. 156)

[102] On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately $5 million more from the DIP lenders, thus raising the allowed total to US$29.5 million.

[103] Counsel for the former executives received the motion material the night before. Counsel for

ou autre (collectivement les « grèvements »), détenus par quiconque. [Je souligne; par. 45.]

– l'obligation d'Indalex de donner avis de l'ordonnance initiale à tous les créanciers connus, autres que les employés et les créanciers auxquels Indalex devait moins de 5 000 $, et la « faculté » qu'ont Indalex et le contrôleur de signifier l'ordonnance initiale aux parties intéressées (par. 49-50).

[100] Dans ses motifs à l'appui de l'ordonnance DE, le juge Morawetz conclut que [TRADUCTION] « les requérantes [Indalex] ne disposent d'aucune autre solution permettant la continuité de l'exploitation » et que le financement DE s'impose ((2009), 52 C.B.R. (5th) 61 (C.S.J. Ont.), al. 9c)). Il signale que, dans son rapport, le contrôleur tient l'approbation de l'accord de financement pour nécessaire et conforme à l'intérêt supérieur d'Indalex et des intéressés, dont ses créanciers, ses employés, ses fournisseurs et ses clients (par. 14-16).

[101] Un avis de la motion qui a mené à l'ordonnance DE a été signifié au Syndicat représentant certains des participants des régimes des salariés, mais celui-ci n'a pas comparu. Le juge Morawetz ordonne expressément ce qui suit au sujet de la signification :

[TRADUCTION] LA COUR ORDONNE l'abrègement du délai imparti pour signifier l'avis et le dossier de demande, de sorte que la demande puisse être régulièrement entendue ce jour même, et elle dispense la demanderesse de la signification de tout autre document s'y rapportant. [Ordonnance DE, par. 1]

(3) L'ordonnance modifiant l'ordonnance DE (d.a. conjoint, vol. I, p. 156)

[102] Le 12 juin 2009, le juge Morawetz a accueilli après audition la demande présentée par Indalex en vue d'être autorisée à emprunter une nouvelle tranche d'environ 5 000 000 $ aux prêteurs DE, ce qui portait l'emprunt total approuvé à 29 500 000 $ US.

[103] L'avocat des anciens cadres a reçu les documents relatifs à l'instance la veille de l'audience.

USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 (Ont. S.C.J.), at para. 4. Morawetz J. wrote that any "reservation of rights" would create uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no alternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

L'avocat du Syndicat a également reçu signification d'un avis. À l'audition de la demande, les anciens cadres (ainsi que les détenteurs de billets garantis de deuxième rang) ont demandé que [TRADUCTION] « leurs droits soient réservés quant à la réparation demandée » (2009 CanLII 37906 (C.S.J. Ont.), par. 4). Le juge Morawetz a opiné que toute [TRADUCTION] « réserve de droits » créerait de l'incertitude chez les prêteurs relativement au rang prioritaire de leur créance et pourrait inciter ces derniers à refuser d'avancer des fonds supplémentaires. En outre, les parties n'avaient proposé aucun autre mode d'accroissement du financement DE, lequel était à la fois [TRADUCTION] « nécessaire et opportun » et devait permettre, du moins l'espérait-on, « d'améliorer la situation des intéressés » (par. 5-9).

(4) The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J.))

(4) L'ordonnance relative à la vente par soumission ((2009), 79 C.C.P.B. 101 (C.S.J. Ont.))

[104] On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

> The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders. [Emphasis added; para. 9.]

[104] Le 2 juillet 2009, Indalex a demandé l'approbation de la procédure projetée de vente par soumission de l'actif d'Indalex. Le juge Morawetz a jugé que l'offre-paravent de SAPA Holding AB (« SAPA ») pouvait être tenue pour valable. L'avocat des participants du régime des cadres a fait valoir que [TRADUCTION] « ni la situation ni le point de vue de ses clients n'avaient été pris en compte dans le cadre de la procédure » (par. 8). Le juge Morawetz a statué que ces éléments pourraient être examinés ultérieurement, lorsque l'approbation de la vente serait demandée (par. 10). Voici ce qu'il dit :

> [TRADUCTION] La situation des retraités est malheureuse. À l'heure actuelle, ils ne touchent pas ce qu'ils ont obtenu à l'issue de négociations. Or, la réalité demeure incontournable et la nature de l'insolvabilité des demanderesses fait en sorte que l'actif ne permet pas d'acquitter le passif. Les retraités ne sont pas les seuls à subir un préjudice. La présente instance vise à obtenir le meilleur résultat possible pour les intéressés. [Je souligne; par. 9.]

(5) The Sale Approval Order (Joint A.R., vol. I, at p. 166)

[105] On July 20, 2009, Indalex brought two motions before Campbell J.

[106] The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

[107] The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) The Sale and Distribution of Funds

[108] SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid US$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) The Order Under Appeal

[109] On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the

(5) L'ordonnance d'approbation de la vente (d.a. conjoint, vol. I, p. 166)

[105] Le 20 juillet 2009, Indalex a saisi le juge Campbell de deux motions.

[106] Dans la première, Indalex demandait au tribunal d'approuver la vente à SAPA de son actif d'entreprise en exploitation, l'acquéreur ne reprenant à son compte aucun des engagements de retraite. Le juge Campbell a approuvé la vente.

[107] Dans la deuxième motion, Indalex a demandé au tribunal d'approuver la distribution provisoire du produit de la vente aux prêteurs DE. L'avocat des participants du régime des cadres et le Syndicat, qui représentait certains des salariés, se sont opposés à cette distribution au motif qu'une fiducie d'origine législative protégeait les déficits de leurs régimes et qu'Indalex avait manqué à ses obligations fiduciaires envers eux. Le juge Campbell a ordonné au contrôleur de payer l'agent administratif des prêteurs DE par prélèvement sur le produit de la vente, mais également d'établir un fonds de réserve suffisant pour donner suite, entre autres choses, aux réclamations des bénéficiaires des régimes dans l'éventualité où il y serait fait droit. Il a ordonné que les débitrices américaines soient subrogées dans les droits des prêteurs DE jusqu'à concurrence du montant qu'elles avaient dû leur verser aux termes de la garantie (par. 14).

(6) La vente et la distribution des fonds

[108] SAPA a acheté l'actif d'Indalex le 31 juillet 2009. Compte tenu du fonds de réserve, la vente n'a pas généré de fonds suffisants pour rembourser intégralement les prêteurs DE, de sorte que les débitrices américaines ont versé à titre de cautions 10 751 247 $ US à ces derniers (motifs de la C.A., par. 65).

(7) L'ordonnance visée par l'appel

[109] Le 28 août 2009, le juge Campbell a entendu la thèse du Syndicat (qui représentait certains des participants du régime des salariés) et de l'avocat des participants du régime des cadres, à savoir que

wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the wind-up deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

le déficit de liquidation était réputé détenu en fiducie. Dans une décision motivée par écrit datée du 18 février 2010, il rejette cette prétention et conclut que la fiducie réputée du par. 57(4) de la *LRR* ne vise pas le déficit de liquidation. Le régime des cadres n'ayant pas été liquidé, il n'y avait donc pas de déficit de liquidation susceptible de faire l'objet d'une fiducie réputée. S'agissant du régime des salariés, le juge Campbell conclut que le déficit de liquidation n'équivaut pas à des cotisations qui sont « accumulées à la date de la liquidation », de sorte qu'il n'est pas réputé détenu en fiducie suivant le par. 57(4).

[110] Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

[110] Indalex a demandé la levée de la suspension accordée dans l'ordonnance initiale afin de pouvoir faire cession de ses biens. Ne concluant pas à l'existence d'une fiducie réputée, le juge Campbell ne juge pas nécessaire de statuer sur la demande visant à faire lever la suspension.

(8) The Decision of the Ontario Court of Appeal

(8) L'arrêt de la Cour d'appel de l'Ontario

[111] The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

[111] La Cour d'appel de l'Ontario accueille l'appel interjeté contre la décision du juge Campbell.

[112] Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

[112] Au nom d'une formation unanime, la juge Gillese estime que la fiducie réputée du par. 57(4) s'applique au déficit de liquidation. Les « cotisations de l'employeur qui sont accumulées [en anglais, « *accrued* »] à la date de la liquidation, mais qui ne sont pas encore dues » dont fait mention cette disposition englobent selon elle toutes les sommes que l'employeur devait au moment de la liquidation de son régime de retraite (par. 101). Plus particulièrement, elle conclut que la fiducie réputée du par. 57(4) s'applique au déficit de liquidation du régime des salariés. Elle refuse cependant de se prononcer sur l'application de la fiducie réputée au déficit du régime des cadres, lequel n'était pas liquidé à la date considérée (par. 110-112), ce qui n'était pas nécessaire puisqu'elle conclut à l'applicabilité de la fiducie par interprétation dans ce cas.

[113] Gillese J.A. found that the super priority provided for in the DIP order did not trump the

[113] La juge Gillese conclut que la superpriorité accordée dans l'ordonnance DE ne prime pas la

deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramountcy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

[114] In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

[115] She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted:

fiducie qui est réputée exister à l'égard du déficit de liquidation du régime des salariés. Le juge Morawetz n'a pas [TRADUCTION] « invoqué » la prépondérance fédérale ni conclu expressément que le droit fédéral écartait la fiducie réputée de droit provincial (par. 178-179). La juge Gillese opine également que, dans l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, notre Cour ne statue pas que l'ordre de priorité établi par la province qui est sans effet aux fins de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), ne s'applique pas non plus pour les besoins de la *LACC* (par. 185-196). La fiducie réputée prend donc rang avant la sûreté DE.

[114] Outre ses conclusions sur la fiducie réputée, la juge Gillese tranche que le fonds de réserve fait l'objet d'une fiducie par interprétation car, dans son rôle d'administrateur des régimes de retraite, Indalex a manqué à ses obligations fiduciaires envers les bénéficiaires dans le cadre de la procédure fondée sur la *LACC*.

[115] Elle conclut qu'à titre d'administrateur de régime qui était également employeur, Indalex avait des obligations fiduciaires tant envers les bénéficiaires des régimes qu'envers la société (par. 129). À son avis, Indalex était tenue de respecter ses obligations envers les premiers et la seconde tout au long de la procédure fondée sur la *LACC* et elle a manqué à ses obligations envers les bénéficiaires des régimes de différentes manières. Indalex avait certes le droit d'engager une procédure sous le régime de la *LACC*, mais une telle mesure rendait les bénéficiaires des régimes vulnérables, ce qui lui imposait donc des obligations fiduciaires en tant qu'administrateur des régimes (par. 132-133). La juge Gillese impute à Indalex de nombreuses erreurs subséquentes commises dans l'administration des régimes : Indalex n'a pris aucune mesure dans le cadre de la procédure fondée sur la *LACC* pour renflouer les régimes sous-capitalisés; elle a demandé la protection de la *LACC* sans en informer les bénéficiaires au préalable; elle a obtenu du financement DE en accordant à la créance des prêteurs une superpriorité sur toute « fiducie d'origine législative »; elle a obtenu ce financement sans en

para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

[116] Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

A. *First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?*

(1) Introduction

[117] The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

[118] The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust

informer au préalable les bénéficiaires des régimes; elle a vendu son actif tout en sachant que l'acquéreur ne reprendrait à son compte aucun de ses engagements de retraite; elle a tenté de faire cession volontaire de ses biens, ce qui aurait fait échec aux prétentions des bénéficiaires relatives à la fiducie réputée (par. 139). La juge Gillese relève également que tout au long de la procédure fondée sur la *LACC*, Indalex était en conflit d'intérêts, car elle représentait à la fois la société et les bénéficiaires.

[116] Va l'omission d'Indalex de s'acquitter de ses obligations fiduciaires, le fonds de réserve fait l'objet d'une fiducie par interprétation (par. 204). De plus, comme les bénéficiaires ont été lésés par Indalex, et que les débitrices américaines ne sont pas des [TRADUCTION] « tiers sans lien de dépendance » avec Indalex, la solution qui s'impose est de reconnaître l'existence d'une fiducie par interprétation en faveur des bénéficiaires (par. 204). Sa conclusion sur ce point vaut à la fois pour le régime des salariés et pour celui des cadres.

III. Analyse

A. *Première question en litige : La Cour d'appel a-t-elle tort de conclure que la fiducie réputée du par. 57(4) de la LRR s'applique au déficit de liquidation du régime des salariés?*

(1) Introduction

[117] Le principal point considéré en l'espèce est l'application ou l'inapplication de la fiducie réputée du par. 57(4) de la *LRR* au déficit de liquidation, dont l'al. 75(1)b) prévoit le paiement.

[118] La fiducie réputée du par. 57(4) vise les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Pour qu'il y ait fiducie réputée, le régime de retraite doit donc être liquidé et les sommes en question doivent remplir trois conditions. Il doit s'agir de (1) « cotisations de l'employeur », (2) « qui sont accumulées à la date de liquidation », (3) « mais qui ne sont pas encore dues ». Il y a déficit de liquidation « [lorsqu']un régime de retraite est liquidé »

for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

[119] The wind-up deficiency payments are "employer contributions" which are "not yet due" as of the date of wind up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the wind up".

[120] Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

[121] I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind up. The wind up deficiency only arises upon wind up and it is neither ascertained nor ascertainable on the date fixed for wind up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

(par. 75(1)). Je conviens avec mes collègues qu'il ne peut y avoir de fiducie réputée au bénéfice du régime des cadres, car celui-ci n'avait pas encore été liquidé à la date considérée. Par conséquent, les motifs qui suivent ne valent que pour le régime des salariés.

[119] Les versements effectués pour combler le déficit de liquidation constituent des « cotisations de l'employeur [. . .] qui ne sont pas encore dues » au moment de la liquidation au sens de la *LRR*. Il s'agit donc essentiellement d'interpréter une disposition de la loi et de déterminer seulement si le déficit de liquidation décrit à l'al. 75(1)b) est « accumul[é] à la date de la liquidation ».

[120] En première instance, le juge Campbell conclut qu'il ne l'est pas, alors que la Cour d'appel arrive à la conclusion contraire. La Cour d'appel estime essentiellement que la fiducie réputée du par. 57(4) [TRADUCTION] « vise toutes les cotisations de l'employeur qui sont exigibles suivant l'art. 75 », à savoir « toute somme due par l'employeur à la liquidation de son régime de retraite » (par. 101).

[121] Sauf le respect qui lui est dû, je suis en désaccord avec la Cour d'appel pour trois raisons principales. Premièrement, suivant son sens ordinaire et grammatical le plus plausible, l'expression « accumulées à la date de la liquidation » renvoie aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Le déficit de liquidation n'est constaté qu'à l'issue de la liquidation, et il n'est ni déterminé ni déterminable à la date de liquidation prévue. Deuxièmement, le contexte législatif général me conforte dans ce point de vue. Le texte des par. 57(3) et (4) qui dispose qu'il y a fiducie réputée est repris presque en tous points à l'al. 75(1)a), ce qui permet de conclure que, dans les deux cas de fiducie réputée, le législateur renvoie à l'obligation qui existe à la liquidation suivant l'al. 75(1)a) et non à celle, supplémentaire et distincte, qui est liée au déficit de liquidation et qui découle de l'al. 75(1)b). Enfin, il appert à mon sens de l'évolution et de l'historique de ces dispositions que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie réputée d'origine législative.

[122] Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

[123] A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a) and includes "an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73-74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up deficiency: paras. 90-91.

[124] For convenience, the provision as it then stood is set out here.

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

[122] Avant d'interpréter le libellé en cause, il vaut la peine de situer dans leur contexte les obligations de l'employeur en cas de liquidation, ainsi que les dispositions sur la fiducie réputée qui font l'objet du présent litige.

(2) Les obligations de l'employeur à la liquidation

[123] La « liquidation » s'entend de la cessation d'un régime et de la répartition de son actif (voir la définition de « liquidation » au par. 1(1) de la *LRR*). L'obligation de l'employeur comporte alors deux volets principaux. Premièrement, suivant l'al. 75(1)a), son obligation correspond au versement d'« un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés et qui n'ont pas été versés à la caisse de retraite ». Sont visées les cotisations dues à la date de la liquidation, mais *non* les paiements exigés à l'al. 75(1)b) par suite de la liquidation (A. N. Kaplan, *Pension Law* (2006), p. 541-542). La seconde obligation vise le déficit de liquidation. L'employeur est tenu de verser toute somme supplémentaire requise du fait que la valeur de l'actif du régime de retraite est inférieure à celle de la totalité des droits à pension acquis de manière immédiate, accélérée ou réputée (Kaplan, p. 542). Sans entrer dans le détail, certains droits d'origine législative ne naissent qu'en cas de liquidation, tels certains enrichissements des prestations et la possibilité d'accélérer l'acquisition du droit à pension. La liquidation fait donc à l'employeur d'autres obligations en sus de celle de verser toutes les prestations prévues par le régime lui-même (voir, p. ex., art. 73-74; Kaplan, p. 542). Ainsi que le conclut la Cour d'appel, les paiements visés à l'al. 75(1)a) sont ceux que l'employeur devait verser pendant l'application du régime, tandis que l'al. 75(1)b) renvoie à son obligation de combler tout déficit de liquidation (par. 90-91).

[124] Pour faciliter sa consultation, voici le libellé qui s'appliquait au moment considéré :

75. (1) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur verse à la caisse de retraite :

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées [en anglais, « *accrued* »] à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

[125] While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

[125] Bien que la liquidation prenne effet à une date déterminée, il s'agit d'un processus, et non d'un moment ou d'une étape en particulier. Un événement la déclenche et elle se poursuit jusqu'à la répartition de la totalité de l'actif du régime. Au risque de trop simplifier, voici quelles sont les étapes du processus de liquidation.

[126] The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the

[126] L'actif et le passif du régime existant à la date de la liquidation doivent être établis. Rappelons que la valeur exacte du passif, bien que *circonscrite à cette date*, n'est ni déterminée ni déterminable *cette date-là*. La valeur du passif peut dépendre des choix qui s'offrent aux bénéficiaires dans le cadre du régime, ainsi que de l'exercice par ces derniers de certains droits légaux et de la levée des options que prévoit le régime. Les participants du régime doivent être avisés de la liquidation, ainsi que de leurs droits et de leurs options, et ils doivent avoir la possibilité d'effectuer leurs choix. L'administrateur du régime doit déposer un rapport de liquidation qui fait état de l'actif et du passif du régime, des prestations payables en application du régime et du

terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA* Regulations").

[127] Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, ... In principle, the value of these benefits is the present value of the benefits accrued to the date of plan termination": *The Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

[128] If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with the market and other assumed elements of the calculation over the course of the permitted five years.

[129] To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be $1,655,200. Indalex made special wind-up payments of $709,013 in 2007 and $875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was $1,795,600 — i.e. higher than it had been two years before, notwithstanding that payments of roughly $1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of $601,000 in April 2009: C.A. reasons, at para. 32.

mode d'attribution et de répartition de l'actif, y compris les priorités de paiement des prestations (*LRR*, par. 70(1), et R.R.O. 1990, règl. 909, art. 29 (le « règlement de la *LRR* »)).

[127] Les prestations versées aux participants peuvent revêtir la forme de [TRADUCTION] « remboursements en espèces, de rentes immédiates ou différées, de transferts dans un régime enregistré d'épargne-retraite, [. . .]. La valeur de ces prestations correspond en principe à la valeur actuelle des prestations accumulées à la date de cessation du régime » (*The Mercer Pension Manual* (feuilles mobiles), vol. 1, p. 10-41). La valeur actuelle est obtenue au moyen d'un calcul actuariel qui tient compte de différentes hypothèses, notamment quant au rendement et à l'espérance de vie.

[128] Lorsque, après avoir calculé l'actif et le passif, le premier est inférieur au second, l'employeur (à savoir le promoteur du régime) comble le déficit de liquidation (*LRR*, al. 75(1)b)). Il peut étaler les versements sur une période de cinq ans (règlement de la *LRR*, par. 31(2)). Puisque le montant de ces versements tient à la différence entre l'actif du régime de retraite et les prestations dues aux bénéficiaires, il varie en fonction du marché et d'autres variables considérées dans le calcul sur la période autorisée de cinq ans.

[129] Dans le cas du régime des salariés, par exemple, toutes les cotisations normales pour service courant avaient été versées au moment de la liquidation (motifs de la C.A., par. 33). Le déficit de liquidation a été estimé au départ à 1 655 200 $. Indalex a effectué des paiements spéciaux de 709 013 $ en 2007, puis de 875 313 $ en 2008. Or, le 31 décembre 2008, le déficit de liquidation s'établissait à 1 795 600 $, de sorte qu'il s'était accru au cours des deux ans écoulés, malgré les quelque 1,6 million de dollars versés (motifs de la C.A., par. 32). Indalex a versé en sus 601 000 $ en avril 2009 (motifs de la C.A., par. 32).

(3) The Deemed Trust Provisions

[130] The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

[131] There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

[132] The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* Regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

[133] When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency" deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations,

(3) Les dispositions relatives à la fiducie réputée

[130] La *LRR* renferme des dispositions visant à soustraire à la saisie par les autres créanciers de l'employeur les sommes dues à un régime de retraite que détient ou que doit l'employeur (Kaplan, p. 395). Ainsi, certaines cotisations au régime de retraite sont dont « réputées » détenues « en fiducie » par l'employeur pour le compte des employés ou des bénéficiaires du régime de retraite.

[131] Deux fiducies réputées doivent être examinées en l'espèce, l'une visant les cotisations de l'employeur qui sont *dues, mais impayées*, l'autre les cotisations de l'employeur qui sont *accumulées, mais qui ne sont pas dues*. Cette seconde fiducie réputée est celle qui nous intéresse dans le présent pourvoi, mais il importe de comprendre la complémentarité des deux fiducies réputées.

[132] La fiducie dont sont réputées faire l'objet les cotisations de l'employeur qui sont « dues et impayées » est créé au par. 57(3). La *LRR* et le règlement de la *LRR* renferment de nombreuses dispositions sur les cotisations de l'employeur et le moment de leur exigibilité. Voici quelles sont, en résumé, les cotisations exigées.

[133] Pendant la durée du régime de retraite, l'employeur verse chaque mois les cotisations normales pour service courant dans les 30 jours qui suivent le mois pour lequel elles sont exigibles (règlement de la *LRR*, par. 4(4)3). Des paiements spéciaux sont également effectués pour combler un déficit entre l'actif et le passif du régime. Il peut y avoir « déficit à long terme » et « déficit de solvabilité », mais la distinction entre les deux n'importe pas pour les besoins des présents pourvois. L'administrateur du régime dépose périodiquement un rapport actuariel, lequel est susceptible de révéler un déficit (règlement de la *LRR*, art. 14). Pour combler un déficit à long terme, l'employeur effectue des versements mensuels égaux sur une période de 15 ans (règlement de la *LRR*, al. 5(1)b)). Dans le cas d'un déficit de solvabilité, l'employeur effectue des versements

s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

[134] I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up . . ., an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

[135] When a pension plan is wound up there will be an interrupted monthly payment period, which is sometimes referred to as the stub period. During this stub period regular and special liabilities will have accrued but not yet become due. Section 58(1) provides that money that an employer is required to pay "accrues on a daily basis". Because the amounts referred to in s. 57(4) are not yet due, they are not covered by the s. 57(3) deemed trust, which applies only to payments that are *due*. The two provisions, then, operate in tandem to create a trust over an employer's unfulfilled obligations, which are "due and not paid" as well as those which have "accrued to the date of the wind up but [are] not yet due".

(4) The Interpretative Approach

[136] The issue we confront is one of statutory interpretation and the well-settled approach is 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": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. Taking this approach it is clear to me that the

mensuels égaux pendant cinq ans (règlement de la *LRR*, al. 5(1)e)). Dès que ces versements normaux ou spéciaux sont dus, mais impayés, ils sont réputés faire l'objet de la fiducie créée au par. 57(3).

[134] Je passe maintenant à la fiducie réputée du par. 57(4), celle sur laquelle nous sommes appelés à nous prononcer en l'espèce. Suivant cette disposition, « [s]i un régime de retraite est liquidé [. . .], l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

[135] Lorsqu'un régime de retraite est liquidé, il y a interruption des versements mensuels (intervalle appelé parfois « période tampon »). Au cours de cette période, des dettes ordinaires ou spéciales ont été contractées sans qu'elles soient immédiatement payables. Le paragraphe 58(1) dispose que l'argent qu'un employeur est tenu de verser « s'accumule sur une base quotidienne ». Puisque les sommes mentionnées au par. 57(4) ne sont pas encore dues, elles ne font pas l'objet de la fiducie dont l'existence est réputée au par. 57(3), laquelle ne vise que les paiements qui sont *dus*. Les deux dispositions s'appliquent donc de concert pour créer une fiducie à l'égard des obligations non exécutées de l'employeur qui sont « dues et impayées », ainsi qu'à l'égard des obligations qui ont pour objet des cotisations « accumulées à la date de la liquidation, mais qui ne sont pas encore dues ».

(4) La méthode d'interprétation

[136] Nous sommes aux prises avec l'interprétation de dispositions législatives et, suivant le principe bien établi, [TRADUCTION] « il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » (E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26). Dès lors, il ne fait aucun

sponsor's obligation to pay a wind-up deficiency is not covered by the statutory deemed trust provided for in s. 57(4) of the *PBA*. In my view, the deficiency neither "accrued", nor did it arise within the period referred to by the words "to the date of the wind up".

(a) *Grammatical and Ordinary Sense of the Words "Accrued" and "to the Date of the Wind Up"*

[137] The Court of Appeal failed to take sufficient account of the ordinary and grammatical meaning of the text of the provisions. It held that "the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75": para. 101 (emphasis added). However, the plain words of the section show that this conclusion is erroneous. Section 75(1)(a) refers to liability for employer contributions that "are due . . . and that have not been paid". These amounts are thus *not* included in the s. 57(4) deemed trust, because it addresses only amounts that have "accrued to the date of the wind up but [are] not yet due". Amounts "due" are covered by the s. 57(3) deemed trust and not, as the Court of Appeal concluded by the deemed trust created by s. 57(4). The Court of Appeal therefore erred in finding, in effect, that amounts which "are due" could be included in a deemed trust covering amounts "not yet due".

[138] In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

[139] In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

doute que l'obligation du promoteur de combler un déficit de liquidation échappe à la fiducie réputée du par. 57(4) de la *LRR*. À mon avis, le déficit n'est pas « accumulé » [« *accrued* », en anglais] et n'est pas survenu pendant la période à laquelle renvoie l'expression « à la date de la liquidation ».

a) *Le sens ordinaire et grammatical des termes « accumulées » [« accrued », en anglais] et « à la date de la liquidation »*

[137] La Cour d'appel ne tient pas suffisamment compte du sens ordinaire et grammatical du libellé des dispositions en cause. Elle conclut que [TRADUCTION] « la fiducie réputée du par. 57(4) vise toutes les cotisations que l'employeur est tenu de verser suivant l'art. 75 » (par. 101 (je souligne)). Or, il ressort du libellé explicite de cette dernière disposition qu'il s'agit d'une conclusion erronée. L'alinéa 75(1)a) établit l'obligation de l'employeur à l'égard des paiements qui « sont dus [. . .] et qui n'ont pas été versés ». Ces paiements *ne* font donc *pas* l'objet de la fiducie réputée du par. 57(4), car celle-ci ne vise que les cotisations qui sont « accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». Les cotisations « dues » sont réputées détenues en fiducie suivant le par. 57(3), et non le par. 57(4) comme le conclut la Cour d'appel. Cette dernière estime en effet à tort que les cotisations qui « sont dues » peuvent être réputées détenues en fiducie comme celles qui « ne sont pas encore dues ».

[138] À mon avis, suivant son sens ordinaire et grammatical le plus plausible, l'expression « accumulées à la date de la liquidation » employée au par. 57(4) renvoie aux sommes déterminées immédiatement avant la date de prise d'effet de la liquidation du régime.

[139] Dans le contexte du par. 57(4), le sens ordinaire et grammatical d'« accumulées » veut que l'obligation soit « entièrement constituée » et que son montant soit « déterminé», même si elle peut ne pas être encore payable. Le déficit de liquidation n'est pas entièrement constitué ni son montant déterminé (ou déterminable) avant la date prévue pour la liquidation, ou le jour même, et ne peut donc pas être visé au par. 57(4).

[140] Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53. However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

[140] Certes, le sens du terme « accumulées » [et plus encore celui de son équivalent anglais « *accrued* »] peut varier selon le contexte. En général, lorsque ce terme est employé de pair avec des droits légaux, son sens courant veut que le droit soit entièrement constitué, même si les répercussions financières de son exécution ne sont pas encore connues et ne peuvent l'être. Ainsi, en responsabilité délictuelle, on parle d'accumulation (au sens d'acquisition ou de naissance) de la cause d'action lorsque tous ses éléments sont réunis, même lorsque l'étendue du préjudice n'est pas encore connue ou ne peut l'être (voir, p. ex., *Ryan c. Moore*, 2005 CSC 38, [2005] 2 R.C.S. 53). Toutefois, lorsque le terme qualifie une somme, il renvoie généralement à un élément dont la valeur est actuellement mesurée ou mesurable, mais qui peut ou non être dû.

[141] In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D. A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, at p. 312.

[141] Dans certains contextes, il y a accumulation [en anglais, « *accrual* »] lorsque l'obligation vient à échéance. On dit du passif accumulé qu'il est [TRADUCTION] « dûment imputable » ou « exigible à une date prévue », ou encore, « entièrement constitué » (voir, p. ex., la définition d'« *accrued liability* » [passif accumulé] dans le *Black's Law Dictionary* (9e éd. 2009), p. 997; D. A. Dukelow, *The Dictionary of Canadian Law* (4e éd. 2011), p. 13; *Hydro-Electric Power Commission of Ontario c. Albright* (1922), 64 R.C.S. 306, p. 312).

[142] In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed. 2010), at s. 6.5(b); see

[142] Dans d'autres cas, la somme qui s'est accumulée [en anglais, « *accrued* »] peut ne pas être encore exigible. Par exemple, on parle d'« intérêts accumulés » [« *accrued interest* »] au sens du montant précis des intérêts qui sont courus, mais qui ne sont pas encore exigibles. En anglais, *accrual* est utilisé dans le même sens dans l'expression « *accrual accounting* » (en français, « comptabilité d'exercice »). Suivant cette méthode, les [TRADUCTION] « opérations qui génèrent des revenus ou occasionnent des dépenses sont comptabilisées lorsque les revenus sont gagnés ou que les dépenses sont engagées » (B. J. Arnold, *Timing and Income Taxation : The Principles of Income Measurement for Tax Purposes* (1983), p. 44). Le revenu est gagné lorsque le bénéficiaire [TRADUCTION] « a essentiellement accompli tout ce qu'il devait accomplir, à condition que la somme

also Canadian Institute of Chartered Accountants, *CICA Handbook — Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

[143] The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum estimated by him to be equal to sinking fund payments [on the bonds and debentures] which shall have accrued but shall not be due at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

> Where . . . a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment. [p. 316]

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to

due puisse être déterminée et que sa perception ne fasse l'objet d'aucune incertitude » (P. W. Hogg, J. E. Magee et J. Li, *Principles of Canadian Income Tax Law* (7e éd. 2010), al. 6.5b); voir également le manuel de l'Institut canadien des comptables agréés, *Manuel de l'ICCA — Comptabilité*, partie II, ch. 1000, par. 41-44). La somme en cause doit alors être déterminée au moment où le droit de la toucher est acquis [« *accrued* »].

[143] Dans l'arrêt *Hydro-Electric Power Commission*, la Cour, qui se prononçait uniquement sur le terme anglais « *accrued* », opine opportunément que ce terme se définit ainsi. Lors de la vente d'actions, le vendeur s'était engagé à remettre, une fois l'opération conclue, [TRADUCTION] « une somme équivalant selon lui aux sommes versées au fonds d'amortissement [des obligations et des débentures] qui sont alors accumulées [*accrued*], mais qui ne sont pas exigibles » (p. 344 (je souligne)). Suivant les conditions des obligations et des débentures, la société était tenue de payer, le 1er juillet de chaque année, un montant déterminé pour chacun des chevaux-vapeur électriques vendus et payés au cours de l'année civile précédente. Le litige portait sur le montant des sommes payables à ce titre une fois la vente conclue. Le juge Duff statue que, dans ce contexte, et selon un [TRADUCTION] « usage largement reconnu », le mot « *accrued* » renvoie au droit ou à l'obligation « entièrement constitué » (p. 312). Il ajoute :

> [TRADUCTION] Lorsqu'une somme forfaitaire doit être versée à une date déterminée et que, vu l'objet du paiement ou les clauses du contrat, la somme en question doit être considérée comme résultant de l'accumulation de sommes pour lesquelles le droit au paiement est entièrement constitué avant la date de paiement convenue, il est tout à fait conforme à l'usage des avocats qui consiste à voir dans chacun de ces éléments accumulés une somme « *accrued* » ou devenue exigible avant la date du paiement. [p. 316]

Par conséquent, chaque fois que naissait, suivant le contrat, l'obligation de verser une somme précise, le droit à l'exécution de cette obligation était acquis (ou « *accrued* »). Le droit était entièrement constitué, même s'il n'y avait pas encore exigibilité, car l'obligation d'effectuer le versement naissait ultérieurement. Pour arriver à cette conclusion, le

"due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

[144] Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37, referring to *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

[145] I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

juge Duff fait remarquer que le terme « *accrued* » (par opposition à « *due* ») est employé dans les obligations et les débentures, ce qui confirme l'interprétation selon laquelle « *accrued* » renvoie à une obligation entièrement constituée, mais dont l'exécution n'est pas encore exigible. De même, au par. 57(4), le terme « accumulées » [« *accrued* »] est utilisé par opposition à « dues ».

[144] Selon ce que j'estime être le sens ordinaire du mot « accumulé » (en anglais, « *accrued* ») et sauf le respect que je porte à la juge Deschamps, je ne crois pas que l'on puisse considérer que le déficit de liquidation était « accumulé » à la date de la liquidation. De l'avis de ma collègue, « [p]uisque les employés cessent d'accumuler des droits lorsque le régime est liquidé, les droits qui servent au calcul des cotisations ont tous été accumulés avant la date de la liquidation » (par. 34) et « aucun passif ne s'accumule pendant ni après la liquidation » (par. 36). Pour elle, « [l]e fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable » (par. 37, citant *Canadian Pacific Ltd. c. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

[145] Je ne saurais convenir qu'aucune obligation ne s'accumule pendant ou après la liquidation. Comme je le précise précédemment, le déficit de liquidation s'entend à l'al. 75(1)b) de la différence entre l'actif du régime et son passif calculé à la date de la liquidation. En cas de liquidation, la *LRR* confère aux employés des droits et des garanties dont ils ne bénéficieraient pas en d'autres circonstances (Kaplan, p. 532). La liquidation impose donc des obligations nouvelles à l'employeur. Plus particulièrement, en cas de liquidation, et seulement dans ce cas, l'art. 74 permet aux bénéficiaires de faire des choix quant au paiement de leurs prestations. Le passif du régime ne peut être établi avant ces choix. Contrairement à ce que laisse entendre ma collègue la juge Deschamps, le montant du déficit de liquidation dépend de droits qui ne prennent naissance qu'à la liquidation et à l'égard desquels les employés ne font des choix qu'après la liquidation.

[146] Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

[147] I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up — that is, the wind-up deficiency — are included.

[148] Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

68. . . .

(2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,

. . .

(c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

[146] En outre, le déficit de liquidation diffère après la liquidation puisque la somme à verser pour acquitter les obligations du promoteur du régime dépend du marché. L'article 31 du règlement de la *LRR* permet de répartir sur cinq ans les versements exigés à l'art. 75. Rappelons que le montant du déficit de liquidation fluctuera au cours de cette période (j'ai déjà fait état de la manière dont il a considérablement varié dans le cas du régime des salariés visé en l'espèce). C'est pourquoi, malgré les estimations effectuées périodiquement après la liquidation pour déterminer le montant que l'employeur doit verser, le montant du déficit de liquidation n'est ni déterminé ni déterminable à la date de la liquidation.

[147] J'examine maintenant le sens ordinaire et grammatical des mots « à la date de la liquidation » (en anglais, « *to the date of the wind up* ») employés au par. 57(4). À mon avis, cette expression fait en sorte que seules sont visées les cotisations accumulées avant la date de la liquidation, et non les sommes qui font l'objet d'une obligation qui ne prend naissance que le jour de la liquidation (en anglais, « *on the date of the wind up* ») et qui correspondent au déficit de liquidation.

[148] Si l'intention du législateur avait été d'englober la date de la liquidation, il aurait employé le libellé voulu. Par exemple, l'al. 68(2)c) de la *LRR*, modifié en 2010 (ch. 24, par. 21(2)), précise dans sa version anglaise quels syndicats doivent recevoir avis de la liquidation :

68. . . .

(2) *If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to*,

. . .

(c) *each trade union that represents members of the pension plan or that, on the date of the wind up* [à la date de la liquidation], *represented the members, former members or retired members of the pension plan*;

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.O. 2010, c. 9, s. 52(5)), read as follows:

70. . . .

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I will turn shortly.

[149] To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "accrued to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued to the date of the wind up" (s. 57(4)).

Contrairement à la formule « *to the date of wind up* », l'expression « *on the date of wind up* » englobe clairement la date de la liquidation. (La version française ne se prête pas à une autre interprétation.) De même, le par. 70(6), qui figurait dans la *LRR* jusqu'en 2012 (abr. L.O. 2010, ch. 9, par. 52(5)), énonce ce qui suit :

70. . . .

(6) À la liquidation partielle d'un régime de retraite, les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite ont des droits et prestations qui ne sont pas inférieurs aux droits et prestations qu'ils auraient à la liquidation totale du régime de retraite à la date de prise d'effet de la liquidation partielle [*on the effective date of the partial wind up*].

Il appert de l'expression anglaise « *on the effective date of the partial wind up* » que les participants ont droit aux prestations à compter de la date de la liquidation partielle, c'est-à-dire qu'ils peuvent les réclamer à compter de la liquidation elle-même. Le législateur s'exprime ainsi lorsqu'il veut qu'une période englobe une date précise. À l'opposé, lorsqu'il dit en anglais « *to the date of the wind up* » (en français, « à la date de la liquidation »), il n'entend pas englober la date où survient la liquidation. Cette conclusion prend en outre appui sur l'architecture de la *LRR*, ainsi que sur son évolution et son historique. J'y reviendrai brièvement.

[149] Bref, le sens ordinaire et grammatical le plus plausible d'« accumulées à la date [*to the date*] de la liquidation » veut que soient visées les sommes entièrement constituées et déterminées immédiatement avant la date prévue de liquidation. Ainsi, l'obligation liée au déficit de liquidation visé à l'al. 75(1)b) n'est donc pas « accumul[é] à la date [*to the date*] de la liquidation » comme l'exige le par. 57(4). De plus, comme cette obligation naît lorsque le régime de retraite est liquidé (al. 75(1)b)), son objet ne peut donc pas être « accumul[é] à la date de la liquidation » (par. 57(4)).

(b) *The Scheme of the Act*

[150] As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

[151] I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "due and not paid". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "not yet due".

[152] The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b).

b) *Le régime de la Loi*

[150] Je le répète, l'art. 57 dispose que les sommes dues à un régime de retraite sont réputées détenues en fiducie. La disposition applicable en l'espèce est le par. 57(4). Il est utile de se pencher sur ces fiducies réputées en liaison avec les obligations de versement qui les font naître. Plus précisément, il s'agit de considérer la relation entre, d'une part, les fiducies dont l'existence est réputée aux par. 57(3) et (4) et, d'autre part, le par. 75(1), qui prescrit certains versements à la liquidation. Selon ma collègue la juge Deschamps, le libellé du par. 75(1) « fait élégamment écho à celui qui crée la fiducie réputée à la liquidation » (par. 42), de sorte que la fiducie réputée doit englober le déficit de liquidation. Je ne suis pas d'accord. À mon avis, la fiducie réputée ne fait écho qu'à l'al. 75(1)a), lequel ne porte pas sur le déficit de liquidation. Il ressort de la correspondance existant entre les fiducies créées et l'al. 75(1)a), et de l'absence d'une telle correspondance avec l'al. 75(1)b) que le déficit de liquidation ne fait pas l'objet d'une fiducie réputée.

[151] Je rappelle la différence entre les fiducies réputées des par. 57(3) et (4). Pendant la durée du régime, l'employeur peut omettre d'effectuer les versements auxquels il est tenu. La fiducie créée au par. 57(3) vise ces versements, car il s'agit de sommes « dues et impayées ». Cependant, lorsque le régime est liquidé, des versements demeurent en suspens en ce sens que le droit y afférent est entièrement constitué, mais que les sommes en cause ne sont pas encore dues. La situation se présente pendant la période tampon mentionnée précédemment où les paiements normaux et spéciaux s'accumulent chaque jour conformément au par. 58(1), mais peuvent ne pas être dus au moment de la liquidation. Bien que le par. 57(3) ne puisse s'appliquer à ces paiements parce qu'ils ne sont pas encore dus, la fiducie créée au par. 57(4) les englobe, car l'obligation s'y rapportant est « accumulé[e] à la date de la liquidation », mais les sommes en question ne sont « pas encore dues ».

[152] L'élément important réside dans le rapport entre ces deux dispositions créant une fiducie et les versements exigés aux al. 75(1)a) et 75(1)b) en cas

The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

[153] It is striking how closely the text of s. 75(1)(a) — which does not relate to the wind-up deficiency — tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s. 57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that . . . are due . . . and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is difficult to understand why, if the intention had been for s. 57(4) to capture the wind-up deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

de liquidation. Ces deux alinéas visent des sommes de nature différente. L'alinéa 75(1)a) renvoie au passif accumulé avant la liquidation et qui résulte de l'application d'autres dispositions de la Loi, alors que l'al. 75(1)b) crée un passif entièrement nouveau qui naît seulement une fois le régime liquidé. Nul ne conteste, pour autant que je sache, que les deux alinéas renvoient à des passifs différents et que le déficit de liquidation visé en l'espèce correspond à l'obligation prévue à l'al. 75(1)b). Les parties ne contestent pas que l'al. 75(1)a) *ne* vise *pas* les paiements visant à combler le déficit de liquidation.

[153] Il est frappant de constater à quel point le libellé de l'al. 75(1)a) — qui ne porte pas sur le déficit de liquidation — s'apparente à celui des par. 57(3) et (4), qui créent des fiducies. Le paragraphe 57(3) vise les « cotisations de l'employeur qui sont dues et impayées », alors que le par. 57(4) a pour objet les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». Les deux types de cotisations de l'employeur entrent dans le champ d'application de l'al. 75(1)a), lequel renvoie aux « paiements qui [. . .] sont dus [. . .] et qui n'ont pas été versés » (qui sont donc réputés détenus en fiducie suivant le par. 57(3)) ou qui sont « accumulés, et qui n'ont pas été versés » (qui sont donc réputés détenus en fiducie suivant le par. 57(4), dans la mesure où ils sont accumulés à la date de la liquidation). La grande ressemblance du libellé des par. 57(3) et (4), d'une part, et du texte de l'al. 75(1)a), d'autre part, et l'absence de toute correspondance entre le libellé de ces dispositions créant une fiducie et le texte de l'al. 75(1)b) donnent à penser que l'objet des fiducies dont l'existence est réputée aux par. 57(3) et (4) s'entend de l'obligation faite à l'al. 75(1)a), et non du déficit de liquidation visé à l'al. 75(1)b). On comprend difficilement que le législateur, s'il a voulu que l'obligation de combler le déficit de liquidation visé à l'al. 75(1)b) bénéficie de l'application du par. 57(4), ait repris le seul libellé de l'al. 75(1)a) pour créer les fiducies. En toute déférence, si comme le dit ma collègue la juge Deschamps, des libellés se font élégamment écho, ce sont ceux de la fiducie réputée et de l'al. 75(1)a), et non ceux de la fiducie réputée et du déficit de liquidation.

[154] I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) *Legislative History and Evolution*

[155] Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43.

[156] Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

[157] The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that the lien and the

[154] L'architecture de la *LRR* me conforte dans l'opinion que le sens ordinaire et grammatical des termes qui y sont employés n'emporte pas l'application du par. 57(4) au déficit de liquidation visé à l'al. 75(1)b).

c) *L'évolution et l'historique législatifs*

[155] L'évolution et l'historique législatifs peuvent constituer un élément important du contexte global dans lequel une disposition législative doit être interprétée. L'évolution législative s'entend des diverses formulations successives du texte de loi, alors que l'historique législatif s'entend des éléments touchant à sa conception, à son élaboration et à son adoption (voir, p. ex., *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471, par. 43).

[156] Il appert tant de l'évolution de la *LRR* que de son historique que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet de la fiducie réputée. L'évolution et l'historique de la *LRR* étant plutôt complexes et parfois difficiles à suivre, je les examine brièvement avant de me livrer à une analyse plus approfondie.

[157] La fiducie réputée a fait son apparition dans la *LRR* en 1973. À cette époque, elle visait les cotisations des salariés que détenait l'employeur et les cotisations de l'employeur qui étaient dues, mais impayées. En 1980, la *LRR* a été modifiée de sorte que la fiducie réputée englobe toutes les cotisations de l'employeur, qu'elles soient dues ou non. En outre, de nouvelles dispositions permettaient aux salariés de faire des choix et exigeaient des versements supplémentaires de l'employeur lorsque le régime était liquidé. La réforme de 1980 a créé de l'incertitude sous deux rapports. Premièrement, on se demandait si les versements requis à la liquidation faisaient l'objet de la fiducie réputée et, deuxièmement, si certaines cotisations de l'employeur faisaient l'objet d'un privilège à raison du montant visé par la fiducie réputée. En 1983, ces deux points ont été clarifiés. Les articles ont été remaniés et leur libellé reformulé afin de préciser que le déficit de liquidation était distinct des

deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency*.

[158] My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due . . . to all amounts due and accrued upon wind up" (para. 42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the wind-up deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

(i) *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113

[159] So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23*a*(1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23*a*(3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

(ii) *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80

[160] Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80; see Kaplan, at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on

sommes réputées détenues en fiducie, et que le privilège et la fiducie réputée portaient sur un même montant. En 1982, le ministre responsable a confirmé que *la fiducie réputée n'a jamais été censée s'appliquer au déficit de liquidation*.

[158] Pour ma collègue la juge Deschamps, cet historique reflèterait l'évolution de l'intention du législateur que la protection couvre d'abord « uniquement les cotisations dues [puis s'étende à tous] les montants dus ou accumulés à la liquidation » (par. 42). Soit dit en tout respect, je ne suis pas d'accord. À mon avis, l'historique et l'évolution de la *LRR* jusqu'en 1983 inclusivement montrent que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet de la fiducie réputée. Qui plus est, il appert de l'évolution de la *LLR* postérieure à 1983 que cette intention demeure inchangée.

(i) *The Pension Benefits Amendment Act, 1973*, S.O. 1973, ch. 113

[159] Aussi loin que je puisse remonter, la fiducie réputée a vu le jour dans la *LRR* par suite de l'adoption de la *Pension Benefits Amendment Act, 1973*, S.O. 1973, ch. 113, art. 6. L'existence d'une fiducie a été réputée à l'égard, d'une part, des cotisations des salariés au régime de retraite touchées par les employeurs (par. 23*a*(1), ce qui s'apparente à la fiducie prévue au par. 57(1) actuel) et, d'autre part, des cotisations de l'employeur devenues exigibles aux termes du régime (par. 23*a*(3), ce qui s'apparente aux cotisations de l'employeur « qui sont dues et impayées » et qui sont réputées détenues en fiducie en application du par. 57(3) actuel). Le texte intégral de ces dispositions et de celles mentionnées ci-après, jusqu'à la version actuelle datant de 1990, figure en annexe.

(ii) *The Pension Benefits Amendment Act, 1980,* S.O. 1980, ch. 80

[160] L'Ontario a entrepris une réforme majeure des régimes de retraite qui a débouché sur l'adoption de la *Pension Benefits Amendment Act, 1980*, S.O. 1980, ch. 80 (voir Kaplan, p. 54-56). Je m'attacherai aux dispositions sur la fiducie réputée et à

wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

[161] It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency . . . , up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

[162] It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

leur interaction avec le passif issu de la liquidation. Pour faciliter la consultation, je renvoie aux dispositions selon leur nouvelle numérotation datant de la refonte de 1980 (R.S.O. 1980, ch. 373). La loi de 1980 a accru la portée de la fiducie réputée quant aux cotisations de l'employeur. Même si elles ne sont pas du tout claires, les nouvelles dispositions semblent faire en sorte que les cotisations de l'employeur, qu'elles soient exigibles ou non, dont le montant est établi comme si le régime avait été liquidé à la date considérée, fassent l'objet d'une fiducie réputée et d'un privilège.

[161] Après la réforme de 1980, l'incertitude persistait quant à savoir si la fiducie réputée visait toutes les cotisations exigibles de l'employeur une fois le régime liquidé. Suivant le par. 23(4), était détenu en fiducie, à une date donnée, un montant devant être déterminé [TRADUCTION] « comme si le régime avait été liquidé à cette date ». Or, les dispositions de 1980 ne précisaient pas expressément les éléments à inclure dans ce calcul. Aux termes du par. 21(2) de la loi de 1980, à la liquidation, l'employeur était tenu de verser « les sommes dont le versement aurait été par ailleurs requis pour satisfaire aux critères de solvabilité [. . .] jusqu'à la date de la cessation ou de la liquidation du régime ». L'article 32 disposait cependant que, à la liquidation, l'employeur effectuait un versement « [e]n plus » de celui exigé au par. 21(2). Restait à savoir si l'intention du législateur était que ce dernier paiement soit détenu en fiducie.

[162] Il n'était pas clair non plus que l'objet du privilège était le même que celui de la fiducie réputée. Suivant le par. 23(3), [TRADUCTION] « les participants ont un privilège sur l'actif de l'employeur à raison du montant qui, dans le cours normal des affaires, serait consigné dans les livres de comptes, qu'il y soit consigné ou non ». Ce passage figure entre deux parties de la disposition qui renvoient expressément à la fiducie réputée, mais l'intention du législateur demeure incertaine quant à savoir si c'est le même montant qui est visé chaque fois.

(iii) *The Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2

[163] The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the amendments.

[164] The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

23. . . .

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs that have accrued, on a daily basis, up to and including

(iii) *The Pension Benefits Amendment Act, 1983*, S.O. 1983, ch. 2

[163] Les modifications de 1983 ont considérablement précisé la portée de la fiducie réputée et du privilège et elles ont circonscrit les cotisations de l'employeur qui en faisaient l'objet. Il en ressort que ni la fiducie réputée ni le privilège n'ont pour objet le déficit de liquidation; le ministre responsable a confirmé que telle était l'intention du législateur en apportant les modifications.

[164] La nouvelle disposition a été modifiée par l'art. 3 de la loi de 1983 pour devenir le par. 23(4), lequel disposait dès lors ce qui suit :

[TRADUCTION]

23. . . .

(4) L'employeur qui, dans le cadre d'un régime de retraite, est tenu de cotiser à ce régime est réputé détenir en fiducie pour le compte des participants du régime une somme égale au total

(a) de toutes les sommes que l'employeur est tenu de verser au régime pour acquitter

(i) le coût du service courant et

(ii) les paiements spéciaux prescrits par règlement,

qui sont dus aux termes du régime ou du règlement, et qui n'ont pas été versés;

(b) lors de la cessation ou de la liquidation du régime, toute autre somme que l'employeur est tenu de payer en vertu de l'alinéa 21 (2) a).

Suivant l'alinéa 21(2)a), l'employeur est tenu, lors de la liquidation, de verser un montant égal au *coût du service courant et aux paiements spéciaux* qui [TRADUCTION] « sont accumulés à la date de la cessation ou de la liquidation, celle-ci comprise, mais qui, suivant les conditions du régime et le libellé du règlement, ne sont pas encore dus ». La disposition prévoit en outre que ces postes sont réputés s'accumuler sur une base quotidienne. Il est donc clair, suivant le par. 23(4), que seuls sont détenus en fiducie les paiements spéciaux et le coût

the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

[165] The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are* "in addition to the amounts that the employer is liable to pay under subsection 21 (2)" (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

[166] The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due*).

[167] This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

[168] A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

> The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension

du service courant qui sont accumulés, sur une base quotidienne, jusqu'à la date de la liquidation, celle-ci comprise. Le déficit de liquidation ne fait manifestement pas l'objet de la fiducie réputée.

[165] La disposition relative au versement supplémentaire exigé à la liquidation établit aussi clairement que ce versement n'est pas réputé détenu en fiducie. Le montant de ce versement supplémentaire est précisé à l'art. 32, dont le libellé est très semblable à celui de l'al. 75(1)b). Il s'agit premièrement de la somme garantie par le Fonds de garantie et, deuxièmement, de l'excédent des prestations de retraite acquises en vertu du régime sur l'actif du régime. Le paragraphe 32(2) dispose que le versement exigé de l'employeur *s'ajoute* à celui exigé au par. 21(2) (lequel s'apparente à celui que vise l'actuel al. 75(1)a) et donc que *seul ce dernier* est réputé détenu en fiducie. Force est de conclure que, en 1983, le déficit de liquidation échappait à la fiducie réputée.

[166] Les modifications de 1983 ont également clarifié la portée du privilège en précisant qu'elle était identique à celle de la fiducie réputée. Le paragraphe 23(5) précisait que le privilège ne valait que pour les sommes réputées détenues en fiducie suivant le par. 23(4) (à savoir le *coût du service courant et les paiements spéciaux accumulés à la date de la liquidation, celle-ci comprise, mais qui ne sont pas encore dus*).

[167] Deux choses sont donc claires. L'objet du privilège et de la fiducie réputée est le même et il exclut le déficit de liquidation.

[168] L'historique législatif renferme un passage bref mais important qui me paraît dissiper tout doute éventuel à cet égard. Lors de la première lecture du projet de modification de 1983, le ministre responsable, l'honorable Robert Elgie, a déclaré ce qui suit :

> [TRADUCTION] La première série de modifications examinée aujourd'hui apporte les changements administratifs nécessaires pour atteindre l'objectif que nous avons fixé vers la fin de 1980,

benefit plan. These amendments will clarify the ways in which we can attain that goal.

In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions. . . .

Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarifies the intent of Bill 214. [Emphasis added.]

(Ontario (Hansard), No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

[169] Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust employer liabilities that arise only upon wind up of the plan.

(iv) *Pension Benefits Act, 1987*, S.O. 1987, c. 35

[170] Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983

à savoir garantir les prestations de retraite après la liquidation d'un régime de retraite à prestations déterminées. Ces modifications préciseront les moyens grâce auxquels cet objectif pourra être atteint.

Dans le projet de loi 214 [la réforme de 1980], les employés bénéficiaient d'un privilège sur l'actif de l'employeur à l'égard des cotisations versées au régime de retraite et perçues par l'employeur, ainsi que des cotisations de l'employeur accumulées. . .

Malheureusement, la portée du privilège fait l'objet de différentes interprétations juridiques. On a fait valoir que le montant protégé grâce au privilège comprenait toute somme éventuelle due par l'employeur à la liquidation du régime, ce qui n'a jamais été voulu par le législateur et n'était pas nécessaire pour assurer la protection souhaitée. La modification apportée à l'article 23 précise l'intention qui sous-tend le projet de loi 214. [Je souligne.]

(Ontario (Hansard), n° 99, 2e sess., 32e lég., 7 juillet 1982, p. 3568)

Les modifications de 1983 ont fait en sorte que la portée du privilège corresponde exactement à celle de la fiducie réputée en ce qui a trait aux cotisations accumulées de l'employeur. Il ressort donc de l'extrait qui précède que le législateur n'a jamais voulu que la fiducie réputée ou le privilège s'appliquent à « toute somme éventuelle due par l'employeur » lors de la liquidation (à savoir, le déficit de liquidation). À mon sens, il est donc pour ainsi dire établi que, en 1983, le législateur entendait accomplir précisément le contraire de ce qui, selon la Cour d'appel, aurait résulté de ces modifications.

[169] L'évolution législative ultérieure montre que l'intention du législateur n'a pas changé. En fait, les modifications subséquentes révèlent clairement son intention d'exclure de la fiducie réputée les obligations de l'employeur qui naissent seulement lors de la liquidation du régime.

(iv) *Loi de 1987 sur les régimes de retraite*, L.O. 1987, ch. 35

[170] Les modifications apportées à la *LRR* en 1987 l'ont essentiellement fait évoluer jusqu'à sa version actuelle. Elles ont précisé davantage la portée des fiducies réputées. Dans la Loi de 1983,

version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s. 21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

[171] The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) as it stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued to the date of the wind up but not yet due".

[172] The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have accrued to and including the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

un même paragraphe créait une fiducie réputée pour les cotisations de l'employeur qui étaient dues mais impayées (al. 23(4)a)) et une autre pour les cotisations de l'employeur qui étaient accumulées jusqu'à la date de la liquidation, celle-ci comprise, mais qui n'étaient pas encore dues (al. 23(4)b), qui renvoyait à l'al. 21(2)a)). Dès 1987, les deux fiducies ont fait l'objet de paragraphes distincts et leur portée a été davantage circonscrite. En outre, après la réforme de 1987, il n'était plus nécessaire de renvoyer à une autre disposition (l'ancien al. 21(2)a)) pour déterminer la portée de la fiducie créée pour les paiements accumulés, mais non encore dus. Par conséquent, si le fond des dispositions n'a pas été modifié en 1987, leur forme a été simplifiée.

[171] Le nouveau par. 58(3) (identique au par. 57(3) actuel) a remplacé l'ancien al. 23(4)a), lequel créait une fiducie pour les cotisations de l'employeur dues mais impayées. Le paragraphe 58(4) (identique au par. 57(4) actuel) a remplacé l'ancien al. 23(4)b) et, en partie, l'al. 21(2)a), et dispose que, dès la liquidation, les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues » sont détenues en fiducie.

[172] La modification de 1987 montre également que le législateur était conscient de la différence entre « à la date de la liquidation » et « à la date [de la liquidation], celle-ci comprise » et qu'il a choisi la première formule. C'est ce qui appert d'un changement léger, mais important, apporté au libellé des dispositions en cause. L'ancienne disposition, l'al. 23(4)b), par son renvoi à l'al. 21(2)a), englobait le coût du service courant et les paiements spéciaux [TRADUCTION] « accumulés à la date de cessation ou de liquidation, celle-ci comprise ». Dans la nouvelle disposition, le par. 58(4), les mots « celle-ci comprise » sont supprimés pour donner le libellé actuel. À mon sens, cette suppression appuie l'intention du législateur d'*exclure* du champ d'application de la fiducie réputée les obligations qui naissent seulement *à la* date même de la liquidation. En toute déférence, l'historique législatif n'étaye pas le point de vue de ma collègue la juge Deschamps selon lequel il y aurait eu, au fil de l'évolution législative, accroissement de la portée de la fiducie réputée. C'est plutôt le contraire.

[173] To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

(d) *The Purpose of the Legislation*

[174] Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at paras. 13-14.

[175] In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

[173] En résumé, voici ce que je conclus de l'évolution et de l'historique législatifs. La loi établit une distinction entre deux types d'obligation de l'employeur qui sont pertinents en l'espèce. Il y a d'une part les cotisations requises pour acquitter le coût du service courant et d'autres paiements qui sont dus ou qui sont accumulés sur une base quotidienne jusqu'à la date considérée. Il s'agit des paiements prévus à l'actuel al. 75(1)a), à savoir les paiements qui sont dus ou accumulés, mais qui n'ont pas été versés. Et d'autre part, il y a les cotisations supplémentaires exigées lorsque le régime est liquidé (ou, comme j'y renvoie précédemment, le déficit de liquidation). Ces paiements font l'objet de l'al. 75(1)b). Il appert de l'évolution et de l'historique législatifs que les fiducies réputées des par. 57(3) et (4) devaient seulement englober les cotisations du premier type et que le législateur n'a jamais voulu que les obligations ultérieures de l'employeur qui naissent une fois le régime liquidé fassent l'objet d'une fiducie réputée ou d'un privilège.

d) *L'objet de la loi*

[174] L'exclusion du déficit de liquidation de la fiducie réputée est conforme aux objectifs généraux de la loi. Les dispositions sur les régimes de retraite ont une importante vocation de protection. Or, le législateur n'entend pas atteindre son objectif de protection à n'importe quel prix, son intention étant clairement de le mettre en balance avec d'autres intérêts importants dans le cadre d'un régime soigneusement conçu (*Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152, par. 13-14).

[175] Dans le cas qui nous intéresse, le législateur a créé des fiducies à l'égard des cotisations qui sont dues ou accumulées à la date de la liquidation afin de protéger, dans une certaine mesure, les droits des bénéficiaires d'un régime de retraite et ceux des employés contre les réclamations des autres créanciers de l'employeur. Or, il y a de bonnes raisons de penser que c'est en raison d'autres objectifs concurrents que le législateur s'est abstenu d'accroître la portée de la fiducie réputée et d'y inclure le déficit de liquidation.

[176] First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

[177] Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

[178] While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended.

[176] Premièrement, si le législateur avait voulu créer une fiducie applicable à la totalité des obligations de l'employeur qui découlent de la liquidation d'un régime, il lui aurait été aisé de s'exprimer beaucoup plus simplement et clairement.

[177] Deuxièmement, si on considère la situation avec un certain recul, il pourrait fort bien être néfaste de protéger le déficit de liquidation au moyen de la fiducie réputée. Il pourrait en effet en résulter une grande incertitude pour les autres créanciers et prêteurs éventuels, une incertitude qui pourrait non seulement compliquer l'exercice des droits des créanciers, mais aussi compromettre l'accès d'une entreprise en difficulté aux fonds des prêteurs. L'ampleur des obligations à la liquidation peut être considérable et, lorsque l'entreprise demeure en exploitation, on ne peut savoir quelle sera cette ampleur sur une période de cinq ans. Le quantum de ces obligations peut, comme le montrent les faits de la présente espèce, fluctuer radicalement pendant cet intervalle. De telles obligations peuvent rendre très difficile l'évaluation de la solvabilité de l'emprunteur et plus difficile encore la juste répartition des paiements entre les créanciers.

[178] Je conviens certes que la protection des régimes de retraite constitue un objectif important, mais il n'appartient pas à la Cour de décider de la mesure dans laquelle cet objectif sera poursuivi ou d'autres intérêts en souffriront. Dans sa conclusion, la juge Deschamps souligne que même si la protection des régimes de retraite constitue un objectif valable, les tribunaux ne doivent pas recourir à l'equity pour modifier les priorités du législateur qui sous-tendent la *LACC*. Il s'agit d'une question de politique générale, et les tribunaux doivent déférer à la décision du législateur (motifs de la juge Deschamps, par. 82). À mon avis, les propos de ma collègue sur ce point valent également pour les décisions de politique générale qui sous-tendent le texte de la *LRR*. Il appartient à l'Assemblée législative de l'Ontario de décider du degré de protection qu'il convient d'accorder aux bénéficiaires d'un régime de retraite. Au vu du

In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

[179] For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

B. *Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?*

(1) Introduction

[180] The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

[181] The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex

libellé de la *LRR*, j'hésite à inférer que le législateur a voulu conférer une vaste protection avec tous les inconvénients que cela pouvait comporter. En somme, l'interprétation que je préconise s'accorde avec l'approche équilibrée du législateur dans la protection du droit à des prestations.

[179] C'est pourquoi j'estime que la Cour d'appel a tort de conclure que la fiducie réputée du par. 57(4) vise le déficit de liquidation.

B. *Deuxième question en litige : La Cour d'appel a-t-elle tort de conclure qu'Indalex a manqué à ses obligations fiduciaires envers les bénéficiaires en tant qu'administrateur des régimes de retraite et d'imposer une fiducie par interprétation à titre de réparation?*

(1) Introduction

[180] La Cour d'appel conclut que, dans le cadre de la procédure fondée sur la *LACC*, Indalex a manqué à ses obligations fiduciaires d'administrateur des régimes de retraite (par. 116). En guise de réparation, elle impose une fiducie par interprétation à l'égard du fonds de réserve et permet ainsi aux bénéficiaires des régimes de retraite de recouvrer l'intégralité de leur créance de préférence à tous les autres créanciers, notamment ceux auxquels le tribunal a accordé une superpriorité sous le régime de la *LACC*.

[181] Les manquements relevés par la Cour d'appel sont de trois ordres. D'abord, Indalex n'a pas respecté l'interdiction faite au fiduciaire de se trouver en conflit d'intérêts car, dans le cadre de la procédure fondée sur la *LACC*, ses intérêts d'entreprise insolvable s'opposaient à son obligation d'administrateur d'agir au mieux des intérêts des participants et des bénéficiaires des régimes (par. 142). Selon la Cour d'appel, ce conflit d'intérêts constituait à lui seul un manquement d'Indalex à ses obligations fiduciaires d'administrateur des régimes. Deuxièmement, Indalex a manqué à ses obligations fiduciaires en demandant, sans en informer au préalable les

breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

[182] In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict — the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the *CCAA* proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

[183] This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?

(ii) If so, was imposition of a constructive trust an appropriate remedy?

bénéficiaires des régimes, la protection offerte par la *LACC* (par. 139). Troisièmement, Indalex a manqué à ses obligations fiduciaires en sollicitant puis en obtenant diverses mesures dans le cadre de la procédure fondée sur la *LACC*, dont la « superpriorité » de la créance des prêteurs DE, l'approbation de la vente de l'entreprise alors qu'elle savait que nul versement ne serait fait aux régimes sous-capitalisés en sus des sommes protégées par les fiducies réputées d'origine législative, et en demandant sa mise en faillite dans l'intention de faire échec aux prétentions relatives à la fiducie réputée (par. 139). En guise de réparation de ces manquements à l'obligation fiduciaire, la cour a imposé une fiducie par interprétation.

[182] À mon sens, la Cour d'appel confère une portée excessive aux obligations fiduciaires d'Indalex en tant qu'administrateur des régimes et elle relève des manquements qui n'en sont pas. Indalex a seulement manqué à son obligation fiduciaire lorsque, une fois devenue insolvable, ses intérêts sont clairement entrés en conflit avec son obligation fiduciaire d'administrateur d'assurer le versement aux régimes de toutes les cotisations devenues exigibles. Son manquement réside dans l'omission non pas d'éviter ce conflit, qui était en soi inévitable, mais de pallier le problème en veillant à ce que les bénéficiaires des régimes puissent être représentés dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. Je conclus également que la fiducie par interprétation ne saurait être accordée à titre de réparation pour ce manquement.

[183] Ce volet des pourvois commande de répondre à deux questions que j'examine successivement :

(i) Quelles étaient les obligations fiduciaires d'Indalex en tant qu'administrateur des régimes de retraite, et y a-t-il eu manquement à ces obligations?

(ii) Dans l'affirmative, l'imposition d'une fiducie par interprétation constituait-elle une réparation appropriée?

(2) What Fiduciary Duties Did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?

(a) *Legal Principles*

[184] The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1, at para. 55.

[185] However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 31. As La Forest J. put it in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574:

> The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship . . . . [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. . . .
>
> . . .
>
> It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. . . . [Emphasis added; pp. 646-47.]

[186] The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the

(2) Quelles étaient les obligations fiduciaires d'Indalex en tant qu'administrateur des régimes de retraite, et y a-t-il eu manquement à ces obligations?

a) *Principes juridiques*

[184] Les appelants ne contestent pas que, en tant qu'administrateur des régimes de retraite, Indalex avait des obligations fiduciaires envers les participants et que, à ce titre, elle ne pouvaient agir que dans l'intérêt des bénéficiaires des régimes. Point n'est besoin, aux fins du pourvoi, de déterminer si l'administrateur d'un régime de retraite est fiduciaire en soi ou *ad hoc*, bien qu'il soit assurément rare qu'un tel administrateur n'ait pas d'obligations fiduciaires dans l'exercice de cette fonction (*Burke c. Cie de la Baie d'Hudson*, 2010 CSC 34, [2010] 2 R.C.S. 273, par. 41, conf. 2008 ONCA 394, 67 C.C.P.B. 1, par. 55).

[185] Or, la conclusion portant que, à titre d'administrateur des régimes, Indalex avait des obligations fiduciaires envers les bénéficiaires marque le début de l'examen, et non sa fin, car les obligations fiduciaires n'existent pas en général, mais découlent des intérêts juridiques qui sont précisément en jeu et s'y rattachent (*Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261, par. 31). Comme l'affirme le juge La Forest dans *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574 :

> La nature particulière de cette obligation [du fiduciaire] peut varier selon les rapports concernés [. . .] [C]e ne sont pas tous les droits découlant de rapports présentant des caractéristiques fiduciaires qui justifient une demande pour manquement à une obligation fiduciaire. . .
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> . . .
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> La prétention qu'il y a manquement à une obligation fiduciaire ne peut se fonder que sur le manquement aux obligations particulières qui découlent des rapports dits fiduciaires. . . [Je souligne; p. 646-647.]

[186] Il convient donc d'apprécier la nature et la portée de l'obligation fiduciaire dans le cadre juridique applicable à la relation dont est issue cette

fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175, at para. 141; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 36-37; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

(b) *The Legal Framework of Indalex's Dual Role as a Plan Administrator and Employer*

[187] In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the *PBA*. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

[188] Turning first to the plan documents, I take the salaried plan as an example. Under it, the company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan".

obligation (voir, p. ex., *Sharbern Holding Inc. c. Vancouver Airport Centre Ltd.*, 2011 CSC 23, [2011] 2 R.C.S. 175, par. 141; *Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247, par. 36-37; *K.L.B. c. Colombie-Britannique*, 2003 CSC 51, [2003] 2 R.C.S. 403, par. 41). À titre d'exemple, la règle générale veut que le fiduciaire ait un devoir de loyauté doublé d'une obligation d'éviter tout conflit d'intérêts (voir, p. ex., *Strother c. 3464920 Canada Inc.*, 2007 CSC 24, [2007] 2 R.C.S. 177, par. 35; *Lac Minerals*, p. 646-647). Toutefois, il peut se révéler nécessaire d'adapter cette règle générale au cadre juridique dans lequel doit être exercée une obligation fiduciaire en particulier. Tel est, à mon humble avis, le cas en l'espèce.

b) *Le cadre juridique de la double fonction d'Indalex à titre d'administrateur de régime et d'employeur*

[187] Pour déterminer la nature et la portée de la fonction et des obligations fiduciaires d'Indalex en tant qu'administrateur des régimes, nous devons considérer le cadre juridique dans lequel évolue l'administrateur. Ce cadre juridique découle principalement des documents constitutifs des régimes de retraite et des dispositions pertinentes de la *LRR*, des sources qui doivent être examinées avant toutes autres pour déterminer les obligations fiduciaires spécifiques qui incombent à l'administrateur dans ce contexte.

[188] En ce qui concerne d'abord les documents constitutifs des régimes de retraite, considérons ceux relatifs au régime des salariés. Ils confient à la société l'administration du régime (art. 13.01). Le terme « société » s'entend d'Indalex Limited, et toute mention par le régime d'une mesure prise ou d'un pouvoir discrétionnaire exercé par la société suppose qu'Indalex agit par l'entremise du conseil d'administration ou d'une personne autorisée par celui-ci aux fins du régime (art. 2.09). Suivant l'art. 13.01, le [TRADUCTION] « comité de gestion du conseil d'administration de la société nomme un comité de retraite et de prestations pour agir au nom de la société dans l'exercice de sa fonction d'administrateur du régime. Le comité de retraite et de prestations se prononce de manière définitive

Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

[189] The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

22. (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

(2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

. . .

(4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[190] Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying

sur toute question relative au fonctionnement, à l'interprétation et à l'application du régime ». Le comité de retraite et de prestations a donc pour mandat d'agir pour le compte de la société et, suivant l'art. 2.09, ses actes sont assimilés à ceux de la société. L'article 13.02 énonce les fonctions du comité, dont l'exercice de toute fonction administrative qui ne relève pas du gestionnaire de la caisse, de l'actuaire ou de l'émetteur de tout contrat de rente collective (par. 13.02(1)).

[189] La *LRR* attribue également pouvoirs et obligations à l'administrateur d'un régime. L'article 22 énumère les obligations générales faites à l'administrateur, dont trois importent particulièrement dans les présents pourvois :

22. (1) [Soin, diligence et compétence] L'administrateur d'un régime de retraite apporte à l'administration et au placement des fonds de la caisse de retraite le soin, la diligence et la compétence qu'une personne d'une prudence normale exercerait relativement à la gestion des biens d'autrui.

(2) [Connaissances et compétences particulières] L'administrateur d'un régime de retraite apporte à l'administration du régime de retraite et à l'administration et au placement des fonds de la caisse de retraite toutes les connaissances et compétences pertinentes que l'administrateur possède ou devrait posséder en raison de sa profession, de ses affaires ou de sa vocation.

. . .

(4) [Conflit d'intérêts] L'administrateur, ou si l'administrateur est un comité de retraite ou un conseil de fiduciaires, un membre du comité ou du conseil qui est l'administrateur du régime de retraite ne permet pas sciemment que son intérêt entre en conflit avec ses attributions à l'égard du régime de retraite.

[190] Il n'est pas étonnant que les pouvoirs et les obligations légaux de l'administrateur soient de nature administrative. La plupart ont trait à la gestion interne de la caisse de retraite et à la relation entre l'administrateur du régime de retraite, les bénéficiaires et le surintendant des services financiers (le « surintendant »). Mentionnons la demande au surintendant d'enregistrer le régime ou de le

to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential beneficiaries with information and documents: s. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

[191] Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

[192] The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

[193] Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

[194] This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc. v. 1976 Debentureholders*,

modifier, et le dépôt de la déclaration annuelle (art. 9, 12 et 20 de la *LRR*), la transmission aux bénéficiaires et aux bénéficiaires éventuels admissibles de renseignements et de documents (par. 10(1)12 et art. 25), l'observation de la *LRR* et de son règlement d'application, ainsi que des documents constitutifs du régime (art. 19), l'envoi aux bénéficiaires d'un avis relatif à une modification projetée qui réduirait les prestations (art. 26), le paiement de la valeur de rachat d'une pension différée (art. 42) et le dépôt d'un rapport de liquidation advenant la cessation du régime (art. 70).

[191] Deux autres dispositions importent particulièrement en l'espèce. L'article 56 dispose que l'administrateur a l'obligation de veiller à ce que les cotisations soient versées à la date d'exigibilité et d'en informer le surintendant lorsqu'elles ne l'ont pas été; l'art. 59 habilite l'administrateur à engager une instance judiciaire en cas de défaut de paiement.

[192] Les obligations fiduciaires de l'employeur-administrateur envers les bénéficiaires d'un régime ont trait aux attributions légales et autres susmentionnées; il s'agit des « intérêts juridiques particuliers » auxquels se rattachent les obligations fiduciaires de l'employeur-administrateur.

[193] Un autre aspect important du contexte juridique dans lequel s'inscrivent les obligations fiduciaires d'Indalex à titre d'administrateur des régimes tient à sa double fonction d'employeur et d'administrateur. L'alinéa 8(1)a) de la *LRR* autorise expressément ce double rôle, mais il crée une situation où une même entité peut devoir s'acquitter de deux ensembles distincts d'obligations fiduciaires (les unes envers la société, les autres envers les participants du régime de retraite).

[194] Telle était la situation d'Indalex. À titre d'employeur-administrateur, Indalex agissait par l'entremise de son conseil d'administration, de sorte que ce dernier avait des obligations fiduciaires envers les participants des régimes. Le conseil d'administration avait également l'obligation fiduciaire d'agir au mieux des intérêts de la société (*Loi canadienne sur les sociétés par actions*, L.R.C.

2008 SCC 69, [2008] 3 S.C.R. 560, at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

1985, ch. C-44, al. 122(1)*a*); *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, par. 36). Pour déterminer ce qui est au mieux des intérêts de l'entreprise, le conseil d'administration peut considérer les intérêts des actionnaires, des employés, des créanciers et d'autres personnes. Or, lorsque ces intérêts ne sont pas concordants ou peuvent entrer en conflit, il appartient aux administrateurs, dans le respect de la loi et dans l'exercice de son appréciation commerciale, de déterminer ce qui sert au mieux les intérêts de la société. Par conséquent, le conseil d'administration d'Indalex, en tant qu'employeur-administrateur, ne pouvait pas toujours agir dans le seul intérêt des bénéficiaires des régimes, mais devait aussi s'acquitter de ses obligations envers la société Indalex.

(c) *Breaches of Fiduciary Duty*

c) *Manquements à l'obligation fiduciaire*

[195] Against the background of these legal principles, I turn to consider the Court of Appeal's findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

[195] Au vu de ces principes juridiques, j'examine les conclusions de la Cour d'appel concernant les manquements d'Indalex à ses obligations fiduciaires à titre d'administrateur des régimes. Je le répète, ces manquements sont de trois ordres : l'existence du conflit d'intérêts, les mesures prises dans le cadre de la procédure fondée sur la *LACC* pour réduire ses obligations vis-à-vis des régimes de retraite et la demande présentée en vue de faire faillite.

(i) Conflict of Interest

(i) Conflit d'intérêts

[196] The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

[196] Il faut d'abord se demander en quoi consiste, dans le cas d'Indalex, un conflit d'intérêts ou d'obligations entre sa fonction de décideur commercial et celle d'administrateur de régime, et quelles mesures elle doit alors prendre?

[197] The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict

[197] La Cour d'appel conclut en fait qu'il y a conflit d'intérêts dès qu'Indalex prend une décision de nature commerciale [TRADUCTION] « susceptible d'avoir une incidence sur les droits des bénéficiaires des régimes » (par. 132) et qu'il y a alors manquement immédiat de l'employeur-administrateur à ses obligations fiduciaires envers les participants des régimes de retraite. En toute déférence, il s'agit d'une interprétation beaucoup

arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

[198] This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

[199] Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal — those inherent in the employer's exercise of business judgment — cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

[200] How, then, should we identify conflicts of interest in this context?

[201] In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at § 121, to explain when a conflict of interest occurs in the

trop extensive. On ne saurait dire qu'il y a conflit d'intérêts uniquement parce que l'employeur, dans l'exercice de son pouvoir de gérer la société au mieux des intérêts de celle-ci, prend une mesure susceptible d'avoir une incidence sur les bénéficiaires des régimes.

[198] Telle est la conclusion qui découle nécessairement du contexte législatif. L'existence de conflits apparents qui sont inhérents à la double fonction exercée par une même personne ne peut constituer un manquement à l'obligation fiduciaire, car ces conflits sont expressément autorisés par la loi, laquelle permet à une personne d'exercer les deux fonctions. Rappelons que la *LRR* permet expressément à l'employeur d'administrer un régime (al. 8(1)a)). En outre, les intérêts commerciaux de la société-employeur en général et les intérêts des bénéficiaires d'un régime de retraite liés à l'obtention des prestations promises risquent presque toujours d'entrer en conflit. Toute décision commerciale importante est susceptible de nuire à la solvabilité de la société et, partant, à sa capacité de respecter ses obligations à l'égard du régime. Sous réserve des limites prévues par les documents constitutifs du régime de retraite et de la loi en général, l'employeur peut modifier unilatéralement le régime, voire y mettre fin, des mesures qui peuvent fort bien ne pas cadrer avec les intérêts des bénéficiaires du régime.

[199] De même, les conflits d'intérêts relevés par la Cour d'appel — ceux inhérents à l'appréciation commerciale de l'employeur — ne peuvent emporter à eux seuls le manquement à l'obligation fiduciaire de l'administrateur. Là encore, c'est ce qui appert du régime législatif, qui permet expressément à l'employeur d'administrer un régime.

[200] Comment devons-nous donc déterminer s'il y a conflit d'intérêts dans ce contexte?

[201] Dans *R. c. Neil*, 2002 CSC 70, [2002] 3 R.C.S. 631, le juge Binnie renvoie au *Restatement Third, The Law Governing Lawyers* (2000), § 121, pour expliquer à quelles conditions il y a conflit

context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.

[202] In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect, that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

(ii) Steps in the *CCAA* Proceedings to Reduce Pension Obligations and Notice of Them

[203] The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131-32.

[204] I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

d'intérêts dans le cadre de la relation entre l'avocat et son client (par. 31). À mon avis, le même principe général, adapté aux circonstances, vaut pour l'employeur-administrateur. Il y a donc conflit d'intérêts lorsqu'il existe un risque important que les obligations de l'employeur-administrateur envers la société nuisent de façon appréciable à la défense des intérêts des bénéficiaires d'un régime. Je rappelle cependant que l'obligation de l'employeur-administrateur de représenter les bénéficiaires d'un régime ne s'entend que des attributions et des fonctions énoncées précédemment.

[202] J'estime dès lors que la Cour d'appel a tort de conclure qu'il y avait conflit d'intérêts aussitôt qu'Indalex prenait une décision [TRADUCTION] « susceptible d'avoir une incidence sur les droits des bénéficiaires des régimes » (par. 132). Elle interprète de manière beaucoup trop extensive la notion de conflit éventuel d'intérêts ou d'obligations et celle d'obligation fiduciaire de l'administrateur d'un régime.

(ii) Mesures prises par Indalex dans le cadre de la procédure fondée sur la *LACC* afin de réduire ses obligations vis-à-vis des régimes de retraite et avis de ces mesures

[203] Pour la Cour d'appel, Indalex a manqué à son obligation fiduciaire du seul fait qu'elle a engagé une procédure en application de la *LACC* tout en sachant que les régimes étaient sous-capitalisés, et ce, sans en informer au préalable les bénéficiaires des régimes (par. 139). Si j'interprète bien ses motifs, la décision d'entreprendre cette démarche relevait uniquement de l'administration de la société, et non de l'administration des régimes de retraite (par. 131). La difficulté résidait selon elle dans le risque que la procédure réduise les obligations de la société vis-à-vis des régimes de retraite au détriment des bénéficiaires (par. 131-132).

[204] En toute déférence, je ne suis pas d'accord. Comme ma collègue la juge Deschamps, j'estime que, à elle-seule, la mesure initiale visant à protéger la société contre ses créanciers ne plaçait pas Indalex en situation de conflit d'intérêts ou d'obligations (motifs de la juge Deschamps, par. 72).

[205] First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

> . . . the purpose of the *CCAA* . . . is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

[205] Premièrement, il importe de rappeler que la procédure de la *LACC* n'a pas pour objet de défavoriser les créanciers, mais bien de trouver une solution à l'insolvabilité d'une société qui soit constructive pour tous les intéressés. Comme le fait remarquer ma collègue la juge Deschamps dans *Century Services*, au par. 15 :

> . . . la *LACC* [. . .] a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif.

Dans le même arrêt (par. 59), elle cite également en l'approuvant l'extrait suivant des motifs du juge Doherty, dissident, dans *Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57 :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiati[ve] des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

C'est pourquoi j'incline très peu à conclure que l'employeur-administrateur manque à ses obligations envers les participants des régimes de retraite du seul fait qu'il engage une procédure sur le fondement de la *LACC*.

[206] Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be

[206] Deuxièmement, les faits de la présente affaire n'appuient pas la prétention selon laquelle les intérêts de l'employeur s'opposaient à ceux des bénéficiaires des régimes quant à la décision de se prévaloir ou non de la protection de la *LACC*. On ne saurait sérieusement soutenir qu'une autre mesure aurait protégé davantage les droits des bénéficiaires des régimes. Ni la Cour d'appel ni les parties n'avancent quelque autre solution qui eût été préférable à la protection contre les créanciers demandée sous le régime de la *LACC*. Indalex éprouvait de graves difficultés financières et ses options étaient limitées : elle pouvait présenter une proposition à ses créanciers (suivant la *LACC* ou la *LFI*) ou faire faillite. Qui plus est, les attributions de l'administrateur des régimes

consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

[207] The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA*, as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

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

[208] This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement*

n'englobaient pas le fait d'assurer la solvabilité de la société, et un administrateur indépendant n'aurait pu raisonnablement s'attendre à être consulté relativement à la décision du promoteur des régimes de se prévaloir de la protection de la *LACC*. Enfin, la demande présentée sur le fondement de la *LACC* n'a pas réduit les obligations de l'employeur vis-à-vis des régimes de retraite, si ce n'est temporairement quant à l'obligation d'effectuer des paiements spéciaux, et c'était la seule mesure susceptible de permettre aux régimes de retraite d'obtenir de la société insolvable les sommes qui leur étaient dues. L'administrateur-employeur ne s'est donc pas trouvé en conflit d'intérêts ou d'obligations lorsqu'il a demandé protection afin de demeurer en exploitation au bénéfice de tous les intéressés.

[207] La Cour d'appel conclut en outre que la société a manqué à son obligation fiduciaire en omettant de donner aux bénéficiaires des régimes un avis de sa demande initiale de protection sous le régime de la *LACC*. Je me range encore une fois à l'opinion de ma collègue la juge Deschamps, qui exprime son désaccord avec cette conclusion. Dans sa version en vigueur au moment de la procédure, le par. 11(1) de la *LACC* disposait qu'une partie pouvait engager une procédure sous le régime de la *LACC* sans en donner avis aux intéressés :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

[208] Malgré la nouvelle numérotation issue des modifications apportées à la Loi en septembre 2009 (L.C. 2005, ch. 47, art. 128, entrée en vigueur le 18 septembre 2009, TR/2009-68), la disposition est foncièrement demeurée la même. Le tribunal saisi en vertu de la *LACC* dispose du pouvoir discrétionnaire de rendre une ordonnance initiale *ex parte*. L'exercice de ce pouvoir n'est pas toujours indiqué, mais il peut l'être, voire se révéler nécessaire, afin d'empêcher [TRADUCTION] « les créanciers de réaliser leurs créances en se ruant littéralement sur l'actif dès qu'ils sont informés des difficultés

Act (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194, at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

[209] This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis P. Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). In his initial *CCAA* order, Gascon J. put off the decision regarding the

financières du débiteur » (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 55 (« *Rescue!* »); voir également *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194, par. 7). Les intimés ne contestent pas l'exercice par le juge Morawetz de son pouvoir discrétionnaire de rendre une ordonnance *ex parte* en l'espèce.

[209] Il ne s'ensuit cependant pas qu'il est toujours nécessaire ou acceptable de rendre une ordonnance initiale *ex parte*. Sans prétendre à l'exhaustivité ni vouloir trancher définitivement la question, je fais simplement remarquer l'existence d'au moins trois cas de figure où les tribunaux atténuent l'effet négatif que pourrait avoir sur les créanciers l'ordonnance rendue sans préavis aux parties susceptibles d'être touchées. Premièrement, lorsque la situation de la société débitrice n'est pas urgente, les tribunaux se montrent réticents à accorder une ordonnance *ex parte*. Dans *Rescue!*, Janis P. Sarra explique que les tribunaux s'attendent de plus en plus à ce que, avant de solliciter une suspension sous le régime de la *LACC*, la demanderesse informe les intéressés au préalable de son intention (p. 55). Par exemple, dans *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, le juge Butler opine que, [TRADUCTION] « [d]ans le cadre d'une procédure fondée sur la *LACC*, une demande initiale ne saurait être présentée sans préavis pour le seul motif que cette loi s'applique. Les éléments présentés doivent permettre au tribunal de conclure à l'existence d'une situation d'urgence » (par. 27). Deuxièmement, dans l'ordonnance initiale, les tribunaux précisent que les parties peuvent présenter une nouvelle demande afin d'obtenir l'annulation de l'ordonnance en tout ou en partie (*Rescue!*, p. 55). Soulignons que l'ordonnance initiale du juge Morawetz confère cette faculté (par. 46). Enfin, les tribunaux ne rendent une ordonnance initiale qu'à l'égard des questions qui doivent être tranchées sans délai et ils diffèrent le règlement des autres jusqu'à ce que tous les intéressés aient reçu avis de la demande. Ainsi, dans *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, le juge Morawetz circonscrit l'ordonnance initiale rendue en application de la *LACC* de telle sorte qu'une priorité n'est accordée qu'aux parties auxquelles un avis de la demande a été

suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

donné. La décision de suspendre ou non les paiements spéciaux ou d'octroyer ou non aux créanciers une priorité sur les bénéficiaires des régimes de retraite est reportée à une date ultérieure, soit jusqu'à ce que les parties susceptibles d'être touchées aient été avisées. Le tribunal adopte une démarche apparentée dans l'affaire *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). Dans son ordonnance initiale fondée sur la *LACC*, le juge Gascon reporte la décision de suspendre ou non le versement des cotisations pour service antérieur ou des paiements spéciaux aux régimes de retraite en cause jusqu'à ce que les parties susceptibles d'être touchées reçoivent avis de la demande (par. 7).

[210] Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

[210] En l'espèce, l'omission de donner avis de la demande initiale présentée sur le fondement de la *LACC* ne constituait pas un manquement à l'obligation fiduciaire. La décision d'Indalex d'agir à titre d'employeur-administrateur ne peut conférer aux bénéficiaires des régimes plus d'avantages que si l'administration de leurs régimes avait été confiée à un tiers indépendant. Dans ce dernier cas, Indalex n'aurait pas été tenue de révéler à ce tiers son intention d'engager une procédure sous le régime de la *LACC*. Les intimés demandent à notre Cour d'attribuer à Indalex, l'administrateur, l'avantage que détient Indalex, l'employeur, grâce à sa connaissance de certaines données, dans des circonstances où l'employeur n'aurait vraisemblablement pas communiqué ces données. Je ne suis pas disposé à brouiller ainsi la distinction entre la fonction d'employeur et celle d'administrateur.

[211] I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

[211] Je conclus qu'Indalex n'a pas manqué à son obligation fiduciaire en engageant la procédure fondée sur la *LACC* ou en omettant d'informer les bénéficiaires des régimes de son intention d'obtenir une ordonnance initiale fondée sur la *LACC*.

[212] I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

[212] Je me penche maintenant sur la conclusion de la Cour d'appel selon laquelle la demande et l'obtention des ordonnances DE sans préavis aux bénéficiaires des régimes, ainsi que la demande et l'obtention de l'approbation de la vente constituaient des manquements à l'obligation fiduciaire.

[213] To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one . . . does not mean that all subsequent decisions made during the proceedings are also solely corporate ones": para. 132. It was at this point that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

[214] The DIP orders could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

[215] I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

[216] Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's

[213] D'abord, je conviens avec la Cour d'appel que [TRADUCTION] « même si la décision initiale d'engager une procédure sous le régime de la *LACC* est de nature strictement commerciale [. . .], toutes les décisions ultérieures prises pendant l'instance ne le sont pas pour autant » (par. 132). C'est à cette étape que les intérêts commerciaux d'Indalex sont entrés en conflit avec ses obligations d'administrateur des régimes de retraite.

[214] Les ordonnances DE auraient fort bien pu faire en sorte qu'Indalex ne puisse plus s'acquitter de ses obligations de capitalisation vis-à-vis des bénéficiaires des régimes. Lorsque, à l'issue de son appréciation commerciale et sur le fondement de la *LACC*, Indalex a sollicité des ordonnances qui auraient eu ou auraient pu avoir une telle conséquence, elle était en conflit avec son obligation d'administrateur des régimes de veiller au versement de toutes les cotisations dès leur exigibilité.

[215] Je ne crois cependant pas que la seule existence de ce conflit d'intérêts et d'obligations constituait en soi un manquement à l'obligation fiduciaire dans les circonstances. Je le rappelle, la *LRR* autorise expressément l'employeur à administrer un régime, et les dispositions législatives relatives au conflit d'intérêts doivent être interprétées et appliquées en conséquence. En outre, un administrateur indépendant n'aurait eu aucun rôle décisionnel à jouer dans le déroulement de la procédure fondée sur la *LACC*. À mon sens, la difficulté résidait en l'espèce non pas dans l'existence du conflit, mais bien dans l'omission d'Indalex de prendre quelque mesure afin que les bénéficiaires des régimes aient la possibilité de veiller à la protection de leurs intérêts dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. En résumé, le manquement ne tenait pas à l'existence du conflit, mais plutôt à l'omission de prendre les mesures qu'elle commandait.

[216] Malgré l'omission d'Indalex de pallier le conflit d'intérêts, les bénéficiaires des régimes ont eux-mêmes pris des mesures pour être représentés aux étapes ultérieures de l'instance fondée sur la

breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

[217] Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

[218] Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206 (Ont. S.C.J.). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Ct. J. (Gen. Div.)), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case.

LACC. Les conséquences du manquement d'Indalex ont ainsi été atténuées; je reviendrai plus en détail sur ce point au moment de me pencher sur la fiducie par interprétation.

[217] Néanmoins, aux fins du bon déroulement de toute procédure susceptible d'être engagée ultérieurement en application de la *LACC*, je saisis l'occasion d'offrir des repères en examinant brièvement les mesures que l'employeur-administrateur pourrait prendre pour pallier un tel conflit. Avant toute chose, l'employeur-administrateur qui se trouve en situation de conflit doit en informer le juge saisi sur le fondement de la *LACC*. Il ne suffit pas d'inscrire les bénéficiaires sur la liste des créanciers; le juge doit être informé que le débiteur, en sa qualité d'administrateur de régime, est en conflit d'intérêts ou susceptible de l'être.

[218] Étant donné son expertise et ses connaissances dans ce domaine, le juge saisi en vertu de la *LACC* est bien placé pour déterminer la meilleure façon de faire en sorte que les bénéficiaires d'un régime soient dûment représentés au moment même où se déroule la procédure fondée sur la *LACC*. Informé de l'existence du conflit, le juge peut juger opportun de nommer, aux conditions qui lui paraissent indiquées, un administrateur ou un avocat indépendant à titre d'*amicus curiae*. Il est en effet arrivé qu'un juge nomme un avocat — et détermine les conditions de son mandat — pour représenter dans une instance fondée sur la *LACC* des personnes ayant intenté une action en responsabilité délictuelle, des clients, des pensionnés et des employés non syndiqués (*Rescue!*, p. 278; voir, p. ex., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206 (C.S.J. Ont.)). Dans d'autres cas, le juge peut estimer qu'il est possible de donner avis aux bénéficiaires du régime sans recourir à quelque intermédiaire. À mon sens, la transmission d'un avis, même si elle est souhaitable, peut ne pas toujours être réaliste, et la décision s'y rapportant devrait relever du pouvoir discrétionnaire du juge. En revanche, le juge peut décider de limiter les prélèvements sur le financement DE jusqu'à ce que les bénéficiaires aient reçu un avis (*Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont.

The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

[219] I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

(iii) The Bankruptcy Motion

[220] Indalex also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

[221] It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

(Div. gén.)), par. 24). En définitive, il appartient au juge d'exercer son pouvoir discrétionnaire et d'arrêter la ou les mesures appropriées. Comme l'exprime bien la Cour d'appel, ce qu'il faut se rappeler c'est que l'entreprise insolvable qui est également administrateur de régime ne peut [TRADUCTION] « simplement ignorer les obligations qui lui incombent en tant qu'administrateur des régimes une fois qu'elle a décidé de se prévaloir de la protection de la *LACC* » (par. 132).

[219] J'estime que la Cour d'appel conclut à tort qu'Indalex a manqué à ses obligations fiduciaires d'administrateur des régimes en prenant diverses mesures dans le cadre de la procédure fondée sur la *LACC*. Je conviens cependant avec elle qu'Indalex a manqué à son obligation fiduciaire en omettant de faire ce qu'il fallait pour que les bénéficiaires des régimes puissent être dûment représentés dans le cadre de cette procédure comme si l'administrateur des régimes avait été indépendant.

(iii) La motion présentée en vue de faire faillite

[220] Indalex a aussi demandé la levée de la suspension accordée sur le fondement de la *LACC* afin qu'elle puisse faire cession de ses biens. Comme le dit le juge Campbell, cette démarche [TRADUCTION] « visait à donner effet à l'ordre de priorité qu'Indalex faisait valoir à l'encontre de la fiducie réputée » (par. 52). La Cour d'appel conclut qu'il s'agit d'un manquement aux obligations fiduciaires d'Indalex, car la motion a été présentée [TRADUCTION] « afin de faire échec aux prétentions relatives à la fiducie réputée et d'obtenir le transfert du fonds de réserve aux [débitrices américaines] » (par. 139). En toute déférence, je ne suis pas d'accord.

[221] Il était certainement loisible à Indalex, l'employeur, de présenter une motion en vue de faire cession volontaire de ses biens. L'administrateur d'un régime de retraite n'a ni obligation, ni pouvoir à cet égard. Le problème en l'espèce tient non pas à la présentation de la motion, mais plutôt à ce qu'Indalex a omis de s'attaquer véritablement au problème du conflit entre ses intérêts commerciaux et ses obligations d'administrateur des régimes.

[222] To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

(3) *Was Imposing a Constructive Trust Appropriate in This Case?*

[223] The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

[224] The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85, cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54, by Sopinka J. (dissenting, but not on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it.

[225] As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over

[222] En résumé, j'estime qu'Indalex n'a pas manqué à une obligation fiduciaire lorsqu'elle a engagé la procédure fondée sur la *LACC* ou demandé la mesure en cause. Il y a eu manquement parce qu'Indalex n'a pas fait en sorte que les intérêts des bénéficiaires des régimes de retraite soient effectivement défendus dans le cadre de la procédure liée à son insolvabilité, en particulier lorsqu'elle a demandé l'approbation du financement DE et de la vente, puis présenté une motion en vue de faire faillite.

(3) *Convenait-il en l'espèce d'imposer une fiducie par interprétation?*

[223] La question qui se pose ensuite est celle de savoir si, comme le conclut la Cour d'appel, l'imposition d'une fiducie par interprétation constitue une réparation adéquate du manquement à l'obligation fiduciaire.

[224] La Cour d'appel exerce son pouvoir discrétionnaire d'imposer une fiducie par interprétation, et cet exercice commande la déférence. Une telle mesure ne peut être infirmée en appel que si l'exercice du pouvoir discrétionnaire s'appuie sur un principe erroné (*Donkin c. Bugoy*, [1985] 2 R.C.S. 85, cité dans *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217, par. 54, le juge Sopinka (dissident, mais pas sur ce point)). En toute déférence, les conclusions erronées de la Cour d'appel sur la portée des obligations fiduciaires de l'administrateur du régime nous obligent à revoir les conditions de l'imposition d'une fiducie par interprétation. Qui plus est, la Cour d'appel commet selon moi une erreur de principe lorsqu'elle conclut que l'actif convoité résulte du manquement à l'obligation fiduciaire, de sorte qu'il serait injuste que la partie fautive se l'approprie.

[225] Comme je le mentionne précédemment, la Cour d'appel statue que le fonds de réserve fait l'objet d'une fiducie par interprétation à l'intention des bénéficiaires des régimes à raison d'un montant égal au déficit de liquidation global des deux régimes. En d'autres termes, une fois Indalex devenue insolvable, les bénéficiaires des régimes avaient droit au paiement de l'intégralité de leurs créances

secured creditors, and indeed over other unsecured creditors, assuming there was no deemed trust for the executive plan.

[226] I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

[227] I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

[228] As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for

grâce à l'imposition judiciaire d'une fiducie prenant rang avant les créances garanties, ainsi que les créances chirographaires, à supposer que le régime des cadres n'ait bénéficié d'aucune fiducie réputée.

[226] J'expose précédemment les raisons pour lesquelles je diffère d'opinion avec la Cour d'appel en ce qui concerne le manquement à l'obligation fiduciaire d'Indalex. Vu mes conclusions sur la nature du manquement susceptible de donner droit à réparation, je crois que la fiducie par interprétation ne saurait être imposée en l'espèce et que la Cour d'appel commet une erreur de principe en exerçant son pouvoir discrétionnaire d'accorder cette réparation.

[227] Je suis en désaccord avec la Cour d'appel sur plusieurs points au sujet de la fiducie par interprétation; il ne me paraît pas du tout évident que l'une ou l'autre des conditions auxquelles une telle fiducie peut être imposée est remplie en l'espèce. Je n'examine cependant en détail que l'un de ces points. Comme je l'explique ci-après, l'imposition d'une fiducie par interprétation par suite d'un manquement à une obligation fiduciaire ne constitue une réparation appropriée que si un actif déterminable résulte des actes de l'auteur du manquement et qu'il serait injuste que ce dernier ou, parfois, un tiers, conserve cet actif. Or, selon moi, un tel actif n'a pas résulté de l'omission d'Indalex de pallier véritablement les conflits d'intérêts auxquels donnait lieu la procédure fondée sur la *LACC*.

[228] La Cour d'appel reconnaît que, sauf lorsqu'il est question d'enrichissement sans cause, l'arrêt *Soulos* s'applique en matière de fiducie par interprétation imposée en guise de réparation. Aux paragraphes 19-45 de cet arrêt, la juge McLachlin (maintenant Juge en chef) écrit qu'une fiducie par interprétation peut constituer une réparation appropriée du manquement à l'obligation fiduciaire. Au paragraphe 45, elle énonce quatre conditions qui doivent généralement être réunies pour qu'une fiducie par interprétation puisse être imposée. Même si, dans *Soulos*, la juge McLachlin précise bien qu'il s'agit de conditions qui doivent « généralement » être réunies, toutes les parties au

breach of fiduciary duty. The four conditions are these:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

[229] My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos*, at para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

pourvoi conviennent qu'elles doivent toutes être respectées pour que le tribunal puisse imposer une fiducie par interprétation à titre de réparation par suite d'un manquement à une obligation fiduciaire. Ces quatre conditions sont les suivantes :

> (1) le défendeur doit avoir été assujetti à une obligation en *equity*, c'est-à-dire une obligation du type de celles dont les tribunaux d'*equity* ont assuré le respect, relativement aux actes qui ont conduit à la possession des biens [ou de l'actif];
>
> (2) il faut démontrer que la possession des biens [ou de l'actif] par le défendeur résulte des actes qu'il a ou est réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'*equity* lui imposait à l'égard du demandeur;
>
> (3) le demandeur doit établir qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations;
>
> (4) il ne doit pas exister de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire; par exemple, les intérêts des créanciers intervenants doivent être protégés. [par. 45]

[229] Je doute que la deuxième condition — la possession des biens (ou de l'actif) par Indalex résultant du manquement à ses obligations — soit remplie. Il y a fiducie par interprétation lorsque la loi impose à une personne de détenir un bien précis pour autrui (D. W. M. Waters, M. R. Gillen et L. D. Smith, *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 454 (« *Waters* »)). Lorsqu'une telle réparation est accordée par suite d'un manquement à une obligation ou d'un enrichissement sans cause, elle vise à « empêcher [les personnes] de conserver des biens qu'en toute "conscience" elles ne devraient pas être autorisées à garder » (*Soulos*, par. 17). Il s'ensuit donc que la fiducie par interprétation peut certes constituer une réparation convenable dans divers cas, mais que la possession de biens doit généralement résulter des actes de la partie fautive (parfois, d'un tiers) vis-à-vis du demandeur, cette partie ou ce tiers fautif ne pouvant alors en toute justice et conscience garder les biens. Ce n'est pas le cas en l'espèce.

[230] The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 995:

> . . . for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

[231] While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive trust: p. 678, quoted in *Waters*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. . . . [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

[232] The relevant breach in this case was the failure of Indalex to meaningfully address the conflicts of interest that arose in the course of the

[230] La Cour d'appel conclut que cette deuxième condition est respectée car [TRADUCTION] « [l]'actif [les sommes constituant le fonds de réserve] est directement lié à la procédure dans le cadre de laquelle Indalex a manqué à son obligation fiduciaire » (par. 204). À mon humble avis, cette conclusion s'appuie sur des principes de droit erronés. Pour satisfaire à la deuxième condition, il faut démontrer que la possession de l'actif par Indalex *résulte* du manquement à son obligation, et non seulement, comme le croit la Cour d'appel, qu'il y a un « lien » entre l'actif et la « procédure » dans le cadre de laquelle Indalex a manqué à ses obligations fiduciaires. Rappelons que, dans *Soulos*, *l'acquisition par le défendeur de l'immeuble en cause était la conséquence directe du manquement à son devoir de loyauté* envers le demandeur (par. 48). Telle n'est pas la situation en l'espèce. Comme le dit notre Cour dans l'arrêt *Peter c. Beblow*, [1993] 1 R.C.S. 980, p. 995, dans le contexte d'une allégation d'enrichissement sans cause,

> pour qu'il y ait fiducie par interprétation, le demandeur doit établir qu'il a, du fait de sa contribution, un lien direct avec le bien qui se trouve grevé d'une fiducie.

[231] Même si le manquement à l'obligation fiduciaire diffère grandement de l'enrichissement sans cause, dans l'arrêt *Lac Minerals*, le juge La Forest (avec l'accord du juge Lamer sur ce point) applique un critère semblable à une réparation liée au droit de propriété. Dans cette affaire, la fiducie par interprétation faisait suite à un acte fautif (p. 678, cité dans *Waters*, p. 471). Les remarques du juge La Forest confirment le caractère strict de la norme applicable à l'imposition judiciaire d'une fiducie par interprétation :

> La fiducie par interprétation confère un droit de propriété, mais ce droit ne peut exister que si un droit à une réparation a déjà été établi. Dans la grande majorité des cas, la fiducie par interprétation ne sera pas la réparation appropriée. [. . .] [I]l n'y a lieu de conférer une fiducie par interprétation qu'en présence d'un motif pour accorder au demandeur les droits supplémentaires découlant de la reconnaissance d'un droit de propriété. [p. 678]

[232] Le manquement intervenu en l'espèce consiste dans l'omission d'Indalex de pallier véritablement les conflits d'intérêts qu'a fait naître la

CCAA proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

[233] Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

[234] Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result.

procédure fondée la *LACC*. (Le manquement qui aurait découlé de la motion présentée en vue de faire faillite n'a pas à être considéré puisque la motion n'a été examinée et ne peut donc pas avoir permis l'entrée en possession de l'actif.) L'actif en cause correspond au fonds de réserve constitué par prélèvement sur le produit de la vente de l'entreprise en exploitation d'Indalex. Ce manquement d'Indalex n'est pas à l'origine des fonds que le contrôleur a conservés en constituant le fonds de réserve.

[233] Quelle peut être l'issue de l'allégation des intimés selon laquelle il y a eu manquement aux exigences de procédure? Suivant la plus favorable, ni le financement DE ni la vente n'auraient été approuvés. Or, cette thèse est irrémédiablement viciée. Premièrement, en ce qui concerne la procédure d'approbation du financement DE, aucun élément de preuve n'établit que si Indalex avait pallié ses conflits dans le cadre de cette procédure, le financement aurait été refusé ou autorisé à d'autres conditions. Parfaitement informé de la situation des régimes de retraite, le juge saisi sur le fondement de la *LACC* estime que le financement DE [TRADUCTION] « s'impose », que « les requérantes ne disposent d'aucune autre solution permettant la continuité de l'exploitation » et que « les avantages du financement DE pour les intéressés et les créanciers l'emportent sur tout préjudice que pourrait causer aux créanciers non garantis l'octroi d'un financement garanti par une superpriorité » (motifs du juge Morawetz, 8 avril 2009, par. 6 et 9). En fait, les intimés réclament des fonds qui ont été obtenus uniquement grâce à la procédure qu'ils contestent aujourd'hui. Vu l'absence d'éléments de preuve voulant que des modalités de financement plus avantageuses aient pu être obtenues, et comme le juge est bien conscient de l'existence des réclamations des bénéficiaires des régimes et qu'il conclut que le financement DE s'impose, la prétention des intimés est non seulement conjecturelle, mais va aussi directement à l'encontre des conclusions du juge.

[234] En ce qui concerne l'approbation de la vente et de la répartition de l'actif, il est clair que les bénéficiaires des régimes ont été représentés de manière indépendante, mais que cette mesure n'a

Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

[235] The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs": trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

[236] There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust — i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's breaches of duty to the plaintiff — had been established.

[237] I would add only two further comments with respect to the constructive trust. A major concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund

rien changé au résultat. En juillet 2009, devant le juge Campbell, pendant toute l'audition des motions visant l'approbation de la vente et la répartition provisoire du produit de la vente, les intérêts des deux régimes ont bel et bien été défendus, même si Indalex n'y a peut-être pas été pour grand-chose.

[235] Par l'entremise d'un avocat compétent, les retraités du régime des cadres se sont opposés à la vente en arguant que, selon le septième rapport du contrôleur, les valeurs de liquidation permettaient aux créanciers chirographaires de recouvrer plus d'argent. Le juge saisi des motions a rejeté leur opposition [TRADUCTION] « au motif qu'aucun élément de preuve n'appuyait clairement cette prétention et que, de toute façon, l'opération approuvée garantissait la valeur de l'actif pour les fournisseurs et les clients, et préservait environ 950 emplois » (motifs du juge Campbell en première instance, par. 13 (je souligne)). Les retraités du régime des cadres et le Syndicat, qui représentait certains participants du régime des salariés, a contesté la répartition projetée du produit de la vente. Il a dès lors été convenu que le juge entendrait leurs arguments au plus tôt et que le contrôleur conserverait des fonds suffisants pour donner suite aux prétentions des retraités dans le cas où il y serait fait droit (motifs du juge Campbell en première instance, par. 14-16).

[236] Aucun élément de preuve n'appuie la prétention que l'actif constituant le fonds de réserve découle du manquement d'Indalex à son obligation fiduciaire en tant qu'administrateur de régime. Je suis donc d'avis que la Cour d'appel a tort de conclure que la deuxième condition à remplir pour qu'une fiducie par interprétation puisse être imposée — démontrer que la possession des biens par le défendeur résulte des manquements à ses obligations envers le demandeur — a été remplie.

[237] Voici deux autres remarques au sujet de la fiducie par interprétation. L'une des préoccupations principales de la Cour d'appel est que, à défaut d'une telle fiducie par interprétation, le fonds de réserve se retrouve en la possession de sociétés ayant un lien de dépendance avec Indalex. Les débitrices américaines ont réclamé l'octroi du fonds

because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

de réserve en faisant valoir les sommes versées en exécution de leur garantie des prêts DE et qu'elles étaient par conséquent subrogées aux droits des créanciers DE et bénéficiaient de la priorité accordée à ces derniers. Sun Indalex a présenté une réclamation dans le cadre de la procédure de faillite intentée aux É.-U. à titre de créancier garanti des débitrices américaines. La Cour d'appel formule sa réticence comme suit : [TRADUCTION] « Permettre à Sun Indalex de recouvrer des sommes pour le compte [des débitrices américaines] équivaudrait à autoriser le débiteur d'obligations fiduciaires à tirer profit de manquements à celles-ci, et ce, au détriment des créanciers de ces obligations » (par. 199).

[238] There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

[238] À mon humble avis, cette approche comporte deux failles. Les débitrices américaines ont dû véritablement débourser de l'argent pour honorer leurs garanties. De plus, à moins qu'un fondement juridique permette de faire abstraction de la personnalité morale distincte de chacune des entreprises, leur existence distincte doit être respectée. Ni les parties ni la Cour d'appel n'ont avancé un tel fondement.

[239] Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach — the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process — had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a $6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

[239] Enfin, il convient de signaler que l'imposition d'une fiducie par interprétation est une mesure totalement disproportionnée au manquement d'Indalex à son obligation fiduciaire. Ce manquement — l'omission de pallier véritablement les conflits d'intérêts nés à l'occasion de la procédure fondée sur la *LACC* — n'a pas eu d'incidence défavorable sur les bénéficiaires des régimes par suite de la procédure d'approbation de la vente dont a résulté la possession des « biens » en cause. Les intérêts des régimes ont été dûment défendus avant que la vente ne soit approuvée et les fonds répartis. Tout compte fait, le tribunal a néanmoins estimé que la vente était dans le meilleur intérêt de l'entreprise. À mon humble avis, priver les autres créanciers de 6,75 millions de dollars pour réparer ce manquement est disproportionné au point d'être déraisonnable.

[240] A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for

[240] L'imposition judiciaire d'une fiducie par interprétation longtemps après les faits à titre de réparation risque de nuire à la certitude qui est

commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

[241] I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

C. *Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?*

[242] Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

D. *Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?*

(1) Introduction

[243] The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

[244] With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to

essentielle à l'activité commerciale et qui est particulièrement importante lorsqu'il s'agit de financer le sauvetage d'une entreprise insolvable. Imposer une fiducie par interprétation par suite du manquement à l'obligation fiduciaire de veiller à ce que les bénéficiaires des régimes de retraite jouissent de garanties procédurales, alors qu'ils en ont bénéficié dans les faits, se révèle inéquitable au vu de l'ensemble des circonstances.

[241] Je conclus que la fiducie par interprétation ne constitue pas une réparation appropriée en l'espèce et que la Cour d'appel a tort, sur le plan des principes, de l'imposer.

C. *Troisième question en litige : La Cour d'appel a-t-elle tort de conclure que la superpriorité accordée dans le cadre de la procédure fondée sur la LACC ne confère pas de préséance par application de la prépondérance fédérale?*

[242] Bien que je ne sois pas d'accord avec ma collègue la juge Deschamps en ce qui concerne la portée de la fiducie réputée du par. 57(4), je conviens que si une fiducie est réputée exister en l'espèce, la créance DE prend rang avant elle en application de la doctrine de la prépondérance fédérale (par. 48-60).

D. *Quatrième question en litige : La décision de la Cour d'appel sur les dépens du Syndicat est-elle entachée d'une erreur?*

(1) Introduction

[243] L'adjudication des dépens en Cour d'appel s'est révélée assez complexe. Bien que le volet du présent pourvoi relatif aux dépens ne vise que ceux adjugés au Syndicat, il convient de revoir en détail l'ordonnance du tribunal inférieur sur les dépens afin de bien saisir les prétentions de cette partie.

[244] Pour ce qui concerne les dépens en Cour d'appel, il n'y a pas d'adjudication favorable ou défavorable au contrôleur étant donné l'entente préalable conclue avec les anciens cadres et le Syndicat. La Cour d'appel ordonne toutefois que les anciens cadres et le Syndicat, qui ont gain de

costs on a partial indemnity basis fixed at $40,000 inclusive of taxes and disbursements from Sun Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, 2011 ONCA 578, 81 C.B.R. (5th) 165, at para. 7.

[245] Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of $269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

[246] USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the

cause, se voient adjuger sur la base de l'indemnisation partielle des dépens de 40 000 $, frais et débours compris, payables solidairement par Sun Indalex et le syndic américain (décision relative aux dépens, 2011 ONCA 578, 81 C.B.R. (5th) 165, par. 7).

[245] Le surintendant, Morneau Shepell Ltd., et les anciens cadres ont conclu une entente en ce qui concerne les honoraires et les débours, et la Cour d'appel l'a approuvée. Les anciens cadres ont obtenu, sur la base d'une indemnisation complète, la somme de 269 913,78 $ pour les honoraires et les débours, payable par prélèvement sur la caisse de retraite des cadres correspondant aux prestations de retraite accumulées respectivement par les 14 anciens cadres, puis répartie entre ces derniers selon leurs droits respectifs à pension aux termes du régime. En d'autres termes, les dépens ne devaient pas être supportés par les trois membres du régime des cadres qui n'ont pas pris part à l'instance (décision de la C.A. relative aux dépens, par. 2). Les dépens de l'appel payables par Sun Indalex et le syndic américain devaient être versés à la caisse du régime des cadres puis répartis entre les 14 anciens cadres selon leurs droits à pension suivant leur régime.

[246] Le Syndicat a demandé le paiement de ses dépens à partir de la caisse du régime des salariés. La Cour d'appel a cependant rejeté la demande au motif que le Syndicat se trouvait dans une [TRADUCTION] « situation fondamentalement différente » de celle des anciens cadres (décision relative aux dépens, par. 3). Ces derniers étaient bénéficiaires de la caisse de retraite (14 des 17 participants au régime), ils avaient consenti au paiement des dépens à partir de leurs droits respectifs à des prestations et ceux qui n'avaient pas consenti à ce prélèvement n'étaient pas tenus à ce paiement. En revanche, le Syndicat était l'agent négociateur (et non le bénéficiaire) de seulement 7 des 169 participants du régime des salariés, dont aucun n'avait été avisé du paiement des frais de justice par prélèvement sur leur régime, ou y avait consenti. En outre, le Syndicat a demandé et demande toujours que ses dépens soient payés à partir de la caisse de retraite, ce qui diffère sensiblement de l'ordonnance rendue en faveur des anciens cadres. Ces derniers ont expressément fait en sorte que leur décision d'engager l'instance

event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

(2) Standard of Review

[247] In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

(3) Analysis

[248] I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

ne compromette pas les prestations de retraite des participants qui n'avaient pas retenu les services d'un avocat, même s'ils auraient évidemment tiré avantage d'un dénouement favorable au régime des cadres. Le Syndicat n'entend pas mettre les 162 participants qu'il ne représente pas à l'abri du risque lié à la poursuite. Il demande que tous les participants partagent ce risque même s'ils ne représentent que 7 d'entre eux. La démarche du Syndicat était donc substantiellement différente de celle des anciens cadres et que la cour a approuvée.

(2) Norme de contrôle

[247] Dans *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678, le juge Rothstein statue que « l'adjudication des dépens est un exemple typique d'une décision discrétionnaire » (par. 126). L'attribution discrétionnaire de dépens ne doit donc être annulée en appel que si le tribunal inférieur « a commis une erreur de principe ou si cette attribution est nettement erronée » (*Hamilton c. Open Window Bakery Ltd.*, 2004 CSC 9, [2004] 1 R.C.S. 303, par. 27).

(3) Analyse

[248] Je ne vois en l'espèce aucune raison de revenir sur la décision de la Cour d'appel quant aux dépens. À mon avis, les prétentions du Syndicat reposent en grande partie sur une interprétation erronée de la décision de la Cour d'appel à cet égard. Contrairement à ce que fait valoir le Syndicat, la Cour d'appel *ne* tient *pas* le consentement des bénéficiaires du régime pour une condition préalable au paiement des dépens à partir de la caisse de retraite. Il est aussi erroné de laisser entendre que la décision relative aux dépens fait en sorte que [TRADUCTION] « les bénéficiaires ne peuvent être indemnisés des dépens que lorsqu'il existe un surplus dans la caisse de retraite en fiducie » ou qu'ils ne peuvent « financer l'exercice d'un recours lorsque la caisse est déficitaire » (mémoire du Syndicat, par. 71 et 76). Je ne considère pas non plus que, dans sa brève décision, la Cour d'appel établit la règle qu'un syndicat représentant les bénéficiaires d'une caisse de retraite ne peut être indemnisé de ses dépens par la caisse de retraite parce qu'il n'est pas lui-même bénéficiaire.

[249] The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

[250] The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

[251] The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

[252] I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The factors set out in *Nolan* and other cases cited therein are best understood as highly relevant

[249] La thèse du Syndicat paraît avoir pour prémisses le droit qu'il aurait au paiement des dépens parce qu'il satisfait au critère qu'il formule à cet égard dans son mémoire et, puisque les participants du régime des cadres ont obtenu le paiement de leurs dépens à partir de leur caisse de retraite, le droit du Syndicat au paiement de ses dépens par prélèvement sur la caisse de retraite des salariés. J'estime néanmoins que ces prémisses ne sont pas valables.

[250] La décision d'ordonner le paiement de dépens à partir d'une caisse de retraite demeure discrétionnaire. Dans *Nolan*, le juge Rothstein considère les différentes questions que se posent les tribunaux pour décider d'adjuger ou non à une partie des dépens qui seront payés par prélèvement sur une fiducie de retraite. Dans *Nolan*, la première considération générale était celle de savoir si l'objet du litige est la bonne administration de la fiducie. Pour se prononcer, les tribunaux se sont posé les questions suivantes : (1) le litige concerne-t-il essentiellement l'interprétation des documents constitutifs du régime; (2) vise-t-il à clarifier un aspect problématique du droit applicable; (3) constitue-t-il le seul moyen de préciser les droits des parties; (4) la mauvaise administration est-elle alléguée; (5) y a-t-il absence d'incidence sur les autres bénéficiaires de la fiducie? (*Nolan*, par. 126).

[251] La deuxième considération générale examinée au par. 127 de l'arrêt *Nolan* est celle de savoir si le litige a été de nature contradictoire, ce qui soulève les questions suivantes : (1) la partie déboutée alléguait-elle le manquement à l'obligation fiduciaire; (2) le litige ne servait-il que les intérêts d'une catégorie de participants, et si les demandeurs avaient eu gain de cause, des dépens auraient-ils été imposés à d'autres participants; (3) le litige avait-il quelque fondement?

[252] Je ne crois pas qu'il convienne de faire des deux considérations retenues dans *Nolan* (lesquelles constituent le critère applicable au paiement des dépens que formule le Syndicat) le critère qui permet de déterminer le droit à l'adjudication des dépens dans le contexte des régimes de retraite.

considerations guiding the exercise of judicial discretion with respect to costs.

[253] The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

[254] The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

[255] The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation — the vast majority I would add — would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

> The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

Il est préférable de voir dans les facteurs énoncés dans *Nolan* — et dans la jurisprudence qui y est citée — des considérations de grande importance qui orientent les tribunaux dans l'exercice de leur pouvoir discrétionnaire en matière de dépens.

[253] Comme l'instance engagée en l'espèce portait sur des points de droit nouveaux, son issue était incertaine et les demandeurs couraient le risque d'être déboutés. La Cour d'appel opine essentiellement que le Syndicat, qui représentait seulement 7 des 169 participants du régime, ne devait pas être en mesure, dans les faits, d'imposer à tous les participants du régime, dont la plupart n'étaient pas membres du Syndicat, les risques inhérents au litige sans les consulter. Quels que puissent être les arguments invoqués à l'encontre de la décision de la Cour d'appel à la lumière de l'issue favorable du recours et du partage par tous les participants du régime des gains obtenus, l'échec du recours ne saurait justifier que tous les participants d'un régime déjà sous-capitalisé subissent les conséquences pécuniaires du risque couru.

[254] Suivant la seconde prémisse de la prétention du Syndicat, si les participants du régime des cadres obtiennent paiement de leurs dépens à partir de leur caisse de retraite, les participants du régime des salariés devraient l'obtenir également. Or, telle n'est pas la teneur exacte de l'ordonnance de la Cour d'appel relative au régime des cadres.

[255] Suivant cette ordonnance, seule la partie de la caisse de retraite attribuable aux participants qui ont pris part au recours — la grande majorité d'entre eux, faut-il le préciser — contribue au paiement des dépens même si tous les participants du régime tirent avantage du dénouement favorable. La Cour d'appel signale d'ailleurs ce qui suit :

> [TRADUCTION] Les retraités représentés par avocat, soit 14 des 17 participants du régime des cadres, ont consenti au paiement des dépens à partir de leurs droits respectifs à des prestations, et ceux qui n'ont pas consenti à ce prélèvement ne seront pas tenus au paiement. [Décision relative aux dépens, par. 3]

[256] The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

[257] In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

[258] I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

IV. Disposition

[259] I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February 18, 2010 orders of Campbell J.

[260] With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

[261] I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and

[256] La Cour d'appel approuve donc un accord sur les dépens qui n'expose pas à un risque supplémentaire les fonds constituant les caisses de retraite et devant permettre le versement des prestations auxquelles ont droit ceux qui n'appuient pas l'exercice du recours. Par conséquent, elle n'applique pas au régime des cadres le critère qui, selon le Syndicat, vaudrait pour le paiement des dépens, car l'ordonnance relative aux dépens découle d'un accord et elle ne prévoit pas le paiement des dépens par prélèvement sur la caisse de retraite dans sa globalité.

[257] S'agissant de la demande du Syndicat, nul accord n'est intervenu au même effet, et ce n'était pas seulement les participants derrière le recours qui s'exposaient au risque lié à l'issue de celui-ci.

[258] Je ne vois aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du Syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du pourvoi devant notre Cour. Je suis d'avis de rejeter sans frais le pourvoi du Syndicat relatif aux dépens.

IV. Dispositif

[259] Je suis d'avis d'accueillir les pourvois de Sun Indalex, de FTI Consulting et de George L. Miller, d'annuler les ordonnances de la Cour d'appel de l'Ontario et de rétablir celles rendues par le juge Campbell le 18 février 2010, sauf dans la mesure précisée ci-après.

[260] En ce qui concerne les dépens, je suis d'avis d'annuler les ordonnances de la Cour d'appel sur les dépens afférents aux appels interjetés devant elle et d'ordonner que chacune des parties paie ses propres dépens devant la Cour d'appel et devant notre Cour.

[261] Je suis d'avis de ne pas modifier les par. 9 et 10 de l'ordonnance de la Cour d'appel rendue concernant l'appel des anciens cadres, de sorte que les débours et honoraires de ces derniers, établis sur la base de l'indemnisation complète, qui totalisent 269 913,78 $, soient payés par prélèvement sur la partie de la caisse de retraite du régime des cadres

specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

[262] I would dismiss the USW costs appeal, but without costs.

The reasons of LeBel and Abella JJ. were delivered by

LeBel J. (dissenting) —

I. Introduction

[263] The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

[264] I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

[265] Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA*

correspondant aux prestations de retraite accumulées respectivement par les 14 anciens cadres; plus particulièrement, les dépens seront répartis entre les 14 anciens cadres en fonction de leurs droits respectifs à pension aux termes du régime et ne seront pas supportés par les trois autres participants.

[262] Je suis d'avis de rejeter sans frais le pourvoi interjeté par le Syndicat relativement aux dépens.

Version française des motifs des juges LeBel et Abella rendus par

Le juge LeBel (dissident) —

I. Introduction

[263] Les participants à deux régimes de retraite établis par Indalex Limited (« Indalex ») risquent de perdre au moins la moitié de leurs prestations de retraite du fait de l'insolvabilité de leur employeur et de l'arrangement homologué par la Cour supérieure de justice de l'Ontario en application de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). La Cour d'appel de l'Ontario a jugé que ces participants avaient droit à une réparation. Mes collègues, les juges Deschamps et Cromwell, arrivent à la conclusion contraire, pour des motifs différents et en partie contradictoires. Avec égard pour leur opinion, et à l'instar de la Cour d'appel, je suis d'avis que la fiducie par interprétation peut s'appliquer en l'espèce et devrait être imposée, pour les motifs qui suivent.

[264] Je ne résumerai pas les faits de l'affaire, mes collègues les ayant déjà exposés. Je m'y reporterai au besoin dans mes motifs. Cependant, avant d'expliquer mes divergences d'opinions avec mes collègues, j'indiquerai brièvement les questions de droit sur lesquelles je souscris, en totalité ou en partie, à leurs motifs.

[265] À l'instar de mes collègues, je conclus que le régime des cadres ne pouvait être protégé par aucune fiducie réputée résultant de l'application du par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), puisque ce régime

proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

[266] But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

[267] Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very concretely,

n'avait pas été liquidé lorsque la procédure fondée sur la *LACC* a été enclenchée. Comme la juge Deschamps, je conclus à l'existence d'une fiducie réputée dans le cas du déficit de liquidation du régime des salariés. Je reconnais toutefois aussi que la priorité de la créance des prêteurs au débiteur-exploitant (« DE ») sur toutes les autres l'emporte, par application du principe de la prépondérance fédérale. Je conviens également qu'il faut rejeter l'appel interjeté par le Syndicat des Métallos sur la question des dépens.

[266] Toutefois, malgré le respect que je porte à mes collègues, je conçois différemment d'eux la nature et la portée des obligations fiduciaires de l'employeur qui choisit d'administrer un régime de retraite régi par la *LRR*. Sa double fonction n'autorise pas l'employeur à faire preuve de laxisme dans la définition et l'exercice de ses obligations fiduciaires, ni ne justifie ses actes répréhensibles. Au contraire, comme je l'expliquerai, j'estime qu'Indalex a non seulement manqué à ses obligations envers les bénéficiaires, mais adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation. Dans cette mesure, je suis d'avis de confirmer les motifs de la juge Gillese et le jugement de la Cour d'appel (2011 ONCA 265, 104 O.R. (3d) 641).

II. Les obligations fiduciaires de l'employeur en sa qualité d'administrateur d'un régime de retraite

[267] Avant d'analyser les obligations de l'employeur à titre d'administrateur d'un régime de retraite visé par la *LRR*, il faut examiner la situation des bénéficiaires. Qui sont-ils? À quelle période de leur vie en sont-ils? En quoi consistent leurs points vulnérables? Une relation fiduciaire s'entend de la relation factuelle et juridique entre un bénéficiaire vulnérable et un fiduciaire qui détient et peut exercer un pouvoir sur le bénéficiaire dans les situations prévues par la loi. L'analyse d'une telle relation nécessite un examen attentif des caractéristiques du bénéficiaire. Il ne faut pas s'en tenir à une perspective théorique et détachée, en négligeant de voir, très concrètement, comment la

this relationship works or can be twisted, perverted or abused, as was the situation in this case.

[268] The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal intended when it imposed a constructive trust.

[269] Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a

relation fonctionne et comment il est possible de la fausser, de la faire dévier ou d'en abuser, comme ce fut le cas en l'espèce.

[268] Les bénéficiaires se trouvaient dans une position de grande vulnérabilité par rapport à Indalex. Ils ne jouissaient pas de la protection que l'existence d'un administrateur indépendant aurait pu leur assurer. Ils n'avaient pas la possibilité de donner leur avis ni de participer aux décisions à l'égard de la gestion des régimes. Toute l'information sur les régimes et sur leur situation leur provenait d'Indalex, à titre à la fois d'employeur et d'administrateur. Leur vulnérabilité particulière découlait essentiellement de leur relation avec Indalex, qui assumait cette double fonction (*Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247, par. 68, le juge Cromwell). La nature de cette relation a entraîné des conséquences très concrètes sur leurs intérêts. Par exemple, comme le signale la juge Gillese dans ses motifs (par. 40), les décisions prises au fil de la gestion du régime des cadres et pendant la procédure fondée sur la *LACC* risquent de faire perdre aux participants entre la moitié et les deux tiers de leurs prestations, à moins d'une injection de fonds. Dans le cas des bénéficiaires retraités ou en fin de carrière, il s'agit probablement de pertes permanentes. Leur vie et leurs attentes s'en trouvent profondément affectées. Pour la plupart d'entre eux, ces pertes sont irrémédiables; aucun arrangement ne leur permettra d'entamer une nouvelle étape de leur vie. Nous ne devons pas considérer la situation des bénéficiaires comme une conséquence indirecte regrettable, mais inévitable, des fluctuations de l'économie. À mon avis, la loi devrait offrir une certaine protection aux bénéficiaires, et c'est ce que la Cour d'appel a tenté de faire en imposant la fiducie par interprétation.

[269] Indalex se trouvait en situation de conflit d'intérêts dès qu'elle a envisagé de demander la protection de la *LACC* et de proposer un arrangement à ses créanciers. Du point de vue de l'entreprise, on ne pourrait guère trouver à redire à cette décision. Il s'agissait d'une décision d'affaires. Cependant, Indalex jouait en même temps le rôle de fiduciaire à

fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

[270] It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

[271] Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained

l'égard des participants aux régimes et des retraités, et c'est là où le bât blesse. L'analogie avec les « deux chapeaux » ne constitue pas un moyen de défense pour Indalex. Elle ne pouvait pas mettre la relation fiduciaire de côté à sa guise lorsque cette relation entrait en conflit avec ses obligations ou ses décisions d'affaires. Tout au long de la procédure intentée sous le régime de la *LACC* et jusqu'à la nomination d'un administrateur indépendant (Morneau Shepell Ltd.) qui s'est substitué à elle, elle demeurait une fiduciaire.

[270] Certes, la *LRR* autorise un employeur à agir à titre d'administrateur d'un régime de retraite en Ontario. Le législateur admet dans ces cas la possibilité d'un conflit d'intérêts. Néanmoins, à mon avis, rien dans la *LRR* ne permet de conclure que l'employeur, en sa qualité d'administrateur, serait assujetti à une norme moindre ou assumerait des fonctions et des obligations moins strictes qu'un administrateur indépendant. Il demeure un fiduciaire aux termes de la loi et en common law (*LRR*, par. 22(4)). L'employeur n'est pas tenu d'assumer le fardeau de l'administration des régimes de retraite qu'il a convenu d'établir ou qui sont le fruit de décisions antérieures. Par contre, s'il choisit de l'assumer, une relation fiduciaire prend naissance et l'on s'attend à ce que l'employeur soit capable d'éviter ou de régler les conflits d'intérêts susceptibles d'intervenir. Lorsque cela se révèle impossible, l'employeur demeure soumis à ses obligations fiduciaires et ne peut s'en débarrasser sommairement.

[271] Dès qu'Indalex a envisagé la possibilité d'engager une procédure fondée sur la *LACC* et a opté pour cette solution, il aurait dû lui paraître évident que sa décision engendrerait des conflits avec les intérêts des bénéficiaires des régimes de retraite, en contravention au par. 22(4) de la *LRR*, et que la situation deviendrait insoutenable. Compte tenu de la nature des obligations qui lui incombaient à titre d'administrateur et de fiduciaire, Indalex ne pouvait plus coiffer « deux chapeaux ». Indalex avait le devoir de protéger les intérêts de la société, mais elle devait aussi s'acquitter de ses obligations fiduciaires envers les participants et bénéficiaires des régimes. Je ne lui reproche pas d'avoir présenté une demande sous le régime de la

this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

[272] The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

[273] Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were

LACC, mais plutôt de ne pas avoir alors renoncé à administrer les régimes. Elle a même continué à les administrer pendant la procédure en vue de conclure un arrangement. D'autres conflits d'intérêts et manquements à ses obligations fiduciaires ainsi qu'aux règles fondamentales d'équité procédurale devant la Cour supérieure ont découlé de cette décision initiale. Qui plus est, Indalex a conservé tout au long de cette procédure une attitude fortement contraire aux intérêts des bénéficiaires, malgré le fait qu'elle administrait toujours les régimes, à tout le moins théoriquement.

[272] Si la *LRR* offre à l'employeur le choix d'agir à titre d'administrateur d'un régime de retraite, elle ne l'autorise pas à manquer aux obligations fiduciaires qui découlent de cette fonction et il ne faudrait pas conclure qu'elle invite les tribunaux à escamoter les conséquences de tels manquements. Cette faculté de choisir présuppose la capacité de l'employeur-administrateur d'éviter les conflits d'intérêts qui entraînent de tels manquements. L'employeur qui choisit d'agir à titre d'administrateur ne saurait prétendre se trouver dans la même situation que l'État qui s'acquitte des obligations fiduciaires que lui impose la Constitution ou la loi à l'égard de certains groupes de la société. Ces obligations incombent à l'État, non pas par choix, mais en raison de son rôle. Dans ces circonstances, l'État est souvent appelé à concilier des intérêts opposés avec ses obligations envers la société en général (*Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261, par. 37-38) en s'acquittant de ses obligations fiduciaires. Si Indalex devait concilier des intérêts et des obligations contradictoires, comme elle le prétend, elle ne pouvait pas conserver la fonction d'administrateur qu'elle avait assumée de son plein gré. La solution consistait non pas à mettre en veilleuse sa fonction d'administrateur avec les obligations fiduciaires en découlant, mais à y renoncer et à la transférer avec diligence à un administrateur indépendant.

[273] Il était loisible à Indalex de demander la protection de la *LACC*. Toutefois, il lui fallait dans ce cas prendre des mesures pour éviter les conflits d'intérêts. Son inaction a forcé les

left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

> When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:
>
> > In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction — but that is for another day.
>
> Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [R.F., at paras. 54-55]

[274] I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its

participants aux régimes à se débrouiller de leur mieux pour rattraper le train en marche une fois que le processus de financement DE assorti d'une priorité sur toutes les autres créances avait été mis en branle. Compte tenu de la manière dont ce processus a été engagé, un délai considérable s'est écoulé avant que les bénéficiaires puissent y participer réellement. Dans les faits, le Syndicat des Métallos, qui ne représentait qu'un petit nombre de bénéficiaires du régime des salariés, a agi en leur nom après le début du processus. Pour leur part, les participants au régime des cadres ont retenu les services d'un avocat. Cependant, du début à la fin, ils se sont heurtés à des difficultés concernant les avis, les délais et leur capacité de participer au processus. En effet, tout au long de la procédure intentée sous le régime de la *LACC*, le contrôleur et Indalex semblent s'être souciés davantage d'écarter les participants aux régimes que de veiller à ce qu'ils puissent être entendus. Le passage suivant des arguments présentés devant notre Cour par Morneau Shepell Ltd., l'administrateur ultérieur du régime, résume bien la conduite d'Indalex et du contrôleur à l'égard des bénéficiaires, dont les observations ne semblaient jamais tomber à point :

> [TRADUCTION] Lorsque l'avocat représentant les retraités a comparu à nouveau à l'audience sur la motion en approbation du processus de vente par soumission, ses objections ont été considérées comme prématurées :
>
> > À mon avis, les questions soulevées par les retraités n'ont aucune incidence sur le processus de vente par soumission. Les retraités pourront soulever ces questions lorsqu'une motion en homologation d'une opération sera présentée — ce qui n'est pas le cas maintenant.
>
> Ce n'est que lorsque l'avocat a comparu relativement à la motion en homologation de la vente, conformément aux directives du juge des requêtes, que les préoccupations des bénéficiaires du régime de retraite ont finalement été entendues. À ce moment-là, selon les appelants, l'intervention des bénéficiaires arrivait trop tard et constituait une contestation indirecte de l'ordonnance DE initiale. Or, il ne peut pas être toujours soit trop tôt soit trop tard pour les groupes intéressés. [m.i., par. 54-55]

[274] Je ne saurais passer sous silence la tentative ratée d'Indalex de faire cession de ses biens

business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

en faillite après l'homologation de la vente de l'entreprise. Cette manoeuvre visait entre autres à nuire aux intérêts des participants aux régimes. À l'époque, Indalex cumulait toujours ses deux fonctions, du moins sur le plan juridique. Cependant, ses obligations fiduciaires ne se trouvaient de toute évidence pas au centre de ses préoccupations. Les conflits d'intérêts se sont multipliés au cours de la procédure. Au lieu d'essayer de les régler, Indalex les a balayés du revers de la main. Elle a ainsi manqué à ses obligations fiduciaires et aux prescriptions du par. 22(4) de la *LRR*.

III. Procedural Fairness in *CCAA* Proceedings

III. L'équité procédurale dans une procédure intentée sous le régime de la *LACC*

[275] The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

[275] La manière dont l'instance s'est déroulée devant la Cour supérieure résultait, du moins en partie, du non-respect par Indalex de ses obligations fiduciaires. Les points de procédure soulevés devant la cour n'ont pas permis d'atténuer les conséquences de ces manquements. Certes, les bénéficiaires ont finalement obtenu ou reçu certains renseignements concernant la procédure et ils ont pu être représentés par un avocat à diverses étapes, mais l'esprit et les principes du système canadien de justice civile n'ont pas été respectés, et c'est là le problème fondamental.

[276] I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some

[276] Je reconnais que, souvent, le temps presse dans ce genre de procédure. La situation d'un débiteur nécessite la prise de mesures rapides et efficaces. Un litige qui s'éternise, comme certaines actions civiles, ne saurait convenir pour l'application de la *LACC*. Toutefois, la procédure prévue par cette loi n'est pas de nature purement administrative. Il s'agit également d'un processus judiciaire, assujetti à ce titre aux principes du système contradictoire. Les règles fondamentales de ce système ne sauraient être bafouées. Toutes les parties intéressées ont droit à une procédure équitable qui leur permet d'exprimer leur point de vue et d'être entendues. Il ne suffit pas à cet égard de répondre que rien d'autre ne pouvait être tenté, qu'il n'existait pas de solution meilleure ou, essentiellement, qu'entendre les participants aurait constitué une perte de temps. Dans toute procédure,

way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

[277] In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203-4: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

que ce soit en droit administratif, pénal ou civil, le droit d'être informé et celui d'être entendu d'une manière ou d'une autre demeurent des principes fondamentaux de la justice. Ils demeurent applicables sous le régime de la *LACC*, comme le font remarquer certains auteurs et juges (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (C.J. Ont. (Div. gén.)), par. 5 (le juge Farley). Ces principes n'ont pas été respectés en l'espèce, et mes collègues le reconnaissent, mais minimisent les conséquences de tels manquements et vices de procédure.

IV. Imposition d'une fiducie par interprétation

[277] Dans les circonstances, la décision de la Cour d'appel d'imposer une fiducie par interprétation ne me paraît pas erronée (par. 200-207). Il s'agit d'une décision équitable conforme aux exigences de la justice, selon les principes énoncés par notre Cour dans les arrêts *Canson Enterprises Ltd. c. Boughton & Co.*, [1991] 3 R.C.S. 534, et *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217. Pareille réparation pour le tort causé par Indalex est fondée (*Soulos*, par. 36, la juge McLachlin (maintenant Juge en chef)). Les faits de l'espèce respectent les quatre conditions qui justifient généralement l'imposition d'une fiducie par interprétation (*Soulos*, par. 45), comme le constate la juge Gillese aux par. 203-204 de ses motifs : (1) le défendeur était assujetti à une obligation en equity relativement aux actes qui ont conduit à la possession des biens; (2) il a été démontré que la possession des biens par le défendeur résultait des actes qu'il a ou est réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'equity lui imposait à l'égard du demandeur; (3) le demandeur a établi qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations; (4) il n'existe pas de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire, comme la protection des intérêts des créanciers intervenants.

[278] In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

[279] The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

[280] For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

APPENDIX

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

6. The said Act is amended by adding thereto the following sections:

23*a*.—(1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

[278] En imposant pareille réparation, la Cour d'appel a exercé la compétence inhérente des tribunaux de concevoir une réparation en equity en réponse non seulement à une question de procédure, mais également à une question de fond. L'article 9 de la *LACC* est formulé en termes généraux et n'a pas pour effet de priver le tribunal du pouvoir de combler au besoin les lacunes du droit pour rendre justice aux parties (G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law, 2007* (2008), 41, p. 78-79).

[279] En imposant la fiducie, la Cour n'a pas négligé le fait qu'Indalex et Indalex É.-U. constituent des personnes morales distinctes. Elle a tenu compte à juste titre de leurs rapports étroits, la seconde contrôlant dans les faits la première. Il était possible, voire nécessaire, de prendre ces rapports en compte pour déterminer si la fiducie par interprétation constituait une réparation adéquate en l'espèce.

[280] Pour les motifs qui précèdent, je suis d'avis de confirmer la fiducie par interprétation et de rejeter l'appel avec dépens en faveur des intimés.

ANNEXE

The Pension Benefits Amendment Act, 1973, S.O. 1973, ch. 113

[TRADUCTION]

6. La même loi est modifiée par l'adjonction de ce qui suit :

23*a*.—(1) Toute somme qu'un employeur reçoit d'un employé conformément à une entente relative à son versement par l'employeur à titre de cotisation salariale est réputée détenue en fiducie par l'employeur en vue de son versement, après qu'il l'a reçue, au régime de retraite à titre de cotisation salariale, et l'employeur ne peut s'en approprier quelque partie ni la transformer à son usage personnel ou à un autre usage non autorisé par la fiducie.

(2) For the purposes of subsection 1, any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.

(3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

Pension Benefits Act, R.S.O. 1980, c. 373

21. . . .

(2) Upon the termination or winding up of a pension plan filed for registration as required by section 17, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

. . .

23.—(1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

. . .

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

(2) Pour les besoins du paragraphe 1, la somme qu'un employeur prélève sur une somme payable à l'employé, notamment par retenue salariale, est réputée constituer une somme que l'employeur reçoit de l'employé.

(3) Toute somme qu'un employeur doit verser à un régime de retraite à titre de cotisation patronale et qui est exigible aux termes du régime est réputée détenue en fiducie par l'employeur en vue de son versement au régime de retraite conformément à celui-ci, à la présente loi et au règlement, et l'employeur ne peut s'approprier ni transformer à son usage personnel ou à tout autre usage non autorisé par le régime quelque partie du montant qui doit être versé à la caisse.

Pension Benefits Act, R.S.O. 1980, ch. 373

[TRADUCTION]

21. . . .

(2) À la cessation ou à la liquidation d'un régime de retraite déposé en vue de son agrément en vertu de l'article 17, l'employeur est tenu de verser à l'assureur, à l'administrateur ou au fiduciaire du régime de retraite les sommes dont le versement aurait été par ailleurs exigible pour satisfaire aux critères de solvabilité, et ce, jusqu'à la date de la cessation ou de la liquidation du régime.

. . .

23.—(1) L'employeur qui reçoit une somme d'un employé conformément à une entente relative à son versement par l'employeur à un régime de retraite à titre de cotisation salariale est réputé la détenir en fiducie jusqu'à son versement au régime de retraite, et ce, qu'il l'ait conservée séparément ou non, et l'employé a un privilège sur l'actif de l'employeur à raison du montant qui, dans le cours normal des affaires, serait consigné dans les livres de compte, qu'il y soit consigné ou non.

. . .

(3) L'employeur qui est tenu de cotiser à un régime de retraite est réputé détenir en fiducie pour le compte des participants au régime une somme dont le montant est calculé conformément au paragraphe (4), et ce,

(*a*) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(*b*) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

. . .

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(*a*) the value of the assets of the plan; and

(*b*) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

a) que la cotisation de l'employeur soit payable ou non aux termes du régime ou de la présente Loi et

b) que l'employeur l'ait conservée séparément ou non,

et les participants ont un privilège sur l'actif de l'employeur à raison du montant qui, dans le cours normal des affaires, serait consigné dans des livres de compte, qu'il y soit consigné ou non.

(4) Aux fins de déterminer le montant qui est réputé détenu en fiducie en application du paragraphe (3) à une date précise, le calcul est effectué comme si le régime avait été liquidé à cette date.

. . .

32. En plus des sommes que l'employeur est tenu de payer en application du paragraphe 21 (2), lors de la cessation ou de la liquidation d'un régime de retraite à prestations déterminées ou lorsqu'une modification fait en sorte qu'un régime n'est plus un régime de retraite à prestations déterminées, l'employeur est tenu de combler la différence entre

a) la valeur de l'actif du régime et

b) la valeur des prestations de retraite garanties suivant le paragraphe 31 (1) et de toutes autres prestations de retraite auxquelles le droit est acquis aux termes du régime,

et l'employeur verse à l'assureur, au fiduciaire ou à l'administrateur du régime de retraite les sommes ainsi requises de la manière prévue par règlement.

Pension Benefits Amendment Act, 1983, S.O. 1983, ch. 2

[TRADUCTION]

2. Le paragraphe 21 (2) de la même loi est abrogé et remplacé par ce qui suit :

(2) Lors de la cessation ou de la liquidation d'un régime de retraite enregistré, l'employeur dont les employés bénéficient du régime verse à l'administrateur, à l'assureur ou au fiduciaire du régime

a) une somme dont le montant est égal

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

23.—(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension plan.

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be money received by the employer from the employee.

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(i) au coût du service courant et

(ii) aux paiements spéciaux prescrits par règlement,

qui sont accumulés à la date de la cessation ou de la liquidation, celle-ci comprise, mais qui, suivant les conditions du régime et le libellé du règlement, ne sont pas encore dus;

b) toute autre somme qui, aux termes du régime de retraite ou du règlement, est due par l'employeur au régime de retraite, mais qui n'a pas été versée à la date de la cessation ou de la liquidation.

(2a) Pour les besoins de l'alinéa (2) a), le coût du service courant et les paiements spéciaux sont réputés s'accumuler sur une base quotidienne.

3. L'article 23 de la même loi est abrogé et remplacé par ce qui suit :

23.—(1) L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à un régime de retraite en tant que cotisation de l'employé aux termes du régime de retraite est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent au régime de retraite.

(2) Pour l'application du paragraphe (1), toute retenue à la source ou autre somme prélevée par l'employeur est réputée constituer de l'argent que l'employeur reçoit de l'employé.

(3) L'administrateur ou le fiduciaire du régime de retraite a un privilège sur l'actif de l'employeur à raison d'un montant égal à la somme réputée détenue en fiducie suivant le paragraphe (1).

(4) L'employeur qui, dans le cadre d'un régime de retraite, est tenu de cotiser à ce régime est réputé détenir en fiducie pour le compte des participants du régime une somme égale au total

a) de toutes les sommes que l'employeur est tenu de verser au régime pour acquitter

(i) le coût du service courant et

(ii) les paiements spéciaux prescrits par règlement

qui sont dus aux termes du régime ou du règlement, et qui n'ont pas été versés;

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

. . .

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32.—(1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

58.—(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

. . .

b) lors de la cessation ou de la liquidation du régime, toute autre somme que l'employeur est tenu de payer en vertu de l'alinéa 21 (2) a).

(5) L'administrateur ou le fiduciaire du régime de retraite a un privilège sur l'actif de l'employeur à raison d'un montant égal à celui de la somme qui est réputée détenue en fiducie suivant le paragraphe (4).

(6) Les paragraphes (1) et (4) s'appliquent que les sommes mentionnées soient conservées séparément ou non.

. . .

8. Les articles 32 et 33 de la même loi sont abrogés et remplacés par ce qui suit :

32.—(1) L'employeur dont les employés participent à un régime de retraite à prestations déterminées par lequel il est lié ou auquel il est partie et qui fait l'objet d'une liquidation partielle ou totale est tenu de verser à l'administrateur, à l'assureur ou au fiduciaire du régime un montant égal à l'excédent de la valeur des prestations de retraite garanties par l'article 31 et de la valeur des prestations de retraite acquises suivant le régime de retraite à prestations déterminées sur la valeur de l'actif du régime établie conformément au règlement applicable au paiement des prestations de retraite accumulées eu égard aux états de services en Ontario.

(2) Le versement que l'employeur est tenu d'effectuer suivant le paragraphe (1) s'ajoute à celui exigé au paragraphe 21 (2).

(3) L'employeur verse à l'assureur, au fiduciaire ou à l'administrateur du régime de retraite à prestations déterminées, de la manière prescrite par règlement, toute somme dont le versement est exigé au paragraphe (1).

Loi de 1987 sur les regimes de retraite, L.O. 1987, ch. 35

58. (1) L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à une caisse de retraite en tant que cotisation de l'employé aux termes du régime de retraite, est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent à la caisse de retraite.

. . .

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

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

. . .

59.—(1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . .

75.—(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to

(3) L'employeur qui est tenu de cotiser à une caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont dues et impayées à la caisse de retraite.

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

. . .

59. (1) L'intérêt sur l'argent qu'un employeur est tenu de verser à une caisse de retraite s'accumule sur une base quotidienne.

(2) L'intérêt sur les cotisations est calculé et crédité à des taux qui ne sont pas inférieurs aux taux prescrits et conformément aux exigences prescrites.

. . .

75. (1) En Ontario, un participant à un régime de retraite dont le total de l'âge plus le nombre d'années d'emploi continu ou d'affiliation continue est d'au moins cinquante-cinq, à la date de prise d'effet de la liquidation totale ou partielle, a droit à l'une des pensions suivantes :

a) une pension conforme aux conditions du régime de retraite si, aux termes du régime de retraite, le participant est admissible au paiement immédiat d'une prestation de retraite;

b) une pension conforme aux conditions du régime de retraite, commençant à la plus antérieure des dates suivantes :

(i) la date normale de retraite prévue par le régime de retraite,

(ii) la date à laquelle le participant aurait droit à une pension non réduite aux termes du régime de retraite si celui-ci n'était pas liquidé et que l'affiliation du participant avait continué jusqu'à cette date;

c) une pension réduite dont le montant correspond à celui à verser aux termes du régime de retraite commençant à la date à laquelle le participant

the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

. . .

76.—(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Commission declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40 (3) (50 per cent rule) and section 75,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Pension Benefits Act, R.S.O. 1990, c. P.8

57. (1) [Trust property] Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

(2) [Money withheld] For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

aurait droit à la pension réduite en vertu du régime de retraite si celui-ci n'était pas liquidé et que l'affiliation du participant avait continué jusqu'à cette date.

. . .

76. (1) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si la Commission déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 40 (3) (règle des 50 pour cent),

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8

57. (1) [Bien en fiducie] L'employeur qui reçoit de l'argent d'un employé en vertu d'un arrangement précisant que l'employeur versera cet argent à une caisse de retraite en tant que cotisation de l'employé aux termes du régime de retraite, est réputé détenir cet argent en fiducie pour l'employé jusqu'à ce que l'employeur verse cet argent à la caisse de retraite.

(2) [Sommes retenues] Pour l'application du paragraphe (1), l'argent retenu des sommes payables à l'employé par l'employeur, que ce soit par retenues salariales ou autrement, est réputé être de l'argent que l'employeur a reçu de l'employé.

(3) [Accrued contributions] An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

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

. . .

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . .

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.

2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).

3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

(3) [Cotisations accumulées] L'employeur qui est tenu de cotiser à une caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont dues et impayées à la caisse de retraite.

(4) [Liquidation] Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

. . .

58. (1) [Accumulation] L'argent qu'un employeur est tenu de verser à une caisse de retraite s'accumule sur une base quotidienne.

(2) [Intérêt] L'intérêt sur les cotisations est calculé et crédité à des taux qui ne sont pas inférieurs aux taux prescrits et conformément aux exigences prescrites.

. . .

74. (1) [Événements déclencheurs] Le présent article s'applique si une personne cesse d'être un participant à la date de prise d'effet de l'un des événements déclencheurs suivants :

1. La liquidation du régime de retraite, si sa date de prise d'effet tombe le 1er avril 1987 ou après cette date.

2. La cessation, par l'employeur, de l'emploi d'un participant, si sa date de prise d'effet tombe le 1er juillet 2012 ou après cette date, la présente disposition ne s'appliquant toutefois pas si la cessation se produit dans les circonstances visées au paragraphe (1.1).

3. L'arrivée d'autres événements prescrits dans les circonstances prescrites par règlement.

(1.1) [Idem : cessation d'emploi] La cessation de l'emploi n'est pas un événement déclencheur si elle résulte d'un acte d'inconduite délibérée, d'indiscipline ou de négligence volontaire du participant qui n'est pas frivole et que l'employeur n'a pas toléré, ou qu'elle se produit dans les autres circonstances prescrites.

(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

(1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(1.2) [Exceptions : choix fait par certains régimes de retraite] Le présent article ne s'applique pas à l'égard d'un régime de retraite conjoint ou d'un régime de retraite interentreprises tant qu'un choix fait en vertu de l'article 74.1 pour le régime et les participants est en vigueur.

(1.3) [Prestation] En Ontario, un participant à un régime de retraite dont le total de l'âge plus le nombre d'années d'emploi continu ou d'affiliation continue est d'au moins 55, à la date de prise d'effet de l'événement déclencheur, a droit à l'une des pensions suivantes :

a) une pension conforme aux conditions du régime de retraite si, aux termes de celui-ci, il est admissible au paiement immédiat d'une prestation de retraite;

b) une pension conforme aux conditions du régime de retraite, commençant à la première des dates suivantes :

(i) la date normale de retraite prévue par le régime de retraite,

(ii) la date à laquelle il aurait droit à une pension non réduite aux termes du régime de retraite si l'événement déclencheur ne s'était pas produit et que son affiliation avait continué jusqu'à cette date;

c) une pension réduite dont le montant correspond à celui à verser aux termes du régime de retraite commençant à la date à laquelle il aurait droit à la pension réduite en vertu du régime de retraite si l'événement déclencheur ne s'était pas produit et que son affiliation avait continué jusqu'à cette date.

(2) [Partie d'année] Pour déterminer le total de l'âge plus l'emploi ou l'affiliation, un crédit d'un douzième est accordé pour chaque mois d'âge et pour chaque mois d'emploi ou d'affiliation continus à la date de prise d'effet de l'événement déclencheur.

(3) [Participant pendant 10 ans] Les prestations de raccordement offertes aux termes du régime de retraite auxquelles un participant aurait droit si l'événement déclencheur ne s'était pas produit et que l'affiliation du participant continuait, sont incluses dans le calcul de la prestation de retraite prévue au paragraphe (1.3) dans le cas d'une personne qui a accumulé au moins 10 années d'emploi continu chez l'employeur ou qui est un participant depuis au moins 10 ans.

(4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

(7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

(7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

. . .

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension

(4) [Prestation de raccordement distribuée proportionnellement] Pour l'application du paragraphe (3), si la prestation de raccordement offerte aux termes du régime de retraite ne se rapporte pas à des périodes d'emploi ou d'affiliation au régime de retraite, la prestation de raccordement est distribuée selon le rapport qui existe entre la période réelle d'emploi du participant à la période d'emploi que le participant aurait faite à la première date à laquelle le membre aurait droit au paiement de prestations de retraite et d'une pleine prestation de raccordement aux termes du régime de retraite si l'événement déclencheur ne s'était pas produit.

(5) [Avis de licenciement] L'affiliation à un régime de retraite qui est liquidé inclut la période de préavis de licenciement exigé en vertu de la partie XV de la *Loi de 2000 sur les normes d'emploi*.

(6) [Champ d'application du par. (5)] Le paragraphe (5) ne s'applique pas afin de calculer le montant de la prestation de retraite d'un participant qui est tenu de cotiser à la caisse de retraite, à moins que le participant verse les cotisations à l'égard de la période de préavis de licenciement.

(7) [Consentement de l'employeur] Pour l'application du présent article, si le consentement de l'employeur est une condition d'admissibilité au droit de recevoir une prestation accessoire, l'employeur est réputé avoir donné son consentement.

(7.1) [Consentement de l'administrateur : régimes de retraite conjoints] Pour l'application du présent article, si le consentement de l'administrateur d'un régime de retraite conjoint est une condition d'admissibilité au droit de recevoir une prestation accessoire, l'administrateur est réputé avoir donné son consentement.

(8) [Calcul de la prestation de retraite] La prestation mentionnée à l'alinéa (1.3) a), b) ou c) à l'égard de laquelle un participant a rempli toutes les conditions d'admissibilité prévues au présent article est incluse dans le calcul de la prestation de retraite du participant ou de sa valeur de rachat.

. . .

75. (1) [Responsabilité de l'employeur à la liquidation] Si un régime de retraite est liquidé, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des

plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

Appeals of Sun Indalex Finance, George L. Miller and FTI Consulting allowed, LeBel *and* Abella JJ. *dissenting. Appeal of USW dismissed.*

Pourvois de Sun Indalex Finance, George L. Miller et FTI Consulting accueillis, les juges LeBel *et* Abella *sont dissidents. Pourvoi du Syndicat des Métallos rejeté.*

Solicitors for the appellant Sun Indalex Finance, LLC: Goodmans, Toronto.

Procureurs de l'appelante Sun Indalex Finance, LLC : Goodmans, Toronto.

Solicitors for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors: Chaitons, Toronto.

Procureurs de l'appelant George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7 : Chaitons, Toronto.

Solicitors for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited: Stikeman Elliott, Toronto.

Procureurs de l'appelante FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited : Stikeman Elliott, Toronto.

Solicitors for the appellant/respondent United Steelworkers: Sack Goldblatt Mitchell, Toronto.

Procureurs de l'appelant/intimé le Syndicat des Métallos : Sack Goldblatt Mitchell, Toronto.

Solicitors for the respondents Keith Carruthers, et al.: Koskie Minsky, Toronto.

Procureurs des intimés Keith Carruthers, et autres : Koskie Minsky, Toronto.

Solicitors for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited

Procureurs de l'intimée Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau

Partnership): Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitor for the respondent/intervener the Superintendent of Financial Services: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Insolvency Institute of Canada: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Federation of Pensioners: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Montréal.

Solicitors for the intervener the Canadian Bankers Association: Osler, Hoskin & Harcourt, Toronto.

Sobeco, société en commandite) : Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Procureur de l'intimé/intervenant le Surintendant des services financiers : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenant l'Institut d'insolvabilité du Canada : Thornton Grout Finnigan, Toronto.

Procureurs de l'intervenant le Congrès du travail du Canada : Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante la Fédération canadienne des retraités : Paliare, Roland, Rosenberg, Rothstein, Toronto.

Procureurs de l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : McMillan, Montréal.

Procureurs de l'intervenante l'Association des banquiers canadiens : Osler, Hoskin & Harcourt, Toronto.

Tab 31

See p. 2

359 B.R. 54
United States Bankruptcy Court,
S.D. New York.

In re ADELPHIA COMMUNICATIONS CORP., et al., Debtors.

No. 02–41729 (REG).
|
Dec. 11, 2006.

Synopsis

Background: Bondholders filed motion to "designate" certain creditors and disallow votes that they had filed in favor of proposed Chapter 11 plan.

Holdings: The Bankruptcy Court, Robert E. Gerber, J., held that:

[1] mere fact that creditors, in exchange for voting in favor of proposed plan, may have obtained special consideration in form of releases, exculpation and reimbursement of fees, which other members of same class that voted against plan did not obtain, was not sufficient basis for draconian sanction of disallowing creditors' votes; and

[2] creditors' ownership, in multi-debtor Chapter 11 case, of claims in several debtors did not, by itself, rise to level of "bad faith," and did not afford sufficient basis on which to disqualify votes filed by these creditors in favor of proposed plan.

Motion denied.

West Headnotes (11)

[1] **Bankruptcy** Acceptance

Motions to "designate" particular entity as not having voted on proposed Chapter 11 plan in good faith, such that its vote will be disallowed, are within bankruptcy court's discretion. 11 U.S.C.A. § 1126(e).

2 Cases that cite this headnote

[2] **Bankruptcy** Acceptance

Ability to vote on reorganization plan is one of the most sacred entitlements that creditor has in Chapter 11 case and should not be denied except for highly egregious conduct, principally, when creditor seeks to advance interests apart from its recovery as creditor under the plan, or when creditor seeks to extract plan treatment that is not available to other members of same class. 11 U.S.C.A. § 1126(e).

4 Cases that cite this headnote

[3] **Bankruptcy** Acceptance

Bankruptcy Code provision authorizing court to "designate" particular entity as not having voted on proposed Chapter 11 plan in good faith, such that its vote will be disallowed, is permissive, and not mandatory, in nature. 11 U.S.C.A. § 1126(e).

2 Cases that cite this headnote

[4] **Bankruptcy** Determination

Burden on party seeking to have a plan ballot disallowed is heavy one. 11 U.S.C.A. § 1126(e).

2 Cases that cite this headnote

[5] **Bankruptcy** Acceptance

"Designation," i.e., disallowance, of creditor's vote on proposed Chapter 11 plan is a drastic remedy, and, as result, designation of votes is the exception, not the rule. 11 U.S.C.A. § 1126(e).

10 Cases that cite this headnote

[6] **Bankruptcy** Acceptance

"Badges" of bad faith, such as bankruptcy court may consider when it rules on motion to "designate" particular creditors and to disallow the votes that they have filed for or against proposed Chapter 11 plan, include votes designed to (1) assume control of debtor; (2) put debtor out of business or otherwise gain

competitive advantage; (3) destroy debtor out of pure malice or (4) obtain benefits available under a private agreement with third party which depends on debtor's failure to reorganize. 11 U.S.C.A. § 1126(e).

3 Cases that cite this headnote

[7] **Bankruptcy** Acceptance

Movant must demonstrate more than mere selfish motive by party voting on proposed Chapter 11 plan in order for court to "designate," i.e., disallow, that party's vote. 11 U.S.C.A. § 1126(e).

4 Cases that cite this headnote

[8] **Bankruptcy** Acceptance

Disqualification of creditor's vote is appropriate, when Chapter 11 plan voting process is used as device with which to accomplish some ulterior purpose, that is out of keeping with purpose of reorganization process itself, and that is only incidentally related to creditor's status qua creditor. 11 U.S.C.A. § 1126(e).

3 Cases that cite this headnote

[9] **Bankruptcy** Acceptance

Mere fact that group of creditors, in exchange for voting in favor of proposed Chapter 11 plan, may have obtained special consideration in form of releases, exculpation and reimbursement of fees, which other members of same class that voted against plan did not obtain, was not sufficient basis for draconian sanction of disallowing creditors' votes, especially where creditors' conduct was fully disclosed under plan. 11 U.S.C.A. § 1126(e).

[10] **Bankruptcy** Acceptance

When creditors are acting to maximize their recoveries, their overly aggressive conduct in Chapter 11 process is not basis for disqualifying their votes. 11 U.S.C.A. § 1126(e).

2 Cases that cite this headnote

[11] **Bankruptcy** Acceptance

Creditors' ownership, in multi-debtor Chapter 11 case, of claims in several debtors did not, by itself, rise to level of "bad faith," and did not afford sufficient basis on which to disqualify votes filed by these creditors in favor of proposed Chapter 11 plan. 11 U.S.C.A. § 1126(e).

Attorneys and Law Firms

***55** Weil, Gotshal & Manges LLP by Martin J. Bienenstock, Esq., Brian S. Rosen, Esq., Melanie Gray, Esq., Sylvia Ann Mayer, Esq., New York, NY, for the ACC Bondholders Group.

Stutman, Treister & Glatt by Isaac M. Pachulski, Esq., Stephan M. Ray, Esq., Los Angeles, CA, Special Conflicts Counsel for the ACC Bondholders Group.

Fried, Frank, Harris, Shriver & Jacobson LLP by Bonnie Steingart, Esq., Gary Kaplan, Esq., New York, NY, for W.R. Huff Asset Management Co., L.L.C.

Pachulski, Stang, Ziehl, Young, Jones & Weintraub P.C. LLP by Dean A. Ziehl, Esq., New York, NY, by Richard Pachulski, Esq., Dean A. Ziehl, Esq., Jeremy V. Richards, Esq., Los Angeles, CA, for the ACC II Committee.

White & Case LLP by J. Christopher Shore, Esq., Gerard Uzzi, Esq., New York, NY, by Thomas E. Lauria, Esq., Richard S. Kebrdle, Esq., Miami, FL, for the Ad Hoc Committee of Arahova Noteholders.

Kasowitz, Benson, Torres & Friedman LLP by David M. Friedman, Esq., Adam L. Shiff, Esq., New York, NY, for the Official Committee of Unsecured Creditors.

BENCH DECISION[1] ON MOTION TO DESIGNATE VOTES OF CERTAIN CREDITORS IN THE CLASS OF ACC SENIOR NOTES

ROBERT E. GERBER, Bankruptcy Judge.

In this contested matter in the chapter 11 cases of Adelphia Communications Corporation and its subsidiaries (the "Debtors"), I have before me the motion of a ***56** group of holders of ACC Senior Notes (the "ACC Bondholders Group") to designate[2] the votes in the class of ACC Senior Notes of three creditor groups that voted to support the Plan now before me for confirmation:[3]

> (1) the members of a "crossover committee" of holders of both ACC Senior Notes and notes of Arahova Communications Corp., an indirect ACC subsidiary (the "ACC II Committee");
>
> (2) accounts maintained or managed by W.R. Huff Asset Management Co., some or all of which are likewise holders of notes of each of ACC and Arahova (referred to, for simplicity, simply as "Huff"); and
>
> (3) those members of the Arahova Noteholders Committee who also hold ACC Senior Notes.
>
> The three of them (the "Targeted Creditors"), joined by the Creditors Committee, oppose the motion, arguing, among other things, that even if the underlying factual contentions are true, there is no basis for disqualifying their votes.

The antagonists on both sides of the issue are predominantly or exclusively investors in distressed debt. And in this and now-withdrawn litigation going in the other direction—where similar efforts to designate were aimed at members of the ACC Bondholders Group—many expressed concerns as to the confidentiality of distressed debt trader investments, trading positions, and trading practices. At various times in these cases, I ruled that as a general matter, there is no absolute rule prohibiting discovery of distressed debt investors' debt trading activities, but that I'd limit discovery of these activities to situations where such was sufficiently relevant.[4] Accordingly, I said I'd initiate consideration of the issues presented under this motion by demurrer—*i.e.,* by 12(b)(6) motions—with discovery (and, if necessary, an evidentiary hearing) to follow if such should be necessary.[5]

[1] **[2]** As described more fully below, motions to designate are within the discretion of the court. Here I conclude that even if all of the factual allegations asserted by the ACC Bondholders Committee were true, I would not disqualify the Targeted Creditors' votes. The ability to vote on a reorganization plan is one of the most sacred entitlements that a creditor has in a chapter 11 case. And in my view, it should not be denied except for highly egregious conduct —principally, seeking to advance ***57** interests apart from recovery under the Plan, or seeking to extract plan treatment that is not available for others in the same class.

While creditor tactics, activities or requests (or plan provisions that result from them) may be objectionable, the Code provides for other ways to address concerns that arise from such (such as upholding objections to confirmation), without the draconian measure of denying one's franchise to vote.[6] And while I assume it to be true that creditors of different debtors in a multi-debtor chapter 11 case have interests contrary to each other (and that the different debtors themselves do as well), that is a fact of life in most, if not all, large chapter 11 cases.[7] If, under section 1126(e) (which now is silent on the matter) or otherwise, creditors who hold claims of multiple debtors are to be denied the right to vote all of their claims, in all of the debtors in which they hold debt—even assuming, once again, that the individual debtors have interests contrary to each other, and that the recoveries of one debtor come at the expense of another—that is a matter for Congress to decide.

Thus the motion is denied. Findings of Fact, Conclusions of Law and bases for the exercise of my discretion in this regard follow.

Facts

For the purposes of this demurrer, the relevant facts are undisputed.[8]

The Plan

On October 17, 2006, I approved a supplement to the disclosure statement and authorized solicitation of votes on what is now the present Plan. A central feature of the Plan is the settlement of disputes relating to the intercompany relationships among the Debtors. Settling parties include Huff, the ACC II Committee, the Creditors' Committee, the ACC Settling Parties, the Arahova Noteholders Committee and certain other ad hoc committees of unsecured creditors. The Plan includes provisions for releases, exculpation and fee reimbursements for members of ad hoc committees and for individual creditors who signed onto the settlement and agreed to support the Plan, and for the same releases to go to any and all ACC Senior Noteholder creditors that support the Plan.[9] The Targeted Creditors voted all of ***58** their claims,

including any ACC claims, in support of the Plan. The ACC Bondholders vehemently oppose the Plan and the underlying settlement and, thus, voted against the Plan.

Inter–Creditor Dispute

The principal inter-creditor dispute, and the one most relevant to the motion at hand, is a dispute between holders of ACC Senior Notes and the holders of Arahova Notes. Creditors of ACC Parent and of the Arahova Debtors have asserted positions that in nearly all respects would cause one group to benefit at the expense of the other—though under the settlement, ACC recoveries were augmented from debtors other than the Arahova debtors, to the end that ACC benefited without a corresponding detriment to Arahova. In nearly all respects, an increase in any recovery on the Arahova Notes results in a decrease in recovery on the ACC senior notes, and vice versa.

Earlier in this case, the Arahova Noteholders filed numerous motions and engaged in related acts (together, the "Arahova Motions") seeking to thwart the judicial determination of interdebtor issues that the Debtors proposed and that I had approved; seeking relief which, if granted, would have been devastating to creditor recoveries in these cases (including, most significantly, a motion seeking the appointment of a chapter 11 trustee for the Arahova debtors, which would have been a breach of the Debtors' DIP financing facility and an event excusing Time–Warner and Comcast from closing on their purchase); and entering into an agreement to put their motions on hold pending the outcome of settlement negotiations. The ACC Bondholder Group asserts, and I take it as true for the purposes of this motion, that these were tactics on the Arahova Bondholders Group's part to improve its recovery. As the ACC Bondholders group appropriately notes,[10] I "sharply criticized" the Arahova Bondholders' tactics, and was "understandably dismayed" by them. In a lengthy decision in January 2006 addressing Arahova Debtors' motions, I stated:

> [T]he Court further decides these motions in light of the compelling inference that the motions were filed as part of a scorched earth litigation strategy that would provide the Arahova Debtors with little benefit that they do not already have (trumped, dramatically, by a resulting prejudice to the Arahova Debtors themselves, along with all of the other Debtors), and which would have the effect (and, the Court believes, the purpose) of imperiling the pending Time Warner/Comcast transaction and the Debtors' DIP financing in an effort to extract a greater distribution, sidestepping the Court-approved process for determining the Intercreditor Dispute issues on their respective merits.[11]

I stated at the conclusion:

> The bringing of motions like these is not unethical, or sanctionable, but neither should it be encouraged, or rewarded. Motions that would bring on intolerable consequences for an estate should not be used as a tactic to augment a particular constituency's recovery.[12]

***59** *Huff's Rule 2004 Discovery*

Huff sought and obtained Rule 2004 discovery to investigate the creation and dissemination of a letter sent by certain members of the ACC Noteholders Committee to the Board of Directors of ACC and to the Wall Street Journal on April 17, 2006. Huff sought discovery based on the premise that dissemination of the letter was an attempt to manipulate the market and an improper solicitation under section 1125(b) of the Code. The ACC Bondholders contend (and I must accept as true for the purposes of a demurrer) that this was not, in fact, Huff's true intent, and instead was an effort to improperly pressure ACC Noteholders.[13]

Plan Agreement

The ACC Bondholders then contend that only two days after I expressed an adverse reaction to alleged activities on the part of certain ACC Bondholders which were the subject of the now-withdrawn motion directed at them, and "in the midst of Huff's coercive tactics," two other holders of ACC Senior Notes agreed to a term sheet embodying a plan settlement, including a settlement of the interdebtor issues.[14] That term sheet, following further modifications, now serves as the basis for the Plan. "Among other egregious positions," the Plan included "thinly-veiled threats of litigation and continued discovery against ACC Senior Notes" who refused to join in the agreement, hire the counsel for the assenting ACC Bondholders, and vote to accept the proposed Plan, and provided broad release provisions for those who satisfied those conditions.[15]

Discussion

I.

Under well-settled principles, when considering a motion to dismiss, as made applicable under Fed. R. Bankr.P. 7012(b), a complaint's factual allegations are presumed true, and are construed in favor of the pleader.[16] "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[17] As the Supreme Court held in *Scheuer v. Rhodes:*

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.[18]

Dismissal should be granted only when the plaintiff's allegations, taken as true, along with any inferences that flow from them, are insufficient as a matter of law.[19]

***60** The court is not, however, bound to accept as true legal conclusions or theories.[20] Similarly, mere conclusory allegations without factual support are insufficient to survive a motion to dismiss.[21] Rather, to withstand a motion to dismiss, there must be specific and detailed factual allegations to support the claim.[22] A court "will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading."[23]

II.

Section 1126(e) of the Bankruptcy Code provides:

> On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

[3] Section 1126(e) is permissive in nature,[24] and a bankruptcy judge has discretion in designating votes.[25] The issue before me, then, is whether, assuming all of the ACC Bondholders' contentions to be true, I should (or would) disqualify, by "designation," any of the Targeted Creditors' votes.

While 1126(e) does not define "bad faith," the courts have designated votes as having been cast in "bad faith" in the following instances:

> (1) if the claimant is using obstructive tactics and hold-up techniques to extract better treatment for its claim compared to the treatment afforded similarly situated claimholders in the same class; or
>
> (2) if the holder of the claim casts its vote for the ulterior purpose of securing some advantage to which it would not otherwise be entitled; or
>
> (3) when the motivation behind its vote is not consistent with a creditor's protection of its own self-interest.[26]

Some courts have held that some type of wrongdoing must be present to evidence bad faith.[27]

***61** **[4]** **[5]** As the ACC Bondholders Group noted in its brief opposing an effort, in the other direction, to designate the votes of some of its members,[28] the burden on a party seeking to have a ballot disallowed is heavy.[29] When others were threatening to target members of the ACC Bondholders Group with a motion to designate in the other direction, I noted the severe implications of vote designation.[30] A right to vote on a plan is a fundamental right of creditors under chapter 11. Designation of a creditor's vote is a drastic remedy,[31] and, as a result, designation of votes is the exception, not the rule.[32] The party seeking to have a ballot disallowed has a heavy burden of proof.[33]

[6] In his decision in *Dune Deck Owners,* in this district, Chief Judge Bernstein canvassed the law in this area, and noted that the "badges" of the requisite bad faith include creditor votes designed to (1) assume control of the debtor; (2) put the debtor out of business or otherwise gain a competitive advantage; (3) destroy the debtor out of pure malice or (4) obtain benefits available under a private agreement with a third party which depends on the debtor's failure to

reorganize.[34] A moment earlier, he capsulized the standards that would satisfy the requisite bad faith as (i) where a claim holder attempts to extract or extort a personal advantage not available to other creditors in the class, or (ii) where a creditor acts in furtherance of an ulterior motive, unrelated to its claim or its interests as a creditor.[35]

[7] **[8]** Notably, a movant must demonstrate more than a mere selfish motive on behalf of a voting party in order for a court to designate that party's vote.[36] "[W]hen the voting process is being used as a device with which to accomplish some ulterior purpose, out of keeping with the purpose of the reorganization process itself, and only incidentally related to the creditor's status *qua* creditor," disqualification is appropriate.[37]

III.

Though the ACC Bondholder Group's lengthy initial and responsive submissions, perhaps inevitably, articulate its arguments in slightly different ways, they nevertheless have two themes. First they assert that the Targeted Creditors extracted special consideration for themselves—releases, exculpation and fee awards—that was not awarded to other members of their voting classes who voted against the ***62** settlement (and used such as a coercive "carrot" to induce additional acceptances of the Plan), and, with respect to some of the Targeted Creditors, that they acted beyond the bounds of acceptable behavior in the process that led to the ultimate solicitation of the Plan. Second, they assert that the Targeted Creditors voted their ACC claims for ulterior purpose of benefiting their Arahova claims and the Arahova estate, and/or that holding claims of different debtors, which have conflicting interests as against each other, represents a kind of *per se* ulterior motive.

A. Special Consideration

[9] The ACC Bondholders argue that the votes on the ACC claims of the Targeted Creditors should be designated because these creditors obtained special consideration in the form of releases, exculpation and reimbursement of fees expressly conditioned upon their acceptance of the settlement in the Plan, and used such as an enticement to others to support the Plan. Members of the same class who rejected the Plan did not secure those benefits.

These matters may support confirmation objections, but they are not matters of the type that warrant disqualification of the Targeted Creditors' votes. The factors identified above as badges of bad faith do not come even close to being applicable here. The Targeted Creditors did not seek to (1) assume control of the debtor; (2) put the debtor out of business or otherwise gain a competitive advantage; (3) destroy the debtor out of pure malice or (4) obtain benefits available under a private agreement with a third party which depends on the debtor's failure to reorganize. Taking the ACC Bondholders Group's allegations at face value, the Targeted Creditors whose behavior was challenged (*i.e.,* those other than the ACC II Committee) were overly aggressive, and/or stepped over the line, in taking action to benefit their economic interests in securing the confirmation of this Plan, and overreached, in particular, in benefiting themselves and using enticements to others to likewise support the Plan.

But to the extent complaints as to that conduct are justified, they can be addressed in the confirmation process. The disputed plan provisions will need to be examined, as part of the confirmation process, to evaluate their compliance with law, and to ascertain whether they are or are not appropriate benefits for those settle, and for those who choose to vote in favor of a chapter 11 plan. And depending on the particular provision concerned, various measures might have to be taken as part of the confirmation process if the contested plan provisions turn out to be objectionable.[38] But whether or not the disputed provisions pass muster at confirmation, they are in any event all variants of measures to advance one's interests in maximizing recoveries under a reorganization plan, which have consistently been held to be acceptable exercises of creditor power. Proposing them is not the type of conduct that warrants vote designation, especially when it is fully disclosed under the Plan.

Likewise, I do not believe that the conduct alleged on the part of the Arahova Bondholders and Huff, even taking the allegations with respect to that conduct as true, warrants designation. Without question, at least some of it was overly aggressive and overreaching. But it was, once more, an effort to maximize recoveries as a creditor under a prospective plan.

***63** **[10]** To be sure, a culture has developed in large chapter 11 cases in which many consider it acceptable, and indeed expected, to use the litigation process as a means to assert or follow through on threats, and to seek various kinds of relief, to secure "leverage" in efforts to increase recoveries. I don't like it. And I particularly don't like it when supposedly

critical concerns then somehow turn out to be not so critical, and threatened or filed motions are put on hold or withdrawn pending "negotiation." But aside from saying, in precatory terms, that I don't like such tactics and that they are a good way to irritate the judge, I don't think that I can or should do anything about them on a motion of this character. In particular, I don't think I should disenfranchise creditors from their statutory voting rights based on my personal views as to the way they should behave. My views as to acceptable behavior in chapter 11 intercreditor disputes may be naïve, or they may be right on the money, but in either event I believe that where, as here, creditors are acting to maximize their recoveries, their overly aggressive conduct in the chapter 11 process is not a basis for disqualifying their votes.

Thus, assuming, as I do, that all of the allegations of the motion are true, they boil down to activities that, while distasteful and heavy handed, are sufficiently within what the law permits, and sufficiently tied to maximize creditor recoveries, that I should not disenfranchise creditors from their statutory rights.

B. Ulterior motives

[11] The ACC Bondholders argue that the Court should designate the ACC votes of Targeted Creditors because they own both Arahova and ACC bonds; because by reason of the economics of the interdebtor issues, the Targeted Creditors stand more to gain by enhanced incremental recoveries at Arahova; and because their economic interests are oriented in favor of the Arahova estate. Thus, the ACC Bondholders allege and argue, Targeted Creditor votes in favor of the Plan in the ACC Senior Notes Class were driven by an ulterior motive—a desire to get a maximized recovery in another class, of another Debtor, under the Plan (that of the class of Arahova notes).

As discussed above, courts have found bad faith where the creditor has an "ulterior motive," such as to procure some collateral or competitive advantage that does not relate to its claim. But the kinds of motives that have so far been held to warrant vote designation have been to assume control of the debtor; to put the debtor out of business or otherwise gain a competitive advantage; to destroy the debtor out of pure malice, or to obtain benefits available under a private agreement with a third party which depends on the debtor's failure to reorganize.[39] None, so far as I'm aware or the parties' briefs have revealed, has been to maximize an economic recovery, or to hedge, by owning bonds of multiple debtors in a single multi-debtor chapter 11 case, or (as I think concerns would be analogous), to hold bonds in different, antagonistic, classes of a particular debtor in a single chapter 11 case.

I assume, both because I have before me a demurrer and because I think the assumption is warranted, that there are inherent conflicts of interest between creditor classes in this case, whether within a single debtor or across multiple debtors, competing, in every practical sense, for maximized shares of the Debtors' limited pot of assets. So the issue, then, is whether ***64** I should find from that an ulterior motive sufficient to warrant the designation of votes of the Targeted Creditors because of their ownership of bonds in each of those classes.[40]

The ACC Bondholders do not cite, and I am not aware of, any case where a parent and a subsidiary debtors were treated as competitors for the purposes of section 1126(e). Inter-company debts and liabilities, which enhance recoveries of some creditors and dilute recoveries of others, are inherent in any multi-debtor bankruptcy. And conflicts between classes of a single debtor, which likewise involve competing claims on the part of those classes to what will usually be a pool of limited assets, will be present in many, if not most, chapter 11 cases as well, and while one can not then speak of "competitor" business entities, many like considerations apply. The statutory trigger for ordering vote designation is an absence of good faith, and I do not believe that holding (or acquiring) claims of different debtors in the same chapter 11 case fairly can be regarded as representing the kind of ulterior motive or "bad faith" that has heretofore been held to warrant vote designation. Thus I must rule that a creditor's ownership of claims in several debtor entities does not, by itself, amount to bad faith under 1126(e), and does not afford a sufficient basis on which to disqualify votes of creditors who have voted to accept the plan.

I come to that conclusion for two other reasons as well. First, as noted, the law has long upheld creditors' efforts to maximize their individual recoveries in their self-interest as creditors under a plan. While this is of course subject to the ulterior interest exception, holding long positions in bonds of various debtors is much more closely akin to ordinary recovery maximization strategies than it is to the efforts of a business competitor to drive the debtor out of business, or to harm it in other ways.[41]

And second, I note, with the assistance of Judge Bernstein's opinion in *Dune Deck Owners,* that Congress once considered a formulation of section 1126 that might support designation here, but that the alternate formulation did not find its way into the Bankruptcy Code.

As Judge Bernstein observed, the original Bankruptcy Code House Bill included a provision, denominated § 1126(e), that expressly authorized the Court to designate the vote of an "entity that has, *with respect to such class,* a conflict of interest that is of such a nature as would justify exclusion of such entity's claim or interest" from the amounts and number of claims or interests required for acceptance.[42] The present § 1126(e) was then codified as § 1126(f). The House drafters expressed an intention to ensure that a creditor who held conflicting claims in two classes could be excluded from voting in one—though not necessarily ***65** both—of those classes.[43] But the conflict of interest section, which was not included in the Senate bill, did not make it into the Code as enacted. Senator DeConcini expressed the view that Congress deemed the provision unnecessary because in its view, section 105 "constitutes a sufficient power in the court to designate exclusion of a creditor's claim on the basis of a conflict of interest."[44]

Since the time the Code was enacted, we have come to place great reliance on what statutes actually say (notwithstanding statements in legislative history that might lead to a contrary result), and I think I must find some significance in the fact that at one time, Congress considered a provision that would impose the requirement sought here, and that it did not enact it. In light of that, I'm reluctant to enact it by judicial fiat. And while I fully recognize that Senator DeConcini regarded section 105 as a means to achieve vote designation notwithstanding the absence of statutory language that would explicitly provide for it, recent section 105 jurisprudence has displayed a marked reluctance to use section 105 to achieve results that are not authorized under the Code or substantial caselaw precedent.[45]

In my view, imposing the disqualification rule sought here in the absence of a clearer statutory or caselaw foundation would be too much of a jump. Congress could, if it wished, declare that when creditors hold claims of multiple classes or debtors in multi-class or multi-debtor chapter 11 cases, they must choose the particular class or debtor with which they will wish to be allied. But it did not enact a provision that would have done exactly that. I cannot now establish such requirements in the absence of a legislative direction, especially retroactively, when no court has previously so held, and creditors had no advance notice that such rules would be applied to take away their statutory right to vote. While I fully recognize that the Code gives me the power to designate for "bad faith," I do not believe that I should apply such an abstract standard in an unprecedented way in a matter of this importance.

Conclusion

The motion of the ACC Bondholders to designate ACC votes of Huff, Arahova Noteholders Committee and ACC II Committee is denied.

All Citations

359 B.R. 54, 47 Bankr.Ct.Dec. 125

Footnotes

1 I use bench decisions to lay out in writing decisions that are too long, or too important, to dictate in open court, but where time does not permit more extensive or polished discussion. Because they often start as scripts for decisions to be dictated in open court, they typically have fewer citations and other footnotes, and have a more conversational tone.

2 As discussed below, "designate" is a word of art in bankruptcy parlance, meaning, in essence, "disqualify."

3 Familiarity with the events in this case, and defined terms used in the ongoing related litigation, is assumed.

4 I authorized discovery to a certain extent, upon a showing of possibly (but not plainly) improper activities, and said I'd authorize it to a greater extent if one side pressed claims based on those activities and the other side expressed a desire to show that essentially the same activities were engaged in by those on the attacking side.

5 While Fed. R. Bankr.P. 9014, governing contested matters, does not by its terms include Fed. R. Bankr.P. 7012 (and hence Fed.R.Civ.P. 12(b)(6)) as rules that are automatically applicable in contested matters (in contrast, *e.g.,* to those

providing for discovery and summary judgment), Rule 9014 provides that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." Fed. R. Bankr.P. 9014(c). In the *Adelphia* cases and others, I've found demurrers to be a useful procedural mechanism to decide some kinds of contested matter disputes economically, saving litigation costs for the benefit of creditors and other stakeholders. There was no objection to this procedure, which was likewise used by the ACC Bondholders Group in its own 12(b)(6) opposition to a like designation motion targeting some of its members.

6 If it is any consolation to the movants here, I'd regard these same principles to be applicable if the now-withdrawn motion in the other direction had been pressed. Several aspects of the discussion that follows have been taken, in some cases nearly verbatim, from the brief filed by the ACC Bondholders Group in response to the attack that had been launched against some of its members.

7 *See In re Adelphia Commc'ns Corp.,* 336 B.R. 610, 617, 644–653 (Bankr.S.D.N.Y.) (Gerber, J.) (the "*Arahova Motions Decision* ") (discussing how prevalent inter-debtor issues are, and how they had been addressed in other cases), *aff'd* 342 B.R. 122 (S.D.N.Y.2006) (Scheindlin, J.)

8 The movants properly observe in their response that the submissions on the demurrers in many cases tried to argue facts, and sought to debate allegations that need to be taken as true on a demurrer. I've disregarded factual arguments of that character, and have taken the basic facts as alleged as true.

9 The Plan may have an ambiguity as to whether a vote in favor of the Plan is enough or whether qualification for release rights is more limited. Particularly if the latter, this is a potential confirmation issue.

> The Plan also has provisions at least seemingly awarding legal fees without court approval of the fees under section 503(b), or satisfaction of section 503(b)(3)(D)'s requirements for "substantial contribution," though they also provide that the parties seeking such fees "shall comply with any procedures required by the Bankruptcy Court in connection with seeking reimbursement" of such fees. *See* Plan § 6.2(d). The U.S. Trustee (who lacks the ACC Bondholder Group's axe to grind) has objected to this aspect of the Plan, and it too presents an issue on confirmation, or an issue as to whether I must impose supplemental procedures or requirements to comply with the Code.

10 *See* Designation Motion ¶ 24.

11 *Adelphia,* 336 B.R. at 618–619.

12 *Id.* at 677–678.

13 *See* Designation Motion ¶ 27 and ¶ 30.

14 *See* Designation Motion ¶ 31.

15 *Id.*

16 *See, e.g., Luedke v. Delta Air Lines, Inc.,* 159 B.R. 385, 389 (S.D.N.Y.1993) (Patterson, J.), cited in *In re Lois/USA, Inc.,* 264 B.R. 69, 89 (Bankr.S.D.N.Y.2001).

17 *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); accord *Northrop v. Hoffman of Simsbury, Inc.,* 134 F.3d 41, 44 (2d Cir.1997) (quoting *Conley*); *In re Granite Partners, L.P.,* 210 B.R. 508, 514 (Bankr.S.D.N.Y.1997) (Bernstein, J.) (denying motion to dismiss complaint, noting dismissal would be proper only when the plaintiff would not be entitled to any type of relief, even if it prevailed on the merits of its factual allegations).

18 *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

19 *See, e.g., Sykes v. James,* 13 F.3d 515, 519 (2d Cir.1993), cert. denied, 512 U.S. 1240, 114 S.Ct. 2749, 129 L.Ed.2d 867 (1994) (applying the standard discussed above but nevertheless dismissing, where claims for relief were legally insufficient); *In re 80 Nassau Assocs.,* 169 B.R. 832, 841 (Bankr.S.D.N.Y.1994) (Bernstein, J.) (granting motion to dismiss complaint for failure to allege a legally sufficient injury).

20 *See In re Sunbeam Corp.,* 284 B.R. 355, 360 (Bankr.S.D.N.Y.2002) (Gonzalez, J.).

21 *See DeJesus v. Sears, Roebuck & Co.,* 87 F.3d 65, 70 (2d Cir.1996) (citations omitted) ("A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6).")

22 *See Friedl v. City of New York,* 210 F.3d 79, 85–86 (2d Cir.2000).

23 5A Wright & Miller, Federal Practice and Procedure, § 1363 (2d ed. 1990 & 2002 Supp.)

24 "... the court *may* designate ...." (emphasis added).

25 *See Century Glove, Inc. v. First American Bank of New York,* 860 F.2d 94, 97 (3rd Cir.1988) (Section 1126(e) "grants the bankruptcy court discretion to sanction any conduct that taints the voting process, whether it violates a specific provision or is in 'bad faith' ").

26 *See In re Kovalchick,* 175 B.R. 863, 875 (Bankr.E.D.Pa.1994) (citations omitted); see also *Collier,* § 1126.06.

27 *See In re Allegheny Int'l., Inc.,* 118 B.R. 282, 293 (Bankr.W.D.Pa.1990) (Cosetti, C.J.) (holding that the court should designate the votes of only those creditors or interest holders who were engaged in wrongdoing).

28 *See* ACC Bondholders Group's 12(b)(6) Motion to Dismiss "Motion ... to Designate Votes of [certain ACC Bondholders]," ¶ 9.

29 *See Kovalchick,* 175 B.R. at 875.

30 *See* Hrg Tr. 75:13–20, Apr. 27, 2006 ("I have, indeed, said that I believe very strongly in creditor democracy, and that I believe that the designation of votes is a serious matter.").

31 See *In re Peter Thompson Assocs., Inc.,* 155 B.R. 20, 23 (Bankr.D.N.H.1993).

32 *See In re Dune Deck Owners Corp.,* 175 B.R. 839, 844 (Bankr.S.D.N.Y.1995) (Bernstein, C.J.).

33 *Kovalchick,* 175 B.R. at 863.

34 *See Dune Deck Owners,* 175 B.R. at 844–845.

35 *Id.* at 844.

36 *See Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am.,* 118 F.3d 635, 639 (9th Cir.1997); *In re Pine Hill Collieries Co.,* 46 F.Supp. 669, 671 (E.D.Pa.1942) ("If a selfish motive were sufficient to condemn reorganization policies of interested parties, very few, if any, would pass muster."); *Dune Deck Owners,* 175 B.R. at 844 (same, quoting *Pine Hill Collieries*).

37 *In re Landing Assocs., Ltd.,* 157 B.R. 791, 807 (Bankr.W.D.Tex.1993) (Leif Clark, J.).

38 Under the Plan, some might simply be inoperative if the Court otherwise ordered; others, if inappropriate, might require Plan provisions to modified. But these would be confirmation matters, not designation issues.

39 *See* page 61 above.

40 A related issue, which I do not need to address given my conclusions, is what, if I found a basis for designation here, I should do with respect to what I believe is many other creditors in the *Adelphia* cases, who hold bonds of several Debtors, or bonds at competing levels of priority (*e.g.,* senior and sub debt), of the same Debtor, albeit in situations where the interdebtor or intercreditor disputes were not as bitter.

41 I don't need to decide, and don't now decide, the extent to which like considerations apply if the creditor's economic interest is enhanced by driving down the value of the estate as a whole, or by causing the entire reorganization—as contrasted to a particular plan proposal—to fail.

42 *See Dune Deck Owners,* 175 B.R. at 845 n. 13 (emphasis added).

43 *Id.,* citing H.R.Rep. No. 595, 95th Cong., 1st Sess. 411 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5963, 6367.

44 *Id.,* citing 124 Cong.Rec. S17420 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini).

45 *See, e.g., In re Dairy Mart Convenience Stores, Inc.,* 351 F.3d 86, 92 (2d Cir.2003) ("This Court has long recognized that Section 105(a) limits the bankruptcy court's equitable powers, which must and can only be exercised within the confines of the Bankruptcy Code.... It does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.") (internal quotations and citations omitted); *In re Aquatic Development Group, Inc.,* 352 F.3d 671, 680 (2d Cir.2003) (Straub, J., concurring) (same).

Tab 32

See pp. 1-2

Bankruptcy and Insolvency Law of Canada, 4th Edition § 23:12

Bankruptcy and Insolvency Law of Canada, 4th Edition
The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra

Part II. Companies' Creditors Arrangement Act

Chapter 23. Part III: General *

IV. Sections 22-22.1 Classification of Creditors

§ 23:12. Classification of Creditors

Section 22(1) specifies that a debtor company may divide its creditors into classes for the purpose of a meeting to be held to vote on a proposed plan of compromise or arrangement relating to the company and, if the debtor company does so, it is to apply to the court for approval of the division before the meeting is held. Under s. 22(2), the court is to consider the following factors: creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account (a) the nature of the debts, liabilities or obligations giving rise to their claims; (b) the nature and rank of any security in respect of their claims; (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed. These criteria are essentially a codification of previous caselaw and thus the cases below continue to be relevant in terms of the courts' reasoning.

The classification of creditors is difficult. The primary responsibility for making the classification is on the debtor company: Re Hellenic Trust Ltd., [1975] 3 All E.R. 382, 119 Sol. Jo. 845, [1976] 1 W.L.R. 123 (S.C.). If a problem is encountered in making the classification, application can be made to the court for directions: Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 171, 1988 CarswellBC 557 (B.C. S.C.).

The reason for dividing creditors into different classes is that creditors have different interests, and they should only be permitted to bind other creditors who have the same interest: Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q.B. 573, 41 W.R. 4, 36 Sol. Jo. 644, 4 R 17 (C.A.). The classification must not, however, be so fine that it renders it impossible to get a plan approved. Bowen L.J. in Sovereign Life Assur. Co. v. Dodd, [1892] 2 Q.B. 573, 41 W.R. 4, 36 Sol. Jo. 644, 4 R 17 (C.A.), held that class "must be confined 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 interests". See also Savage v. Amoco Acquisition Co. (1988), 68 C.B.R. (N.S.) 154, 59 Alta. L.R. (2d) 260, 40 B.L.R. 188, 1988 CarswellAlta 291 (Alta. C.A.), leave to appeal refused (1988), 40 B.L.R. xxxii (note), 89 N.R. 398 (note), 89 A.R. 80 (note) (S.C.C.); Re Campeau Corp. (1991), 10 C.B.R. (3d) 100, 86 D.L.R. (4th) 570, 1991 CarswellOnt 155 (Ont. Gen. Div.), leave to appeal to C.A. refused (1992), 86 D.L.R. (4th) 570n (Ont. C.A.), leave to appeal to S.C.C. refused (1992), 86 D.L.R. (4th) 570n (S.C.C.). The test proposed by Bowen L.J. is called the "commonality of interest test". The test is easier to state than it is to apply.

In Re Canadian Airlines Corp. (2000), 2000 CarswellAlta 503, 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]), the court listed the following as the matters to be considered in assessing commonality of interest:

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

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

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

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

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

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

The Ontario Court of Appeal, in dismissing an appeal of a decision that declined to place subordinated debenture holders in a separate class for purposes of voting on a *CCAA* plan (reported at 2005 CarswellOnt 6483 (Ont. S.C.J. [Commercial List])), held that creditors must be classified based on "commonality of interest" between them for the purpose of voting on a plan of compromise or arrangement under the *CCAA*. The principles that a court should consider in determining the commonality of interest between creditors include: (i) commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test; (ii) the interests to be considered are the legal interests that a creditor holds *qua* creditor in relationship to the debtor company prior to and under the plan, as well as on liquidation; (hi) the commonality of interests are to be viewed purposively, bearing in mind the object of the *CCAA*, namely, to facilitate reorganizations if possible; (iv) in placing a broad and purposive interpretation on the *CCAA*, the court should be careful to resist classification approaches that would potentially jeopardize viable plans; (v) absent bad faith, the motivations of creditors to approve or disapprove of a plan of compromise are irrelevant; and (vi) creditors should be able to consult together, meaning that creditors should be able to assess their legal entitlement as creditors before or after the plan in a similar manner: Re Stelco Inc. (2005), 2005 CarswellOnt 6818, 78 O.R. (3d) 241, 15 C.B.R. (5th) 307 (Ont. C.A.).

Classification is not to be done on the basis of identity of interests, *e.g.*, all landlords; rather it should be done on the basis of commonality of interests and rights: Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 1991 CarswellOnt 220, 86 D.L.R. (4th) 621 (Ont. Gen. Div.).

In classifying creditors, the first task is to decide whether the debt is secured or unsecured. If it is unsecured, reference should be made to the notes, *ante*, on the meaning of "unsecured creditor". Ordinarily, there will not be too much difficulty in classifying unsecured creditors.

In deciding whether the classification of unsecured creditors is appropriate, the fact that a substantial debt is held by an assignee is irrelevant. In making the classification, the court is concerned with what the claimant holds, not with who holds the claim. However, the court ordered that the vote of the creditor should be separately recorded and tabulated so that the court could, if the creditors voted to accept the plan, consider the matter on the application to sanction the plan in deciding whether the plan was fair and reasonable: Re Canadian Airlines Corp. (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.), application for leave to appeal dismissed, 2000 ABCA 149, 19 C.B.R. (4th) 33, 2000 CarswellAlta 503, [2000] A.J. No. 610, 80 Alta. L.R. (3d) 213, 261 A.R. 120, 225 W.A.C. 120 (C.A. [In Chambers]).

In addition to commonality of interest concerns, the Ontario Court of Appeal held that a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". The classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. The Court expressly held that to the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary, for example Re NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1, 1990 CarswellNS 33, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.), the Court expressly preferred the Alberta approach. The Court held that to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a *CCAA* restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or subclasses of classes that might well defeat the purpose of the Act. It is important to remember that classification of creditors,

Court File No. CV-21-00658423-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC. ET AL.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES OF U.S. CLASS COUNSEL
(MOTION RETURNABLE JUNE 7, 2022)

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